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Jeff McMahan

# Killing in War

JEFF MCMAHAN

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to matters of *jus ad bellum*. But it would take us too far afield to pursue this suggestion here. The important point for our purposes is that if we could offer soldiers a source of guidance about the morality of war that would be more impartial and more authoritative than their own government, this could provide a basis for holding them accountable for their participation in unjust wars—perhaps accountable in law but certainly accountable to their own consciences. This increased accountability could in turn give them an incentive to take their epistemic duties more seriously than they tend to do at present.

## 4

# Liability and the Limits of Self-Defense

## 4.1 DIFFERENT TYPES OF THREAT

### 4.1.1 The Relevance of Excuses to Killing in Self-Defense

By fighting in a war that lacks a just cause, unjust combatants are acting in a way that is objectively wrong. Some moral theorists, including some theorists of the just war, have claimed that objective wrongdoing is sufficient for liability to defensive attack, provided that the attack is both necessary for the prevention or correction of the wrong and proportionate to the gravity of the wrong. Recall, for example, Elizabeth Anscombe's claim, which I cited earlier in Chapter 1, that "what is required, for the people attacked to be non-innocent in the relevant sense [that is, liable to attack], is that they should themselves be engaged in an objectively unjust proceeding which the attacker has the right to make his concern; or—the commonest case—should be unjustly attacking him."<sup>1</sup> If this view is correct, all unjust combatants are morally liable to attack in war, since they are engaged in a form of objective wrongdoing—pursuing unjust goals by military means—that is sufficiently serious to make them liable to attack as a means of preventing further wrongdoing of this sort.

Yet objective wrongdoing is not sufficient for liability in other areas; for example, it is not sufficient for liability to punishment in the criminal law. A person may violate the law and yet be exempted from punishment by an excuse that shows that she is not blameworthy for the act that violated the law. In the criminal law, in other words, certain excuses negate liability. And partial excuses may mitigate a person's liability for having violated the law, a consideration that may be taken into account in the sentencing phase of the trial.

A similar claim applies to moral liability to defensive violence. Suppose that a person who poses an objectively wrongful threat to another is excused, either wholly or in part, for doing so. His moral liability to

defensive violence may be diminished as a consequence. This does not mean that it is impermissible for the person he threatens to defend herself against the threat he poses. But it can affect what counts as a proportionate defensive response. Suppose, for example, that a person is threatening to destroy one of your highly valued possessions. You could certainly stop him by breaking a bottle over his head and might be able to stop him by kicking him hard in the shin. Suppose that the value of the object is such that if he were fully responsible for his action, it would be proportionate to smash him over the head with a bottle. But in fact someone earlier put a drug in his drink without his being aware of it, and this, you realize, has weakened his control over his own action. He is partially, though perhaps not entirely, excused on grounds of diminished responsibility. In this case, it may be reasonable to suppose that smashing him with a bottle would be disproportionate, so that you have to settle for kicking him in the shin, despite the fact that this may be insufficient to prevent him from destroying your possession.

The principle to which I am appealing—that the extent to which a person is excused for posing a threat of wrongful harm affects the degree of his moral liability to defensive harm, which in turn affects the stringency of the proportionality restriction on defensive force—is considerably more controversial when what is at stake is the potential victim's life. I will therefore have to say more about the application of this principle to cases involving lethal threats as the argument of this chapter progresses.

The relevance of the principle for our purposes is that if it applies to killing in self-defense, then it also applies to killing in war. For one of the presuppositions of this book is that the justifications for killing people in war are of the same forms as the justifications for the killing of persons in other contexts. The difference between war and other forms of conflict is a difference only of degree and thus the moral principles that govern killing in lesser forms of conflict govern killing in war as well. A state of war makes no difference other than to make the application of the relevant principles more complicated and difficult because of the number of people involved, the complexities of their relations with one another, and the virtual impossibility of having knowledge of all that is relevant to the justification of an act of killing.

The basic forms of justification for the killing of persons, as I noted in Chapter 1, appeal to the victim's consent (actual and, perhaps, hypothetical), the victim's liability or desert, and the claim that killing is the lesser evil. Of these, only the latter two are applicable to killing in

war, and of these the appeal to liability is significantly less controversial. (I mention liability and desert together because they are related, but no one supposes that the justification for killing enemy combatants is ever that they deserve to die; hence I will say nothing more about desert as a justification for killing.) The appeal to liability is the principal form of justification for the infliction of harm in the law: people are to be punished in the criminal law only when they have made themselves liable to punishment, not when punishing them would avert a greater evil, and people are forced to pay compensation in tort law only when they have acted in a way that makes them liable to compensate a victim, not when their paying compensation would be the lesser evil. And the appeal to liability is also the form of justification for harming and killing that is standardly recognized in common sense morality as governing lesser forms of conflict. Thus, for example, killing in self-defense is justified not when killing the attacker would be the lesser evil than allowing the potential victim to be killed, but when the attacker has acted in a way that makes him morally liable to defensive violence. The strategy of argument—the methodology—in this book is to extend this form of justification from these areas in which it is familiar and well understood to the context of war. The claim is that if a soldier is morally justified in killing a person in war, that is usually because the other person has acted in a way that has made him liable to be killed.

As I also noted in Chapter 1, the criterion of liability to attack in war is not merely that one poses a threat to another. At a minimum, the threat must be unjustified. But neither is the criterion of liability that one poses a threat to another through action that is objectively unjustified, as Anscombe claims. Rather, as I suggested earlier, it is a necessary condition of liability to defensive attack that one be *morally responsible* for posing an objectively unjustified threat. I will say more in defense of this claim later. But even if we add morally responsible agency as a condition of liability, and claim that the basis of liability to attack in war is posing a threat of unjustified harm in one's capacity as a morally responsible agent, we will still be omitting a crucial consideration. This is that while posing a threat of wrongful harm without either justification or excuse is a sufficient condition of liability to defensive force, it is not a necessary condition. For mere moral responsibility for an unjust threat of wrongful harm to another may be sufficient for liability to attack, even if one does not oneself *pose* the threat—that is, even if one is not oneself the agent of the threat. I will say more about this in Chapter 5.

Assume, then, that moral responsibility for an unjustified threat is the basis of liability to attack in war.<sup>2</sup> There are various forms and degrees of responsibility, and therefore also of liability. In particular, the degree of a person's responsibility for unjustifiably posing a threat of wrongful harm to others varies with the significance of any excusing conditions that may apply to his action. The more a person is excused for some objectively wrongful act, the less responsible he is for the consequences, and the less liable he may be to defensive action to prevent those consequences from occurring. If this is right, it could be highly relevant to the morality of killing in war. If, for example, an unjust combatant is fully excused for fighting in an unjust war, that may mean that his liability to defensive action is comparatively weak. In that case there might be a requirement that just combatants exercise certain forms of restraint in fighting against him. Or if there were no such requirement, the justification for attacking him without restraint might have to appeal at least in part to considerations other than his liability to attack, and those other considerations would have to be identified.

To try to elucidate the relation between excuses and liability, I will focus initially on cases of individual self-defense outside the context of war. Some of the examples I will use for purposes of illustration will presuppose that agents have knowledge that it is sometimes difficult to have even in cases of individual self-defense and that it is virtually impossible to have in the complex and confused circumstances of war. But it is helpful to try to get clear about what is at issue in simplified cases, even if they have certain idealized features, in order to know what to look for in the more complicated cases involving combatants in war that are our ultimate concern here. The conclusions we may draw from simplified cases of individual self-defense may have no direct application in war because the conditions for knowledge are so different. But it is important to identify the considerations that would be relevant in war if only we could have knowledge of them, in order to determine how we might most effectively try to compensate for the absence of that relevant knowledge.

It will help to have before us a set of distinctions among various different kinds of agent, to whom I will refer as "Threats," who pose a threat to others. I will define certain categories of Threat, offering one or more hypothetical examples of each. This will, I hope, introduce some conceptual clarity, which will then enable us to explore questions about whether, why, and to what extent different types of Threat are liable to defensive action, after which we can try to determine into which

category or categories most unjust combatants fit, with the ultimate aim of better understanding their moral status in war.

#### 4.1.2 Culpable Threats

I begin with the category at one end of the spectrum: *Culpable Threats*. These are people who pose a threat of wrongful harm to others and have neither justification, permission, nor excuse. They may intend the harm they threaten, or the risk they impose, or the threat may arise from action that is reckless or negligent. But because they have neither justification nor excuse, they are fully culpable for their threatening action. As such, they are fully liable to necessary and proportionate defensive action. A man who attempts to murder his wife so that he can inherit her money is a Culpable Threat. Not only the wife herself but any third party would be fully justified in killing this man if that were necessary to prevent him from killing her—or even just the surest means of saving her.

It is generally agreed that the proportionality restriction on killing a Culpable Threat is weaker than it is in other cases. Precisely because of the Culpable Threat's full culpability, it can be proportionate to inflict a significantly greater harm on a Culpable Threat if that is necessary to prevent him from inflicting a lesser harm on an innocent victim. The proportionality restriction is thought to be particularly weak in the case of lethal threats. It is, for example, often claimed that it can be permissible to kill any number of Culpable Threats when that is necessary to prevent them from killing a single innocent person. Others, though not as many, think that if a Culpable Threat intends to kill an innocent victim, it can be permissible to kill him if that is necessary to avert the threat no matter how low the probability of his succeeding in killing his victim would otherwise have been.

#### 4.1.3 Partially Excused Threats

Culpable Threats are *fully* culpable; there are no excusing conditions that apply to their action. It is possible, however, to be culpable for an act while having a partial excuse. This is obvious, for when an excuse is only partial, some residue of culpability remains. There is therefore a large category of what I will call *Partially Excused Threats*: people who unjustifiably pose a threat of wrongful harm to others but whose action is excused to some extent, though not fully. A Partially

Excused Threat may have an excuse of any of the three broad types I identified earlier. A person might, for example, unjustifiably pose a threat to an innocent person only because he has himself been credibly threatened with some sanction if he fails to harm that person. If the level of duress to which he is exposed could be resisted by a person of ordinary fortitude, and in particular if it is insufficient to overwhelm his own will, his excuse is only partial, only mitigating. The strength of the excuse is a function of, among other things, the severity of the sanction and the magnitude of the harm he threatens to cause.

A person might also unjustifiably pose a threat to an innocent person by mistake, because he lacks relevant knowledge. But if his ignorance was avoidable—if, for example, he has been negligent in investigating the facts relevant to the permissibility of his action—his excuse is only partial. The same is true if he acts with a diminished capacity for responsible agency, but not in the complete absence of that capacity—as, for example, in the case of the person who threatens to destroy your valued possession. The drug he was involuntarily administered has impaired his capacity for self-control, but not eliminated it.

Partially Excused Threats are not necessarily less culpable than Culpable Threats. A Culpable Threat may, for example, be fully culpable for intentionally imposing a comparatively minor threat, while a Partially Excused Threat may be excused to some degree for negligently posing a greater threat. If the threat posed by the Partially Excused Threat is significantly greater, he may be more culpable than the Culpable Threat, despite the fact that his offense is negligent rather than intentional, and that he has a partial excuse. For the degree of an agent's culpability is a function of all these variables—whether the wrongful threat is intentional, reckless, or negligent, whether the agent has an excuse and how strong that excuse is, and the magnitude of the threatened harm—as well as others.

The proportionality constraint on defensive action against a Partially Excused Threat is more stringent than it is in the case of a Culpable Threat. This does not mean, of course, that it is always permissible to inflict greater harm on a Culpable Threat. What it means is that the extent of a Partially Excused Threat's liability is always discounted for his excuse—that is, that his liability would be greater without the excuse, if all other considerations remained the same. In other words, his liability would be greater if he were a Culpable Threat, and other things were equal.

As I noted earlier, the difference in liability emerges in the narrow proportionality constraint. Suppose that someone is attacking you and that if you do not defend yourself, you will be severely injured, though not killed. You have two defensive options. You can kill the Threat, thereby escaping entirely unharmed. Or you can incapacitate him in a way that will injure but not kill him—but only after he will have inflicted a lesser though still substantial injury on you. Suppose that if the person attacking you is a Culpable Threat, it would be proportionate to kill him. In that case, it may be permissible to kill him *rather than* incapacitate him at the cost of suffering a substantial injury—for example, a broken arm. Yet if you know that he has a partial excuse, it may be wrong for you to kill him—that is, you may be morally required to suffer the broken arm in order to avoid killing him. Suppose, for example, that he mistakenly believes that it is his duty to kill you. It is, in the circumstances, a natural mistake, but he could have avoided it if he had taken greater care in investigating the facts before he acted. If the excuse significantly diminishes his culpability, killing him may be disproportionate. In short, the harmfulness of the defensive action to which the Partially Excused Threat is liable varies with the degree of his culpability.

One may wonder why a wholly innocent victim might be required to share the cost of a Partially Excused Threat's wrongful action. Why should not the Threat be required to suffer the entire cost? Or suppose that you could also save yourself without killing the Threat, by breaking some other innocent person's arm. Why should *you*, among all the innocent people in the world, be singled out as the one who has to share the cost of his wrongful action with the Partially Excused Threat?

The answer, I think, is that for you the alternative to sharing the cost with the Threat is to *kill* him, and to do so intentionally, and the option of dividing the cost between the Threat and another innocent person requires you intentionally to break an innocent person's arm. In short, the explanation of why *you* have to share the cost appeals to the distinction between doing and allowing. To see this, suppose that a stranger is drowning and the only way you can save him would involve breaking your arm. Our general practice of refusing to make small sacrifices, such as sending money to Oxfam, to save people who will otherwise die, suggests that we do not believe that it is obligatory to *save* a stranger at the cost of suffering a broken arm. So the reason why you might be required to accept a broken arm for the sake of the Partially Excused Threat, who is not even innocent in the way the

drowning stranger is, must be that what you must do to avoid it is to *kill* someone rather than merely to allow someone to die.

#### 4.1.4 Excused Threats and Innocent Threats

In the next category are those who unjustifiably pose a threat of wrongful harm to others but are *fully* excused for doing so. The paradigm case of an *Excused Threat* is a person who acts under irresistible duress—that is, the sanction he faces, or the harm he will suffer, if he does not unjustifiably threaten someone else is so severe that it overwhelms his will, and would overwhelm the will of anyone else with a normal capacity for the exercise of willpower.

It is important to note that the claim that a person is fully excused for an act of objective wrongdoing implies only that the person is not culpable, that he or she is entirely blameless. It does *not* necessarily imply that the person is absolved of all *responsibility*. A person may be responsible for his objectively wrongful action even if he is not blameworthy. This is true, for example, in most if not all cases of what we call irresistible duress. When we say that duress is irresistible, we usually do not mean that literally. We concede that *some* people could and indeed would resist, and that it was physically and in some sense psychologically possible for the person who failed to resist to have resisted instead. There is therefore a basis for holding him responsible. But the standard of responsibility is not the standard of culpability. We do not accept that all those who are responsible for acting wrongly are also blamable. There are, of course, *some* cases in which what counts as a full excuse on an objective account of permissibility absolves a person not only of all culpability but also of all responsibility. But not all cases of full excuse are like this. I will say more about this later.

I have thus far focused on duress as an example of a full excuse. This was deliberate, for what I have called epistemically-based excuses pose a problem for the taxonomy of Threats. Consider a person who poses a lethal threat to another on the basis of factual and moral beliefs that he is fully epistemically justified in having—that is, he is justified in having these beliefs and in assigning them a degree of credence approaching certainty. But the beliefs are in fact false. If they were true, he would be objectively justified in killing the person he is now attempting to kill, who is in fact wholly innocent. On an objective account of justification, he is acting impermissibly but has a full epistemic excuse. But on a subjective account of justification, which makes a person's

*justified* beliefs relevant to the permissibility of his action, this person acts permissibly and indeed justifiably, and therefore cannot have an excuse, for there is nothing for him to be excused *for*.

Call this person an *Epistemically Justified Mistaken Threat*. According to an objective account of permissibility, or an objective account of justification, he is an Excused Threat. But not according to a subjective account. It seems, therefore, that we need another label for such a Threat for those who accept subjective accounts of permissibility and justification. Let us say, then, that on a subjective account, he is an *Innocent Threat*. An Innocent Threat is someone who in objective terms acts impermissibly in posing a threat to another but also acts subjectively permissibly, or even with subjective justification. (This is in two respects an unfortunate label. First, the term “Innocent Threat” has several meanings in the literature, all different from the one I propose. Second, I have until now followed the just war tradition in using “innocent” to mean, roughly, “not liable.” But it is possible—indeed I will argue that it is true—that some Innocent Threats in my sense *are* morally liable to defensive attack. But because the other labels I have considered are at least equally problematic, I will persist in using the term “Innocent Threat” in this particular technical sense.)

The categories of Excused Threat and Innocent Threat are therefore overlapping but not coextensive. According to both objective and subjective accounts of permissibility, a Threat who poses an objectively unjustified threat on the basis of irresistible duress is only an Excused Threat. But a person who poses an objectively unjustified threat on the basis of what the Scholastics called invincible ignorance is an Excused Threat according to an objective account but an Innocent Threat according to a subjective account.

When a Threat is excused on one account but acts permissibly on the other, the different labels refer to the same facts. In such cases of overlap, there can obviously be no substantive moral difference between an Excused Threat and an Innocent Threat. There are, however, relevant differences within the category of Innocent Threats (and, of course, corresponding differences within the category of Excused Threats, on an objective account). One such difference is that between those who act merely permissibly, with no positive moral reason, and those who act for a positive moral reason, and thus act with subjective justification. There are also relevant differences among those who intend to cause harm, those who knowingly but unintentionally cause harm, those who foreseeably risk causing harm, and those who cannot foresee that their

action will cause harm. All such Threats may be acting in ways that are objectively impermissible but subjectively permissible.

It will be helpful to have particular examples that exemplify some of the various possibilities. Here are some cases that illustrate the distinctions that can be drawn.

(1) *The Resident* The identical twin of a notorious mass murderer is driving in the middle of a stormy night in a remote area when his car breaks down. He is nonculpably unaware that his twin brother, the murderer, has within the past few hours escaped from prison in just this area, and that the residents have been warned of the escape. The murderer's notoriety derives from his invariable modus operandi: he violently breaks into people's homes and kills them instantly. As the twin whose car has broken down approaches a house to request to use the telephone, the resident of the house takes aim to shoot him, preemptively, believing him to be the murderer.

I will reserve the term "Epistemically Justified Mistaken Threat" for Innocent Threats who intend to kill someone whom they believe to be liable to be killed. The resident belongs in this category. He intends to kill someone who is in fact innocent in every sense, so his action is objectively wrong. But given his beliefs, which we may assume are epistemically fully justified, his action is subjectively not only permissible but justified.

(2) *The Technician* A technician is guiding a pilotless drone aircraft toward its landing when it unaccountably veers off course in the direction of a group of houses in which he reasonably believes several families are living. He alters the drone's course in the only way he can, sending it where he knows it will kill one innocent bystander when it crashes. Although there was no reason for him to know this, all the families in fact moved out the day before, while the technician was still on vacation.

Because the plane would not have killed or injured anyone had he not acted, the technician's altering its course is objectively wrong. But his action is subjectively justified because his belief that the plane would otherwise have killed numerous people is fully epistemically justified and, if that belief were true, his act would be objectively justified. So just as the case of the resident is a case in which a person is subjectively justified in intentionally killing a person who is in fact innocent, so this

is a case in which the technician is subjectively justified in foreseeably but unintentionally killing an innocent person.

(3) *The Conscientious Driver* A person who always keeps her car well maintained and always drives carefully and alertly decides to drive to the cinema. On the way, a freak event that she could not have anticipated occurs that causes her car to veer out of control in the direction of a pedestrian.

I will assume that on an objective account of permissibility, this conscientious driver is acting impermissibly. It is impermissible to drive, or to continue to drive, when one will lose control of the car and threaten the life of an innocent person. But of course she cannot know that these are the conditions in which she is driving. So while on an objective account of permissibility, she is an Excused Threat, on a subjective account, she is an Innocent Threat. She does not intend to harm anyone and cannot foresee that she will harm anyone, but she knows that driving is an activity that has a very tiny risk of causing great harm—so tiny that the activity, considered as a *type* of activity, is entirely permissible. But she has bad luck. Notice that although her action is subjectively permissible, it is not subjectively justified. She has no positive moral reason to engage in the activity that she knows has a tiny risk of unintentionally killing an innocent bystander.

(4) *The Ambulance Driver* An Emergency Medical Technician is driving an ambulance to the site of an accident to carry one of the victims to the hospital. She is driving conscientiously and alertly but a freak event occurs that causes the ambulance to veer uncontrollably toward a pedestrian.

This example is just like the case of the conscientious driver except that the ambulance driver has a positive moral reason to drive. She therefore has a subjective justification, and not merely a subjective permission, to act in a way that she knows has a tiny risk of causing great harm to an innocent bystander.

(5) *The Cell Phone Operator* A man's cell phone has, without his knowledge, been reprogrammed so that when he next presses the "send" button, the phone will send a signal that will detonate a bomb that will then kill an innocent person.

It is objectively wrong for the cell phone operator to press the "send" button. But he cannot know that. He is fully epistemically justified in

believing, and with a degree of credence approaching certainty, that his pressing the button is entirely harmless. So if he presses it, he will be acting subjectively permissibly, though not with subjective justification, unless there is a positive moral reason to press it (such as the need to call the emergency number to report an accident). He is therefore an Excused Threat on an objective account, and an Innocent Threat on a subjective account. But unlike the resident, the cell phone operator does not choose to cause harm. And unlike the conscientious driver and the ambulance driver, he does not choose to engage in an activity that has a foreseeable risk of causing serious harm. Subjectively, his situation is not relevantly different from my situation right now, or yours. For after all, my computer could be rigged to detonate a bomb when I press the “tab” key. And even your book could be rigged to detonate a bomb when you turn the next page.

Because anyone who is an Innocent Threat on a subjective account is an Excused Threat on an objective account, while not all who are Excused Threats on an objective account are Innocent Threats on a subjective account, I will refer to the Threats in the five cases cited above as Innocent Threats rather than as Excused Threats. This makes it clear that the reason they are excused on an objective account and acting permissibly on a subjective account is that they are acting on the basis of epistemically justified but false beliefs. Although none of the five is blamable for posing an objectively unjustified threat, they nevertheless differ in the degree to which they are responsible for the threat they pose. Of the five, the one who bears the greatest responsibility for the threat she poses is the conscientious driver. Although she does not intend to harm anyone, she does know that her action carries a small risk of causing great though unintended harm. Although her act is of a type that is generally objectively permissible, and although she has taken due care to avoid harming anyone, she has had bad luck: the risk she knew her act carried has now, improbably and through no fault of her own, been realized. Because she knew of the small risk to others that her driving would impose, and because she nonetheless voluntarily chose to drive when there was no moral reason for her to do so—in short, because she knowingly imposed this risk for the sake of her own interests—she is morally liable to defensive action to prevent her from killing an innocent bystander.

In contrast to the conscientious driver, the resident, the technician, and the ambulance driver all act not merely subjectively permissibly but with subjective moral justification. Each justifiably believes that

he or she has a strong moral reason to do exactly what he or she is doing, and that this reason is not outweighed by any countervailing reasons. But in each case, one or the other of these beliefs is mistaken. Although all of these three agents are blameless, it is reasonable to suppose that all are nevertheless responsible for their choices and that this responsibility, however minimal, is a basis for liability to defensive action. There are, however, differences among them that arguably make a difference to the degree of their responsibility. All three pose a lethal and objectively unjustified threat to a person who is in fact innocent. The resident threatens to kill a person intentionally, the technician threatens to kill a person foreseeably but unintentionally, and the ambulance driver took a risk of killing a person and now as a result of bad luck threatens to kill someone accidentally. If it is true, in general, that it is more seriously wrong to kill a person intentionally than to kill a person foreseeably but unintentionally, and more seriously wrong to kill a person foreseeably than to take a known risk of killing a person accidentally, then the resident chooses to take a greater moral risk in acting than the technician does, and the technician takes a greater moral risk than the ambulance driver. To choose to kill a person intentionally is to take a great moral risk. If one has bad luck and gets it wrong, so that one ends up having intentionally killed a person who is in fact innocent, the degree to which one is responsible for the death seems greater than it is if one has merely run a low risk of killing an innocent person accidentally and ended up killing her through bad luck. If moral responsibility for an objectively unjust threat is the criterion of liability to defensive action, and if the degree of a person’s liability varies with the degree of her responsibility, then it seems that the resident is liable to defensive action to a greater degree than the technician, who is in turn liable to a greater degree than the ambulance driver.

#### 4.1.5 Nonresponsible Threats

Like the conscientious driver, the cell phone operator acts in a way that is merely subjectively permissible rather than subjectively justified. There is no positive moral reason for him to press the “send” button on his phone. Yet intuitively he seems even less responsible for the threat he poses than the three Innocent Threats who act with subjective justification. The reason why this is so is that, unlike the others, he does not intentionally kill, knowingly kill, or even knowingly impose on others a risk of being killed. The threat he poses is not one that he



could conceivably foresee; nor is there any association between the kind of act he does and the kind of threat he poses. What is singular about his case is not that he is nonculpably and invincibly ignorant of some relevant fact—a characteristic he shares with the other four Innocent Threats; it is, rather, that he is nonculpably and invincibly ignorant *that he poses any kind of threat or risk of harm to anyone*.

These facts absolve him of all responsibility for the threat he poses. He is what I call a *Nonresponsible Threat*: a person who without justification threatens to harm someone in a way to which she is not liable, but who is in no way morally responsible for doing so. (He remains, of course, an Excused Threat on an objective account and an Innocent Threat on a subjective account. There is thus some overlap not only between the categories of Excused Threat and Innocent Threat but also between those two categories and the category of Nonresponsible Threat.) If, as I have claimed, moral responsibility for an objectively unjustified threat to another is the basis of liability to defensive force, then the cell phone operator is not liable at all. If there is a justification for attacking or killing him in defense of the person he will otherwise kill by pressing the button on his phone, it must appeal to some consideration other than that he has acted in a way that makes him liable to defensive action.

The cell phone operator is a Nonresponsible Threat because he has no way of knowing that he poses a threat to anyone. In this respect he is relevantly like a person who merely by being in a public space has contracted a highly contagious and lethal disease, but is himself a symptomless carrier. But there are other ways in which people may pose a threat to others without being in any way morally responsible for doing so. One is to pose a threat without any exercise of agency at all, as in the cases discussed by Robert Nozick and Judith Jarvis Thomson in which a person is thrown from a height by someone else and threatens to land on and crush an immobilized person below.<sup>3</sup> Another example of this sort is a fetus whose continued growth inside a pregnant woman's body threatens her life. A different way in which one may pose a threat without responsibility is to act, or to move one's body, in the absence of any capacity for responsible agency. If it were possible, as it sometimes is in works of science fiction, for one person to use drugs or a device implanted in another person's brain to exercise complete control over that person's will, the manipulator could turn the person under his control into a Nonresponsible Threat.

It is worth noting a difference between the cell phone operator and Nonresponsible Threats of the other two types I have identified. The cell

phone operator's complete absence of moral responsibility for posing a threat arises from the fact that he cannot know that he poses a threat. He nevertheless acts as a morally responsible agent. But Nonresponsible Threats of the other two types—those who pose a threat but not in their capacity as agents and those who have no capacity for morally responsible agency—are, *in posing a threat*, relevantly like a tumbling boulder or a charging tiger. The one does not act at all, while the other acts, but as a lower animal does, not as a responsible agent. What they do is not so much beyond the scope of moral evaluation as it is beneath it. It is neither permissible nor impermissible. Because what they do is not permissible, even subjectively, they cannot be Innocent Threats. Because it is also not impermissible, they cannot be Excused Threats. The cell phone operator, by contrast, acts objectively impermissibly and subjectively permissibly. It is only in cases of his sort that the category of the Nonresponsible Threat overlaps with those of the Excused Threat and the Innocent Threat.

According to common sense intuition, it is permissible to kill a Nonresponsible Threat if he would otherwise kill an innocent person, and perhaps even if he would only severely injure an innocent person. So the claim that a Nonresponsible Threat is not liable to defensive force is highly counterintuitive. I will therefore advance a couple of arguments in favor of the claim that a Nonresponsible Threat cannot be liable.

I claimed earlier in Section 3.1.2 that the explanation of why it is wrong to kill an innocent bystander in self-preservation begins with the fact that in general the presumption against killing a person is stronger than the presumption against letting a person die, and the presumption against intentional killing is stronger than that against unintended killing and much stronger than that against unintentionally allowing someone to die. If one's life is threatened by a Nonresponsible Threat, so that one must choose between intentionally killing the Threat and allowing oneself to be killed by him, the presumptions oppose killing in self-defense. To overcome or defeat the presumption against intentional killing, there must be some important moral difference between the Threat and oneself. The presumption could be overcome if the Threat had made himself liable to be killed. But there is no plausible basis for this claim. As I argued earlier, merely posing a threat to another is not sufficient for liability; neither is posing an objectively unjustified threat. In the case of a Nonresponsible Threat, his posing an unjustified threat to you is just a fact about his position in the local causal architecture and as such cannot cause him to forfeit his right not to be killed. The

natural and understandable personal partiality of the person whose life he threatens is also insufficient to overcome the presumption against killing. If it were, it would generally be permissible to kill a single innocent bystander as a means of self-preservation. There is, in short, nothing that relevantly distinguishes a Nonresponsible Threat from an innocent bystander, and thus nothing in either case that can overcome the presumption against intentional killing.

It does not follow from the fact that a Nonresponsible Threat is not liable to defensive action that it can never be permissible to harm him in self-defense. On occasion, it can be permissible intentionally to harm even an innocent bystander as a means of self-preservation. The justification cannot, of course, be that the bystander is liable, for an innocent bystander is by definition not liable. But there can be a lesser-evil justification for intentionally harming an innocent bystander and the same kind of justification is available in some cases for harming a Nonresponsible Threat in self-defense. In general, whatever it would be permissible to do to an innocent bystander as a means of self-preservation it would also be permissible to do to a Nonresponsible Threat in self-defense, in relevantly similar conditions.

One might argue that there is a significant moral difference between killing an innocent bystander in self-preservation and killing a Nonresponsible Threat in self-defense—a difference that is related to but not identical with the obvious and perhaps necessary truth that a Nonresponsible Threat poses a threat while an innocent bystander does not. The difference is in the mode of agency: when one kills an innocent bystander in order to save one's own life, one uses her strategically, as an instrument in the service of one's own purposes, whereas when one kills a Nonresponsible Threat in self-defense, one does not use him to one's advantage but merely reacts to him and the problem he presents. Warren Quinn, who to my knowledge was the first to call attention to this distinction, though not in the context of self-defense, referred to these two modes of agency as "opportunistic agency" and "eliminative agency," and suggested that "it would not be surprising if we regarded fatal or harmful exploitation as more difficult to justify than fatal or harmful elimination."<sup>4</sup>

I suspect that Quinn is right that this distinction is of moral significance. Yet the fact that self-defense against a Nonresponsible Threat involves eliminative rather than opportunistic agency does not show that it is permissible, or that a Nonresponsible Threat may be liable to defensive action. For eliminative agency is often seriously

wrong—for example, when a person murders his business rival because of the threat the victim's business poses to his own. It is therefore possible that the difference in agency shows only that, while killing a Nonresponsible Threat in self-defense is wrong, killing an innocent bystander in self-preservation is even more seriously wrong because it involves a more objectionable form of agency.

But in fact the appeal to the different modes of agency does not show even this. For there are cases in which killing an innocent bystander in self-preservation involves eliminative rather than opportunistic agency but still seems impermissible. Here are two examples, both involving what Noam Zohar calls an "Innocent Obstructor."<sup>5</sup>

*Innocent Obstructor 1* One is running through the woods, trying to avoid being killed by a Culpable Threat. One comes to a high, narrow, and wobbly public bridge that one must cross to evade the Threat. There is, however, an innocent bystander sitting in the middle of the bridge with her legs dangling off, enjoying the view. If one runs onto the bridge, she will be shaken off and will plummet to her death.

*Innocent Obstructor 2* The background details are the same as in Innocent Obstructor 1. But in this variant, merely running onto the bridge will not shake the innocent bystander off. Yet the bridge is too narrow for you to cross without her moving off it and there is insufficient time for her to move to allow you to escape. You must instead pause to shake the bridge vigorously to topple her off.

In the first of these cases one would kill the Innocent Obstructor as an anticipated side effect of one's effort to save oneself from the Culpable Threat. Although the killing would be unintended, intuitively it still seems impermissible. In the second case, the killing would be intended as a means, but one's agency would be eliminative rather than opportunistic. One would not be exploiting the innocent bystander's presence in order to save one's life. Yet to kill her is a clear instance of impermissibly killing an innocent bystander as a means of self-preservation.

Some proponents of the Doctrine of Double Effect would argue that even in the second case one need not intend to kill the innocent bystander and certainly need not intend her death. One might intend only to clear her out of one's path, and if she were to survive the fall uninjured, that would not thwart one's plan, which shows that her death is not within the scope of one's intention. And even if one must

intend to topple her off the bridge as a means of clearing one's path, it remains true that one can intend to topple her off without intending to kill her and without intending that she die. Still, it is unlikely that many defenders of the Doctrine of Double Effect would think it permissible to shake the bridge to get her off it in these circumstances, even if one did not strictly intend to harm or kill her. It is certainly tempting to appeal to the distinction between eliminative and opportunistic agency in an effort to defend the intuition that intentionally killing a Nonresponsible Threat in self-defense is permissible while intentionally killing an innocent bystander in self-preservation is not. But there are no ways of understanding the concept of intention or of reinterpreting the Doctrine of Double Effect that are likely to help in this effort.

The comparison between intentionally killing the Innocent Obstructor and killing a Nonresponsible Threat in self-defense also provides some intuitive support for the claim that it is in general impermissible to kill a Nonresponsible Threat in self-defense because the Threat's lack of liability means that the main form of justification for self-defense does not apply. For it is intuitively plausible to claim that it is impermissible intentionally to topple the innocent bystander from the bridge, thereby causing her death, in order to facilitate one's escape. Yet there is no difference in the mode of agency involved in killing her and that involved in killing a Nonresponsible Threat. And it seems impossible to find a plausible basis for distinguishing between them on grounds of liability. It is clear that the Innocent Obstructor has done nothing to forfeit her right not to be intentionally killed. Is there, then, some difference between her and a Nonresponsible Threat that could ground the claim that the latter *has* forfeited his right? Is there, for example, some difference that could be relevant to liability between sitting quietly on a bridge and merely pressing the buttons on a cell phone, when there is no reason in either case for the person to suspect that either activity could be instrumental in bringing about another person's death? What seems relevant here is shared equally by both: a complete absence of responsibility for the predicament in which the person under threat finds himself. If we alter *that* factor in either case, we get an intuitively quite different result. If, for example, the woman on the bridge knew that a person would soon need to cross the bridge in order to evade a Culpable Threat, or if she planted herself there intentionally in order to prevent him from being able to cross, then it would be plausible to regard her as liable, *even though she would still be a bystander*—for status as a bystander is a matter of one's causal position, not of one's

responsibility.<sup>6</sup> She would then be no more a threat than she is in either of the original cases, but she *would* be to some degree morally responsible for the threat one faced from the Culpable Threat, which her presence would impede one's ability to escape from. This supports the claim I made earlier: that what matters is not whether one *poses* a wrongful threat through one's own action but whether one is morally responsible for a wrongful threat.

#### 4.1.6 Justified Threats and Just Threats

Primarily for the sake of completeness, it is worth noting two more categories of Threat, though neither is a category that could encompass unjust combatants, at least in a general way. Sometimes an agent acts with objective moral justification but nevertheless threatens to inflict wrongful harm on an innocent person—that is, harm that would *wrong* the victim, or contravene his or her rights. I will refer to such an agent as a *Justified Threat*. There are two general types of Justified Threat, and in both cases the form of justification that applies to the agent's action is a lesser-evil justification. In one case, the Justified Threat is objectively justified in intentionally infringing the right of an innocent person, a person who has neither waived nor forfeited her right. These are cases in which the innocent person's rights are straightforwardly overridden by more important countervailing considerations—for example, a case in which it is necessary to kill one innocent person as a means of preventing a much larger number of other innocent people from being killed by someone else. Anyone who is not a moral absolutist must believe that there are in principle such cases.

In the other case, the Justified Threat is objectively morally justified in acting in a way that infringes the rights of an innocent person as a foreseen but unintended effect. An example of a Justified Threat of this sort is the tactical bomber, a familiar figure in debates about the Doctrine of Double Effect and the relevance of intention to permissibility. The tactical bomber is fighting in a just war and has been ordered to bomb one of the enemy's more important military facilities. He knows that in doing so he will inevitably kill some innocent civilians who live nearby, but he also knows that the number of deaths he will cause is proportionate in the wide sense in relation to the importance of destroying the facility. His action is therefore objectively morally justified but will have as a side effect the killing of people who have done nothing to lose their right not to be killed. Like the person who

intentionally kills an innocent person to save a much greater number of other innocent people, the tactical bomber justifiably threatens people who have done nothing to make themselves liable to be threatened.

The final category I will mention consists of those who are objectively morally justified in posing a threat of harm to which the potential victim is morally liable. Call such people *Just Threats*. The harm that a Just Threat would inflict would neither wrong the victim nor infringe his or her rights. The victim has no justified complaint about being harmed in the way threatened by the Just Threat. An obvious example of a Just Threat is someone who responds with necessary and proportionate defensive force to an attack by a Culpable Threat.

While I suggested that unjust combatants are neither Justified Threats nor Just Threats, that claim may be slightly misleading. Because unjust combatants are engaged in a general form of action—fighting in a war that is unjust because it lacks a just cause—that is objectively wrong, it is not possible that they could be Justified Threats or Just Threats through the course of a war. Yet there can be some occasions even during an unjust war when unjust combatants may act not only objectively permissibly but even with objective justification. This can be the case, as I noted in Section 1.3, if just combatants are pursuing their just cause by impermissible means, such as intentionally attacking people who are innocent in the relevant sense. If a soldier on the opposing side, who is fighting in an unjust war, attacks the just combatants to prevent them from killing innocent people, he may then be acting with objective moral justification against people who are liable to be attacked.<sup>7</sup> On that occasion, then, he may have temporary status as a Just Threat. I say “may have” rather than “has” because even while he is doing one act that is morally justified, and perhaps even morally required, he is also engaged in a temporally extended course of action that is wrong: fighting in an unjust war. Because of this—that is, because after he has prevented the just combatants from doing wrong, he will revert to the pursuit of his own ongoing wrongful course of action—he remains a legitimate target of attack. His moral status is curiously mixed. Even while he is doing one act for which there is objective justification, he does not cease to be engaged in another course of action that is wrong.

The set of categories I have outlined—Culpable Threats, Partially Excused Threats, Excused Threats, Innocent Threats, Nonresponsible Threats, Justified Threats, and Just Threats—is not exhaustive. There are various other possibilities, such as the category of persons who, acting in a way that is objectively permissible but not objectively justified, pose

a threat of wrongful harm to another. There are also those who pose a threat of wrongful harm through action that is objectively justified but subjectively impermissible. I will not consider these and other possibilities that are of no obvious relevance to the moral status of combatants in war.

#### 4.2 LIABILITY TO DEFENSIVE ATTACK

The next issue to consider is whether and to what extent Threats of the different types I have identified are morally liable to defensive attack. I will assume that it is uncontroversial that when an agent is to some degree culpable for posing a threat of wrongful harm to another, that agent is liable to defensive attack. Culpable and Partially Excused Threats are, therefore, liable to defensive attack. Liability is, however, a matter of degree and the degree of a Partially Excused Threat's liability depends on the strength of the excusing conditions that apply to his or her action. As I noted before, degree of liability is manifest in the stringency of the narrow proportionality constraint. The stronger a Partially Excused Threat's excuse is—the more it approaches a full excuse—the more stringent the proportionality constraint becomes. If the excuse is trivial, the Partially Excused Threat is barely distinguishable from a Culpable Threat and is liable to virtually the same degree of harm to which he would be liable in the absence of the excuse. If, by contrast, the excuse has nearly the force of a full excuse—if, that is, it is almost fully exculpating—then the degree of harm to which the Partially Excused Threat is liable, or the degree of harm that it would be proportionate to inflict via defensive action, is only marginally more than it would be permissible to inflict on an Excused Threat in the same circumstances.

Excused Threats who are not also Innocent or Nonresponsible Threats are liable, though to a reduced degree relative to Culpable and Partially Excused Threats. If an excuse is sufficient to absolve a person not only of all culpability for posing an objectively wrongful threat but also of all responsibility, then the Excused Threat is also a Nonresponsible Threat. If, however, the excuse absolves the agent only of culpability and not of all responsibility, and if responsibility for a wrongful threat is the criterion of liability to defensive attack, then the Excused Threat must be liable to some degree. This seems intuitively right in the paradigm case of an Excused Threat: namely, a person who acts under irresistible duress. As I noted, duress is never literally irresistible; hence, while that

excuse may render a person altogether blameless, it does not render him wholly nonresponsible.

Similarly, Innocent Threats who are not also Nonresponsible Threats are liable to defensive action. Again this follows from the fact that they are morally responsible for posing a wrongful threat (if this were not so they would be Nonresponsible Threats), together with the assumption that responsibility for a wrongful threat is the criterion of liability to defensive attack. There is a clear intuitive basis for this judgment in the case of someone like the conscientious driver, who chooses for nonmoral reasons of her own to act in a way that she knows imposes a tiny risk of great harm to innocent people. If she has bad luck and will now accidentally kill an innocent person unless defensive action is taken against her, she seems liable to necessary and proportionate defensive action. Since what is at stake is the life of an innocent bystander, proportionate harm could include death.

If moral responsibility for a wrongful threat is a sufficient condition of liability to defensive action, it is a necessary truth that all Innocent Threats who are not also Nonresponsible Threats are liable. What may be disputed is whether some of those I have identified as Innocent but not Nonresponsible Threats are really not Nonresponsible Threats. This is particularly true in the cases of the technician, the resident, and the ambulance driver, all of whom act with subjective justification. For simplicity, I will focus mainly on the case of the resident, who is what I have called an Epistemically Justified Mistaken Threat. To strengthen the challenge to my earlier claim that he is not a Nonresponsible Threat, let us assume that the members of his immediate family—his wife and small children—are with him in the house when the murderer's identical twin is approaching. In that case his shooting the twin, though objectively wrong, is not only subjectively morally justified but is even subjectively morally *required*. His situation, let us assume, is subjectively indistinguishable from that of a person whose house really *is* being approached by an escaped mass murderer in the middle of the night. Assume that such a person, in shooting the genuine mass murderer, would be a Just Threat. Our original resident's situation is, on these assumptions, subjectively indistinguishable from that of a Just Threat. The resident and the Just Threat respond in exactly the same way to subjectively identical circumstances. How, then, can the resident, and Epistemically Justified Mistaken Threats in general, be liable? Is it really sufficient for liability that they voluntarily choose to harm or kill someone and have the bad luck to be objectively mistaken, when a Just

Threat makes the same choice in indistinguishable conditions, yet has the good luck to be correct, and is therefore not liable? Can whether someone is liable really be just a matter of luck?

It cannot be *merely* a matter of luck. A person cannot become liable to defensive action without having engaged in some form of voluntary action that had some reasonably foreseeable risk of creating a wrongful threat. But when two people have acted in the same way, it can then be a matter of luck that one becomes liable to defensive action while the other does not.<sup>8</sup> What we are liable to is a function of what happens as a result of our action, which is a matter over which we have imperfect control. In many cases this seems intuitively acceptable. In the case of the conscientious driver, for example, either the driver will kill the pedestrian or the pedestrian, or some third party, will kill the driver in self- or other-defense. The harm threatened by the driver, which is a type of harm that one foreseeably risks inflicting on others when one drives, cannot be divided between the two of them, or among all those who, like the conscientious driver, chose to drive for reasons that were optional. All of the cost must go either to the driver or to the pedestrian. Since the driver chose to impose the risk for reasons of her own, it is fair that she should suffer the cost rather than imposing it on the pedestrian. Yet there are indefinitely many drivers who imposed the same risks that she did but had better luck. That she is liable and they are not is a matter of moral luck. Yet she acted in the knowledge that bad moral luck was a possibility.

Some people will, however, think that the conscientious driver cannot be held responsible for what happens as a result of events that were entirely unforeseeable. And even more people will think that the resident cannot be held responsible for the consequences of action that would be morally required if his fully epistemically justified beliefs were true. Some people, in other words, will think that the conscientious driver is a Nonresponsible Threat, and even more will think that the resident is. The idea that Innocent Threats who are subjectively justified in acting, and perhaps even those who are only subjectively permitted, are actually Nonresponsible Threats will not seem *morally* implausible to most people. This is because most people assume that it is permissible to kill a Nonresponsible Threat in self- or other-defense. On this assumption, it is permissible to kill the conscientious driver and even the resident in self- or other-defense, even if they bear no responsibility for the wrongful threat they pose, just as it is permissible, on this view, to kill the cell phone operator if there is no other way to prevent him from pressing the "send" button.

But for those who believe that there is no basis for the claim that a Nonresponsible Threat is liable to defensive attack, and who also believe that an appeal either to liability, consent, or lesser evil is necessary to override the presumption against the intentional killing of a person, the idea that the conscientious driver and the resident are Nonresponsible Threats is counterintuitive, since it seems to imply that it would be wrong for the pedestrian to kill the driver in self-defense, and that it would be wrong for the identical twin to kill the resident in self-defense. For if neither the driver nor the resident is liable, and since neither can be killed on the basis of a lesser-evil justification, there seems to be no plausible justification for killing them in self-defense.

But even if we believe, as I do, that there is a basis for liability in such cases as those of the conscientious driver and the resident, we have to concede that it is slight. And in cases such as these in which the moral asymmetry between the Threat and the potential victim is so slight, it may be that the Threat's liability is insufficiently significant to be morally decisive. In most cases in which killing in self-defense is justified, the presumption against intentional killing is easily overridden by the liability of the Threat; but when the degree of the Threat's responsibility, and therefore liability, is negligible, it may be insufficient to override that presumption. Perhaps it is a mistake to suppose that in such cases the slight or negligible liability of the Innocent Threat is morally decisive, so that while the innocent victim is entitled to kill the Threat in self-defense, the Threat has no right of self-defense against the victim. And perhaps it is also a mistake to suppose that when there is no basis for liability on the part of the Threat (that is, in cases involving Nonresponsible Threats), the presumption against intentional killing is morally decisive, so that it is impermissible for the innocent victim to defend herself. Perhaps the proper resolution in these cases is different. It may be that in cases in which there is little moral difference between the Threat and the potential innocent victim, it is too simplistic to suppose that *some* degree of responsibility, however slight, on the part of the Threat makes it justifiable for the victim to kill in self-defense, whereas when there is no basis for the attribution of responsibility, the victim must allow herself to be killed. We should consider whether there is another way of resolving these conflicts that recognizes the essential moral equality of the parties involved.

Suppose for the sake of argument that one or more of the following claims is true.

- Nonresponsible Threats are not morally liable to defensive attack, but the idea that the innocent victim must simply submit to being killed is unacceptable.
- All Innocent Threats, both those who act subjectively permissibly and those who act with subjective justification, are Nonresponsible Threats and are not liable to defensive attack, but the idea that the innocent victim must simply submit to being killed is unacceptable.
- Most Innocent Threats are not Nonresponsible Threats but the degree to which they are responsible is too slight for conflicts between them and their potential innocent victims to be resolved decisively in favor of the victim.

How, given one or more of these assumptions, should such conflicts be resolved? I can think of three possible modes of resolution. There may be others. In briefly sketching the three, I will, for convenience, focus mainly on unavoidable conflicts between Nonresponsible Threats and their potential innocent victims.

(1) One possibility is to divide the unavoidable harm between them. Suppose, for example, that instead of killing a Nonresponsible Threat in self-defense, the potential victim can save her life by nonlethally injuring the Nonresponsible Threat, though only at the cost of suffering a comparable nonlethal injury herself. If she follows that option, she and the Nonresponsible Threat, both of whom are entirely innocent people, will share the misfortune of their having come into unavoidable conflict. That may seem a fairer (if not altogether realistic) way of resolving the conflict than insisting that because the Nonresponsible Threat is not liable, the moral presumption against intentional killing requires that the victim allow herself to be killed.

Suppose, however, that the harm cannot be divided. In practice, it seldom can be. It may still be possible, though, to follow a decision-procedure that treats both innocent parties fairly by giving them each an equal chance of surviving. The potential victim might, for example, be morally required to use a randomizing device, such as a coin toss, to determine whether to kill the Nonresponsible Threat or to allow herself to be killed. It is, of course, entirely fanciful, indeed ridiculous, to imagine that anyone who was about to be killed would or could do such a thing. But if such a procedure really were the morally ideal solution, it

would be important to know that, if only so that the knowledge could guide the design of institutions that might promote such resolutions at a different level of action. Or it might be that disinterested third parties, who would not be acting under such extreme pressures, could intervene in the knowledge that only a random selection would be fair. If we thought that the Threat was not entirely nonresponsible, but was liable to some slight degree, the ideal solution might be a weighted lottery that would give the Threat a lower chance of survival, with the reduction in probability being proportionate to the degree of his liability.

(2) A second possibility is that in cases in which there is little or no moral asymmetry between a Threat and the potential innocent victim, we should see each as objectively permitted to engage in self-defense against the other. Suppose, for example, that the innocent person who will be killed if the cell phone operator presses the button on his rewired phone can save herself only by killing him before he presses the button. One might argue that although the cell phone operator has done nothing to make himself liable to be killed, morality does not require the potential victim to allow herself to be killed. She has a right not to be killed that she is permitted to defend against infringement even by a Nonresponsible Threat. So she is morally permitted to kill him. But because he too has a right not to be killed that he has done nothing to forfeit, he retains his right of self-defense and would be permitted to kill her in preemptive defense, if that were possible. Let us refer to this kind of case, in which each party to a conflict is objectively permitted to try to kill the other in self-defense, as a “symmetrical defense case.”

I suspect that there are symmetrical defense cases. I have elsewhere argued that the conflict between a Justified Threat and an innocent victim who will be killed as a side effect of his action if she does not kill him in self-defense is such a case.<sup>9</sup> But there are problems in regarding at least some conflicts between Nonresponsible Threats and innocent victims, and between Innocent Threats and innocent victims, as symmetrical defense cases. One such problem is that one must explain how the presumption against intentional killing is overridden in the absence of either liability on the part of the Threat or a lesser-evil justification. Another is that Nonresponsible Threats do not seem to threaten their victim's *rights* when the threat they pose does not derive from their agency at all. So insofar as the justification for self-defense by the victim depends on the assumption that she is thereby defending her rights against infringement, it will not extend to these cases.<sup>10</sup>

(3) The third and final possibility I will mention is that in cases in which there is little or no relevant moral asymmetry between the Threat and the potential victim, we should be guided by a convention designed to bring about the fewest killings of innocent people if people were to follow it over time. Gerhard Øverland has defended such a proposal.<sup>11</sup> He argues, in effect, that the best convention for regulating conflicts between Threats who are morally innocent and potential victims who are morally innocent is to permit the victim, but not the Threat, to kill in self-defense, on the ground that it is the Threat who has initiated the conflict. He offers two reasons for thinking that this convention would result in fewer innocent people being killed, and thus would be accepted *ex ante* by hypothetical contractors: (i) that initiators of conflict are more likely to be culpable than those who react to a threat from another; hence when mistakes occur this rule is more likely to penalize the guilty and less likely to lead the genuinely innocent to fail to defend themselves; and (ii) that locating conventionally-based liability with the initiator will help to deter people from becoming Threats, even ones who are morally innocent. Another reason he does not mention is that because one person can threaten many but cannot threaten fewer than one, it may be that each of us is more likely to be a potential victim of a Threat who is morally innocent than to be such a Threat. This, however, ignores the fact that there are cases in which one potential victim is threatened by more than one Threat—a familiar phenomenon in war. But the convention is supposed to govern all cases involving Threats who are morally innocent, including cases of individual self-defense, so if in general there are more cases in which one innocent person threatens many than cases in which many threaten one, it may still be true that each of us is antecedently more likely to be the victim rather than the Threat in cases in which there is little or no moral difference between them. (Alternatively, however, we could have a more fine-grained convention that would permit victims to engage in self-defense when they outnumber Threats who are morally innocent, but not when they are outnumbered by those Threats.)

There are naturally problems with this proposal as well. One is that, like the previous suggestion, it too requires an explanation of how it could be acceptable to have a convention that permits people intentionally to kill innocent people rather than to allow other innocent people (themselves) to be killed. Perhaps it could be claimed that the presumption against intentional killing is overridden by hypothetical consent, by the presumed rationality of agreeing to abide by such a

convention. Another problem, though, is that this proposal does not respond to the concern that led to the search for an alternative way of resolving these conflicts: namely, that it seems unfair, when both parties to a conflict are entirely innocent, that one party should be morally required to bear the full cost—death—while the other suffers nothing at all.

I will return to the discussion of these three proposals for resolving conflicts in which there is little moral difference between the Threat and the victim, and to their applications and the plausibility of their implications, in the following section.

### 4.3 THE MORAL STATUS OF UNJUST COMBATANTS

I have argued that Culpable Threats, Partially Excused Threats, and Excused Threats and Innocent Threats who are not also Nonresponsible Threats are all liable to defensive attack. Culpable Threats are fully liable and the degree of harm that it would be narrowly proportionate to inflict on them in self-defense is determined entirely by the magnitude of the expected harm they threaten to cause (unless, perhaps, there is contributory fault on the part of the victim). Narrow proportionality in defense against a Partially Excused Threat is determined in part by the magnitude of the harm to be averted but also by the strength of the excusing conditions that apply to the Threat's action. The stronger the excuse, the more stringent the restriction. The proportionality constraint is even more stringent in self-defense against Excused Threats and Innocent Threats. In general, among Threats who are liable, the grounds for liability are weakest in the case of Innocent Threats (who are, of course, Excused Threats with a full epistemically-based excuse according to an objective account of permissibility). The basis for their liability is simply that they know they are intentionally harming, or foreseeably harming, or imposing a risk of harm, and also know that it is possible that those they harm may be innocent. Nonresponsible Threats are not liable at all.

All unjust combatants who are actually or potentially engaged in fighting are aware that they are intentionally attacking some people, risking harming others, or at least are committed to doing so. They can therefore be Nonresponsible Threats only if they altogether lack the capacity for morally responsible agency. There are, possibly, some

who meet that description. I will discuss them at the end of the chapter. What this means is that there is a basis for liability in the case of virtually all unjust combatants.

This is true even if some unjust combatants are fully excused on grounds of irresistible duress. For, as I noted, duress can absolve a person of all culpability but does not absolve him of all responsibility. Even if unjust combatants are Innocent Threats who act with subjective justification, there is a basis for the attribution of liability in their prior choice to join or to allow themselves to be conscripted into the military, knowing that there was a risk that they would be ordered to fight in an unjust war, and knowing as well that they might mistakenly regard that war as just.

There is, indeed, some reason to think that the liability of combatants is *strict*, in the sense that they can be liable to attack even if they have done nothing objectively wrong, at least as yet. Suppose, for example, that many people in a particular society join the military for good moral reasons. Their country has been peaceable for decades but nevertheless has hostile neighbors. They want to be able to defend it effectively if it is attacked. So they join and begin to train for the defense of their country. Soon thereafter, their government begins to conspire to launch an unjust aggressive war against a neighboring country in two years' time. The plans and preparations for this war are highly secret: no one in the general population or in the lower ranks of the military knows anything about them. But they are discovered by spies of the country that is the intended victim. The government of this latter country knows that it cannot prevent this war by diplomatic or other peaceful means and that to wait until the attack is imminent before responding militarily would be tantamount to accepting defeat. Its only chance is preventive war. But preventive war would involve attacking the potential aggressor's soldiers, who know nothing of their government's plans and are engaged exclusively in activities of the sorts in which soldiers engage in peacetime: training, drilling, and so on. Are these soldiers *liable* to preventive attack? I think that even in this case, in which the soldiers have as yet done nothing wrong, there are grounds for holding them liable. They earlier made a voluntary choice that in effect committed them in a public way to obedience, and those to whom they owe obedience will, unless prevented, order them to fight in an unjust war in which it is reasonable to expect that they will participate. These two factors—that they chose to make themselves instruments of their government and that their government will otherwise use them to fight



an unjust war—make them share moral responsibility for the threat their country poses to its neighbor, and this in turn makes them liable even to preventive attack when that is necessary to avert the threat.<sup>12</sup>

The justification for attacking unjust combatants in war would, however, be highly problematic if unjust combatants were Innocent Threats and if the first of the three alternative modes of resolution discussed in the previous section turned out to be the morally most appropriate way to resolve conflicts between Innocent Threats and their innocent potential victims. No one would or could fight a war on the basis of a strategy that sought to apportion the harms suffered on both sides according to some formula for justice in the distribution of harm, such as a weighed lottery. So if unjust combatants were Innocent Threats and that were the right way to deal with Innocent Threats, wars that we now regard as just wars would all have been fought in an unjust manner.

Many people would, however, welcome the suggestion that unjust combatants are Innocent Threats and that conflicts between Innocent Threats and their victims must be treated in the second alternative way suggested above, as symmetrical defense cases. This is, indeed, one way to interpret what, in Section 2.3, I referred to as the “epistemic argument”. If all unjust combatants were Innocent Threats, and if conflicts between Innocent Threats and their potential innocent victims were symmetrical defense cases, the moral equality of combatants would be vindicated.

This suggestion was easy to refute because the moral equality of combatants asserts the universal equality of status among combatants, yet it is uncontroversial that not *all* unjust combatants are Innocent Threats. Some fight in full awareness that their war is unjust because it lacks a just cause. But the moral equality of combatants embraces them as well. Still, if most unjust combatants were Innocent Threats, or even if only a great many were, that would provide some partial support for those who think that participation in a war is not wrong just because it lacks a just cause.

Yet I think it is clear that at most only a small proportion of unjust combatants qualify as Innocent Threats, in the sense in which I am using that term. For few, if any, fight on the basis of factual and moral beliefs that are fully epistemically justified—that is, beliefs to which they are justified in according a high degree of credence and that, if true, would make their action objectively justified. This is shown by the considerations I discussed in evaluating the moral risks involved in

fighting in war. I argued in Section 3.3.3 that given that what is at stake morally in a decision to go to war is of the highest importance, soldiers have a stringent moral responsibility to seek to overcome the epistemic constraints that typically characterize their situation. If they were to do that, there would be various highly relevant considerations that would be available to them independently of the facts about their particular war. Among the facts they could know, as I pointed out earlier, is that at least half the time that soldiers go to war they fight unjustly. With a bit more thought they could discover that the proportion of just to unjust wars is probably not even 50–50, that there are probably fewer just wars than there are unjust wars. So unless they are confident that their war is purely self-defensive and is not a response to a justified instance of humanitarian intervention, they ought to be skeptical. Yet they also know that most soldiers in situations relevantly like their own are not skeptical but instead believe that the war in which they fight is just—indeed that soldiers are almost as likely to have that belief when their war is unjust as they are when it is just. They can probably see that the soldiers against whom they would be fighting are equally convinced that *their* war is just, and they know that it is very unlikely that both sides are right. Soldiers can understand many of the reasons why other soldiers are so often misled about the morality of the wars in which they fight. For they know that soldiers tend to defer to the authority of their government, that governments often lie, and so on. In particular, they can know just from looking around at their fellow soldiers that soldiers very seldom even try to fulfill their rather exacting epistemic duties. So it is hardly surprising that they so often get it wrong.

What this means is that soldiers should know that there is a high risk of getting it wrong. In this respect, fighting in war is quite different from engaging in individual self-defense. In individual self-defense, there is little reason to be on guard against mistaking a wholly innocent or unthreatening person for a Culpable Threat. It is for this reason that the examples in the literature—such as my case of the resident and the twin, or the case in which someone mistakes an actor rehearsing a murder scene for a genuine murderer—are contrived and unrealistic. But soldiers would know, if they gave the matter only a little thought, that they have compelling reasons to be on guard against the high risk of mistaking an unjust war for a just war. They cannot assume that they are uniquely exempt from the characteristic tendency among soldiers to ignorance and delusion about the moral character of the wars in which they fight. It should be apparent to them that unless they give very

careful consideration to what they are being ordered to do, whether they end up as just combatants or unjust combatants is mainly a matter of moral luck. If they fail to take these and other considerations into account, they are negligent. What counts as negligence in the formation of belief is sensitive to context, but in this context the demand for epistemic justification is high. That so few soldiers ever refuse to fight in wars that are unjust strongly suggests that unjust combatants are quite generally negligent about their epistemic responsibilities. But if they are negligent, they are not Innocent Threats.

All of the foregoing claims, most of which merely rehearse points made earlier in the section on moral risk, are quite general and make no reference to the particular war in which a soldier might be commanded to fight. But many wars that are unjust have characteristic properties that should arouse suspicion in anyone ordered to fight in them. One wonders, in retrospect, how Nazi soldiers who fought in Poland, France, Denmark, Russia, and the many other countries they unjustly invaded could possibly have imagined that they were fighting in a just war. In general, wars fought abroad on the territory of a state that has not itself invaded another state are likely to be unjust wars of aggression, particularly if the enemy combatants are citizens of that state and live and circulate among civilians there without being betrayed to their adversaries—civilians whom the invading soldiers might be told that they are defending. It is, of course, entirely possible that such a war is an instance of justifiable humanitarian intervention or preventive war, but in that case the burden of justification lies with the invading soldiers' government and, at least in the case of humanitarian intervention, the evidence necessary to establish a convincing justification should be publicly available. It is also a cause for suspicion if, in the world as it is now, a country resorts to war without seeking authorization from the United Nations. Of course, none of these features, or even all of them in conjunction, is an infallible indicator of an unjust war. But they do raise doubts that must be rebutted before a soldier can claim epistemic justification for the belief that his war is just. If a soldier decides to fight in a war that has some or all of these features and the war turns out to be unjust, he is very unlikely to count as an Innocent Threat.

The conclusion that I draw from the foregoing discussion is that the great majority of unjust combatants are neither Excused Threats nor Innocent Threats, but Partially Excused Threats. The many excuses that I cited earlier as having frequent application to the action of unjust combatants do function to mitigate the culpability of these combatants

for fighting in an unjust war. In this respect, Walzer is right: the vast majority of unjust combatants are not criminals, in either a moral or a legal sense. But their excuses are seldom full excuses; nor do their epistemic limitations often rise to the level of subjective justification.

There are interesting theoretical questions here that I will not pursue in depth because the cases in which they arise are insufficiently common to affect the practical implications of my argument. One such question is whether a number of partial excuses can add together to provide a full excuse. Suppose, for example, that an unjust combatant is immature, so that his capacity for morally responsible action has not reached its peak, and that he fights under moderate duress and in a state of ignorance for which he is partially though not fully excused. Might these excuses combine to make him an Excused Threat? It seems clear that they combine to diminish his culpability by more than any one of them does on its own, but it is doubtful that they combine to yield a full excuse. This is because each leaves grounds for blame that do not seem to be wholly canceled or eliminated by the others. But even if they did together provide a full excuse, that would not relieve this combatant of liability, since even a full excuse would absolve him only of culpability, not responsibility.

A related question is whether two or more distinct excuses, each of which is a full excuse, could combine to exempt an agent not only from all culpability but also from all responsibility. Suppose, for example, that an unjust combatant fights both with a full epistemically-based excuse (which, on a subjective account of permissibility, is a subjective permission) and also under irresistible duress. Is he then not only an Excused Threat and an Innocent Threat but also a Nonresponsible Threat? I do not know how to answer this question, but for our purposes that does not matter. If I was right to claim earlier that each of these conditions is quite rare on its own, it seems that instances in which both conditions are present together must be so rare as to be of little or no practical concern—a conclusion that is reinforced by the fact that an unjust combatant with more than one full excuse would in any case not be identifiable as such in combat.

If, as I have argued, the overwhelming majority of unjust combatants are Partially Excused Threats, then unjust combatants are entitled to act on the *presumption* that the unjust combatants they face in combat are Partially Excused Threats. In practice, it would be unreasonable for them to do otherwise, in the absence of more detailed knowledge about a particular unjust combatant or group of unjust combatants. Some

unjust combatants may, perhaps, benefit from this presumption, for there are certainly some unjust combatants who are Culpable Threats who have enlisted and gone to fight in the absence of duress and in full awareness that their war is unjust. If their adversaries respect the presumption, this may lead to their being treated less harshly than they are liable to be treated. In other cases, however, it may lead to unjust combatants' receiving treatment that is harsher than that to which they are liable. These differences are unlikely to be detectable on the battlefield, because virtually all unjust combatants are liable to attack and the differences I am describing are therefore only differences in the application of the narrow proportionality restriction. If, acting on the presumption that all unjust combatants are Partially Excused Threats, a just combatant inflicts a harm on an unjust combatant that would be proportionate if the latter were a Partially Excused Threat but is objectively disproportionate because he is in fact an Innocent Threat, the objective disproportionality would be indiscernible by anyone other than an omniscient observer, of which there are none.

I mention this in-practice-irrelevant detail only to emphasize an important theoretical point, which is that in claiming that just combatants are entitled to presume that all unjust combatants are Partially Excused Threats, I am not "collectivizing" the moral status of unjust combatants. No individual combatant gets his moral status merely from membership in a collective. If an unjust combatant is not a Partially Excused Threat but is treated as if he were one, and if this treatment is worse than what his actual status demands, then he has probably been treated unjustly. But the just combatant who has treated him this way has acted with subjective justification, and the responsibility for his objective error almost certainly lies more with the unjust combatant than with the just combatant. Just combatants are, of course, morally required to do the same epistemic work that unjust combatants are (and in most cases probably fulfill the requirement no better than unjust combatants do, which is to say that they are generally just combatants only by virtue of having had good moral luck). Yet their epistemic obligations are primarily concerned with determining the moral character of their war, not with determining the moral status of individual adversaries on the battlefield. To require the latter would be to require the impossible; hence they must be guided by broad presumptions.

#### 4.4 LIABILITY AND PUNISHMENT

Although the vast majority of unjust combatants are Partially Excused Threats, some are Culpable Threats, others are Excused or Innocent Threats, and a few may be Nonresponsible Threats. Apart from those who are Nonresponsible Threats, unjust combatants in all these categories are liable to defensive attack to one degree or another. This is because all are responsible to one degree or another for posing an objectively wrongful threat of harm to others. But if they are liable to defensive force, might they also be liable to punishment?

There is no necessary connection between liability to defensive force and liability to punishment. This is in part because one's being liable to defensive force is compatible with one's being fully excused for the action to which the defensive force is a response. Both Excused Threats and Innocent Threats are, on an objective account of permissibility, fully excused for the wrongful threats they pose. What this means is that they are absolved of all culpability, or blameworthiness. But they remain responsible for the threats they pose. Innocent Threats, for example, act in the knowledge that they are harming someone and that there is a risk that the person they are harming is entirely innocent, or that they are imposing a risk of harm on innocent people. The risks are sufficiently slight that we do not blame them if they have bad luck and those risks eventuate in harm. But we hold them liable to defensive force nonetheless because they have chosen to act in the awareness of those risks.

Liability to punishment, unlike liability to defensive force, presupposes culpability. Excused Threats and Innocent Threats are therefore not liable to punishment. They are either fully excused or are acting subjectively permissibly; either way, they are absolved of all culpability and it would therefore be unjust to punish them for their objective wrongdoing. But the same is not true of Culpable Threats and Partially Excused Threats. They are wholly or partially culpable for posing an objectively wrongful threat to others and therefore could in principle be liable to punishment, particularly, of course, if they succeed in harming or killing innocent people. If most unjust combatants are Partially Excused Threats, and some much smaller proportion are Culpable Threats, the question arises whether they ought to be punished in the aftermath of a war. I will argue that, at least at present, there are decisive reasons,

mostly of a pragmatic nature, not to hold unjust combatants liable to punishment.

Assuming that most unjust combatants are Partially Excused Threats, the case in favor of punishment appeals, not so much to retribution, but to deterrence. At least since the end of World War II, the aim of preventing wars from occurring has assumed an importance in the international law of war at least equal to that of the aim of constraining the conduct of wars when they occur. Hence the insistence of the UN Charter that the *only* legal occasion for the resort to war in the absence of authorization from the Security Council is self-defense or collective defense against aggression by another state—that is, when war has effectively already begun. Because our current legal instruments are comparatively crude and rudimentary, it may be best, for pragmatic reasons, to aim broadly at the prevention of war. Yet in more favorable conditions what we ought to aim for is the prevention of *unjust* wars. And one way to try to do that is to try to deter soldiers from participating in unjust wars by threatening them with punishment if they do. If a government contemplating the initiation of an unjust war were fearful that at least some of its soldiers might resist the order to fight because of their own fear of punishment, this could help deter the government from risking a challenge to its authority from within its own military.

At present, however, there is no impartial international court that could conduct trials of combatants who have fought in an unjust war. Because no government could try its own soldiers for fighting in a war in which it had commanded them to fight, the idea that unjust combatants are liable to punishment could lead to trials by victorious powers of the individual soldiers of their defeated adversary. Since there are probably more unjust wars than just wars, and because any country that fights a war declares itself to be in the right, the victorious power that would prosecute allegedly unjust combatants would be more likely to be a vengeful aggressor prosecuting just combatants who had opposed it. In cases in which it seems likely from the outset that the unjust side will win the war, the fear of being “punished” after the war could combine with the fear of being killed in the war to deter people from fighting in a just war against the aggressor.

Even when it is the side with the just cause that emerges victorious, the prospect of punishment for genuinely unjust combatants could have various bad effects on the conduct of the war. Unjust combatants who feared punishment at the end of the war might be more reluctant to surrender, preferring to continue to fight with a low probability of

victory than to surrender with a high probability of being punished. (The just side could, of course, offer an amnesty, but it would undermine the point of threatening unjust combatants with punishment if they could predict that the threat would have to be withdrawn to induce them to surrender.) And they might also reason that if they face mass punishment in the event of defeat, they have little to lose from abandoning all restraint in the effort to win. They might reason, for example, that if they will be punished in any case if they are defeated, and if the prosecutors are unlikely to have knowledge of their individual acts, each might have nothing to lose, but perhaps something to gain, from the commission of war crimes or atrocities that would increase their chance of victory and thus of immunity to punishment.

Even if there were a just and impartial international court, there would still be powerful objections to any attempt to punish unjust combatants merely for fighting in an unjust war. Even if they are a minority, some unjust combatants are not culpable. And among those who are culpable, some are significantly more culpable than others. Collective punishments would therefore be unjust. Individuals would have to be tried to determine whether they were culpable and if so to what degree. But it would be entirely impossible, for obvious reasons, to provide fair trials for all the members of an army. It might be feasible to try some small proportion of the unjust combatants who would be selected randomly for prosecution, but this would not only involve comparative unfairness but would also dilute the deterrent effect of threatening punishment. This is especially true on the assumption that most of those tried and convicted would have substantial excuses, so that their sentences would have to be comparatively mild. A threat in advance of war to impose quite mild sanctions on a randomly selected and rather small proportion of unjust combatants in the war’s aftermath would be unlikely to have any significant deterrent effect. So even if it could be imposed in a fair and feasible manner, punishment of unjust combatants would be a waste of resources that could surely be put to better use in the *post bellum* period.

It is also worth noting that the intended deterrent effect of punishment would not be on those who would be punished. For when a war is over, most combatants tend to return to civilian life. They are likely to be out of the military, or too old to serve, by the time the next war starts. In this respect, unjust combatants are quite different from ordinary criminals and terrorists, who may be strongly disposed to recidivism. So if the aim of punishment would be deterrence, the punishment would probably

be unjust, for those punished would not be responsible for the threats that might later be posed by the different and unidentifiable individuals whom the punishment would be intended to deter.

I prefaced my arguments in this section by saying that *at present* there are decisive reasons not to hold unjust combatants liable to punishment. But it is possible that conditions could change in a way that would make it desirable to threaten unjust combatants with punishment. One reason that I have not yet mentioned why it would be unwise to threaten unjust combatants with punishment now is that, although there is a law of *jus ad bellum*, there is no authoritative interpreter of that law that soldiers can consult in advance of going to war. When the legal authorities in a soldier's society order him to fight in a war, international law fails to provide him with any source of guidance that might authoritatively controvert his government's assertions about the legality of the war. If the war turns out to be unjust and illegal, the law cannot fairly hold him liable when it has failed to be clear about what it demands of him.

I suggested earlier, at the end of Section 3.3.3, that one important step we can take in preventing unjust wars is to seek to mitigate or eliminate the conditions that tend to excuse participation in them. This is particularly true of the epistemic excuses. If international law could find a way to put soldiers on notice that the war in which they have been commanded to fight, or in which they are at present fighting, is an illegal war and that they can be held legally accountable for participating in it, this would significantly facilitate our ability to threaten them with punishment without unfairness.

#### 4.5 THE RELEVANCE OF EXCUSES TO THE DISTRIBUTION OF RISK

Excuses reduce the degree of a person's responsibility for action that is objectively wrong. This is true even of partial excuses. If, as I have claimed, moral responsibility for an objectively wrongful threat is the criterion of liability to defensive force, it seems that diminished responsibility should entail diminished liability. Diminished liability, in turn, is manifest in the increased stringency of the narrow proportionality constraint. It follows that the stronger a Threat's excuses are, the more stringent the proportionality constraint is in governing the harm it is permissible to cause him in self-defense. To most of us, this is intuitively clear in cases of individual self-defense, or at least in cases not involving

lethal threats. If a person's action threatens to injure you in some comparatively minor way, and if he is a Culpable Threat, it seems that it would be proportionate for you to inflict an even greater harm on him than he would otherwise inflict on you if that is necessary to defend yourself. But that degree of harm might be disproportionate if he is, for example, an Excused Threat. If he is in no way culpable, the degree of his liability is lower and defensive force may be proportionate only if it inflicts on him no more harm, or perhaps even less harm, than he would otherwise inflict on you.

The same is true in war, though of course in conditions of war the relevant information about an individual unjust combatant's excuses will almost certainly be lacking. Still, if what I have argued thus far is right, we know that most unjust combatants are at least partially excused for the wrongful threats they pose to others. Since the dominant view is that unjust combatants do not act wrongly at all, anyone who has been persuaded by my argument that most unjust combatants are in fact Partially Excused Threats should be intuitively disposed to find their excuses greatly mitigating. That is, if in the past one has regarded unjust combatants as acting objectively permissibly but has now been persuaded that they act objectively wrongly, one will naturally take them, in general, to be entirely or almost entirely excused. But in that case one should conclude that their liability to attack is correspondingly diminished, so that what counts as proportionate force in fighting against them may be significantly constrained relative to what is commonly believed.

The contrast between the two views is striking and worth emphasizing. The view about the moral status of unjust combatants that I am defending parallels the common view about individual self-defense. It holds that unjust combatants are liable to attack because they are responsible for an objectively wrongful threat, yet concedes that because they generally have excuses, their liability is diminished so that the narrow proportionality restriction on defense against them is stricter than it would be in the absence of excuses. The prevailing view, by contrast, holds that even though unjust combatants act objectively permissibly, it is nevertheless permissible to kill them intentionally at any time no matter what they are doing. The suggestion that just combatants might be morally required to exercise restraint in fighting against unjust combatants, or at least against some of them, is thus quite a radical departure from the prevailing view.

Yet this view is not entirely unprecedented in the just war tradition. In his treatise "On the American Indians," Vitoria argued that if those he

referred to as “the barbarians” attack the Spanish because of unfounded but excusable fear, “the Spaniards must take care for their own safety, but do so with as little harm to the barbarians as possible, . . . since in this case what we may suppose were understandable fears made them innocent. . . . This is a consideration which must be given great weight. The laws of war against really harmful and offensive enemies are quite different from those against innocent or ignorant ones.”<sup>13</sup>

There are contemporary cases in which it is possible to have knowledge that makes it reasonable to act on different presumptions in fighting against different groups of combatants. During the Gulf War of 1990–1, forces of the US-led coalition were sometimes engaged in battle against the Iraqi Republican Guard—an elite, well-paid, and loyal force—yet at other times fought against units composed almost entirely of recent conscripts who had been coerced by threats to themselves and their families to take up positions in the desert. Although there were presumably some members of the Republican Guard who fought only from fear of what would be done to them if they did not, and some conscripts who were eager to defend the Ba’athist regime, it was reasonable for coalition forces to act on the presumption that any excuses available to members of the Republican Guard were comparatively weak, while those that applied to the action of the conscripts were quite strong. If that is correct, then the proportionality constraint on what could permissibly be done to the conscripts was stricter than it was in its application to action against the Republican Guard. In effect, the proportionality restriction imposed a *requirement of restraint* on coalition forces in at least some of their engagements with units composed mainly of conscripts that did not apply, or at least not to anything like the same extent, to their engagements with the Republican Guard.

Michael Walzer rejects this view. Here is what he says about this example.

Imagine a battle in which American forces are about to turn the flank of a Republican Guard division, and some regular army [i.e., conscript] units are rushed into place to protect the flank. It isn’t an actual case, but it could easily have happened; it isn’t a weird hypothetical. So, how would McMahan explain to the American soldiers that they have to use minimal force and accept greater risks over there, even while they are fighting as harshly as is “necessary” over here? I would like to listen to his talk to the soldiers. I don’t believe that he could make the case. What he regards as significant differences of responsibility between the Guard and the regular army just aren’t going to make a difference on the battlefield—because of what battlefields are like.<sup>14</sup>

I suspect that most people share Walzer’s view. Interestingly, Walzer himself parts company with some people when he acknowledges that soldiers *are* required to exercise restraint, and to accept greater risks to themselves, to avoid harming *civilians*, or to reduce the harm they cause to civilians as a side effect of their military action. He claims that it is a condition of permissibly causing harm to civilians as a side effect of military action that the combatant “seeks to minimize it, accepting costs to himself.” Thus, “if saving civilian lives [that is, by not killing civilians] means risking soldiers’ lives, the risk must be accepted.”<sup>15</sup> In this he and the recent *U.S. Army/Marine Corps Counterinsurgency Field Manual* are in agreement, as the latter also asserts that “combat, including counterinsurgency and other forms of unconventional warfare, often obligates Soldiers and Marines to accept some risk to minimize harm to noncombatants.”<sup>16</sup> Suppose, then, that we convert the example Walzer gives into “a weird hypothetical” example by imagining that the regular army units are not composed of conscripts but that they do drag innocent civilians onto the battlefield with them to use as shields—that is, in the hope that the presence of the civilians will make the American soldiers reluctant to attack them. Walzer must accept that in these circumstances any commander would be morally required to explain to his forces that they must exercise restraint and accept greater risks over there, on the flank where the civilians are, even though they may fight without restraint over here, where the Republican Guard are. The presence of the civilians has to make a moral difference on the battlefield, no matter what battlefields are like. So whatever this commander would say to his forces is what I might say to soldiers preparing to attack a unit of conscripts who are on the battlefield only as a result of extreme duress—with this difference: I would say to them, not that those they are about to attack are a mix of highly blameworthy combatants and wholly innocent civilians, but that those they are about to attack are almost as innocent, in the relevant sense, as most civilians are—indeed, that they *were* innocent civilians until just a short while ago, when they were driven from their homes and onto the battlefield by threats to themselves and their families. I would say that, in an important sense, they did not choose to be here, and that we should accordingly do our best to subdue them while causing as little harm to them as possible, even if that means accepting greater risks to ourselves.

There are, of course, different forms and degrees of risk that just combatants might take in seeking to reduce the harm they cause to unjust combatants whom they recognize as having strong excuses. The

exercise of restraint might increase the risk to their own safety, or the safety of their comrades, or it might increase the risk of failure in the achievement of their just cause. The *Counterinsurgency Field Manual* acknowledges both risks and states that “combatants are not required to take so much risk that they fail in their mission or forfeit their lives.”<sup>17</sup> Strictly interpreted, however, this is not a significant limitation. For what it says is simply that if the exercise of restraint is certain to cause them to fail in their mission or to lose their lives, then there is no requirement of restraint. The quoted passage thus leaves it open that they could be required to exercise restraint in ways that would significantly reduce the probability of succeeding in their mission, or significantly increase the probability of their being killed.

The suggestion that just combatants could be required to jeopardize the success of their mission in order to reduce the harm they would inflict on unjust combatants is substantially less plausible than the suggestion that they should accept greater risks to their own lives in order to do so. For just warfare is much more than the mere exercise of rights of individual self-defense by just combatants. If the point were just to preserve the lives of the just combatants, the best course in most cases would be for them simply to stay at home. But they deliberately put their lives at risk for a reason: to achieve their just cause. In most cases, the importance of achieving the just cause has such great weight in *in bello* proportionality calculations that the partial excuses of unjust combatants have scarcely any effect on those calculations at all. If unjust combatants are even minimally culpable, as I have argued that virtually all are, then they are liable to attack and the great value of achieving the just cause may simply overwhelm any claim they might have to be treated with restraint—even though that claim might be decisive if less were at stake.

The basic idea here is probably clear but it is sufficiently important to bear some elaboration. The proportionality restriction that is relevant here is not the familiar wide *in bello* restriction that governs the amount of harm it may be permissible to inflict on innocent bystanders as a foreseeable side effect of action intended to attack a military target. It is instead the narrow restriction that governs the degree of harm that it is permissible to inflict on a person who is responsible for an objectively wrongful threat, as a means of averting that threat. This latter restriction is sensitive to a variety of factors. These include (1) the magnitude of the wrongful harm to be prevented, (2) the effectiveness of the defensive act in averting the harm, (3) the magnitude of the

harm inflicted on the wrongdoer, and (4) the degree of his responsibility for the threat he poses. The relevant point here is that when the first of these is very great, variations in the fourth are likely to have comparatively little significance, provided that the Threat is morally responsible, and particularly if he is culpable to some extent, as most unjust combatants are. In war, of course, the second factor tends to weigh against the proportionality of the harm inflicted defensively, for the killing of any particular unjust combatant is unlikely to make a significant contribution to the achievement of the just cause. Yet in war the incapacitation of unjust combatants, usually by killing them, is almost always a necessary means of achieving the just cause. That is the nature of war. Those pursuing an unjust cause deploy armed forces to achieve their goal by force. The victims must fight back to prevent themselves from being compelled to surrender whatever it is their enemies want. Successful opposition to the enemy’s unjust cause involves incapacitating enough of the enemy soldiers to prevent them from being able physically to compel the yielding up of whatever it is their side wants. So if what is at stake is of the greatest importance for many people, if success requires killing, and if those killed are not only responsible but also culpable for the wrong they are doing, then the degree of their culpability is unlikely to affect whether killing them as a means of preventing that wrong is proportionate in the narrow sense. They have, it seems, no justified complaint about being killed, if sparing them would have diminished the prospect of success in achieving the just cause. Any complaint on their behalf invites the harsh response that they could have avoided being killed if they had considered more carefully what they were ordered to do, and refused to do it.

It seems that the claim I have made—namely, that the narrow *in bello* proportionality constraint on acts of war by just combatants is more restrictive when unjust combatants have significant excuses—has practical application primarily, and perhaps only, in cases in which all that is at stake is the security of the just combatants themselves. That is, the requirement of restraint by just combatants applies primarily when the issue is simply their own self-defense. If that is right, then what seemed like a radical claim has quite limited practical significance. This is because it is seldom the case that all that is at stake in a confrontation between just combatants and unjust combatants is the survival of those individuals. If just combatants exercise restraint and fewer unjust combatants are killed, those who might have been killed instead survive to continue to promote their side’s unjust cause. And if

more just combatants are killed than otherwise might have been, their deaths weaken their side's ability to achieve its just cause.

There are, however, some cases in which it is reasonable to believe that efforts to spare unjust combatants would have virtually no effect on the probability of success in achieving the just cause, but would increase the risks faced by just combatants themselves. This might be true, for example, in cases of radically asymmetrical warfare, when victory by the side with the just cause is more or less assured in advance. And it might also be true when there is a high probability of being able to render unjust combatants *hors de combat* without killing them, for example by incapacitating them through nonlethal injury, or by inducing them to surrender so that they can be taken captive. It is in such conditions that the unjust combatants' excuses could impose a requirement of restraint on just combatants—that is, a requirement to take greater risks with their own lives and well-being in order to reduce the harm they would otherwise inflict on unjust combatants.

My earlier comments about fighting with restraint against Iraqi conscripts during the Gulf War can now be clarified in the light of this significant qualification. Coalition forces would not have been required to fight with restraint against Iraqi conscripts if that would have jeopardized their ability to restore the sovereignty of Kuwait. But there may well have been cases in which, rather than using maximum force against the positions held by units composed largely of conscripts, coalition forces could have restrained their firepower and been more patient in offering opportunities for surrender, even though it might have been costlier in various ways and physically riskier to do so.

#### 4.6 CHILD SOLDIERS

I have argued that most unjust combatants are Partially Excused Threats—that is, that they typically have many excuses that mitigate their culpability for posing an objectively wrongful threat to others, but that in most cases some element of culpability remains. In part because of that residue of culpability, the effect of their excuses on the stringency of the narrow proportionality restriction is largely negligible in cases in which the exercise of restraint by just combatants would compromise the effectiveness of their efforts to achieve their just cause. The situation would be somewhat different, however, if it were a reasonable presumption that unjust combatants are either Excused Threats

or Innocent Threats. For in that case, although they would be morally responsible for wrongfully posing a threat, they would not be culpable, and that might significantly diminish their liability to defensive attack. And if unjust combatants could reasonably be regarded as Nonresponsible Threats—that is, if they were not only not culpable but not even morally responsible for their action—then they would not be morally liable to attack at all and any justification for attacking them would have to be of a different form, such as a lesser-evil justification.

There are surely some unjust combatants who are Excused Threats, Innocent Threats, or even Nonresponsible Threats. But in almost all conflicts in war, they constitute at most a tiny minority and as individuals they cannot be identified and singled out for different treatment. The same is true of those unjust combatants who are Culpable Threats. Hence, as I claimed earlier, it is reasonable, and unavoidable, for just combatants to act on the presumption that unjust combatants are Partially Excused Threats. Yet there may be some cases in which that presumption does not hold. In some instances it may be reasonable to suppose that most or even all the members of some military unit against which one must fight are Excused Threats, Innocent Threats, or perhaps even Nonresponsible Threats. This could be the case if, for example, one were at war with people who deploy units consisting largely or entirely of child soldiers.

Child soldiers are quite common in some areas of the world, particularly Africa, Asia, and South America. The conditions that lead to their deployment are often, indeed usually, quite horrific. The process often begins with abduction. A group of armed men enters a village and gathers the inhabitants together in an open public space. A child of perhaps 10 years of age is selected and ordered to take a gun and kill his friend, or perhaps one of his parents. The first such child may hesitate or refuse, and is instantly shot dead. Another is then brought forward and given the same order. Those subsequently chosen are less likely to refuse. After a sufficient number of children have been put through this ordeal in full view of the entire village, they are taken away at gunpoint to a camp where they are to be turned into soldiers. Actually though, the process has already begun. It began with the coerced killings in the village, which have various effects: making the killer feel irredeemably corrupted, making him an outcast from his community, binding him to his abductors, and so on. A similar strategy was used in the Nazi concentrations camps. In his final reflections on his experiences in Auschwitz, Primo Levi wrote of those prisoners who became collaborators



with the Nazis that “the best way to bind them [was] to burden them with guilt, cover them with blood, compromise them as much as possible, thus establishing a bond of complicity so that they [could] no longer turn back.”<sup>18</sup> It is surprising how this one arcane and unfamiliar element of human psychology seems somehow naturally accessible to otherwise ignorant and psychologically insensitive men. At the camp, the abducted children are further brutalized, indoctrinated, and trained, perhaps for several years. Finally, they are given light automatic weapons and administered drugs that further anesthetize their consciences and subdue their fears, and are sent to fight for an unjust cause, often in an indiscriminate manner.<sup>19</sup>

The reigning theory of the just war draws no distinction between child soldiers and other combatants. For according to that theory, child soldiers are liable to attack like all other combatants merely by virtue of posing a threat to others. Whether and to what extent they are morally responsible for their action is irrelevant, as is the fact that they are children. It is permissible to do to them whatever it would be permissible to do to adult combatants. Yet the process described above by which children are turned into child soldiers is not unusual or atypical. Children who have been subjected to these horrible abuses have unusually strong excuses of all the broad types identified in Section 3.2. Abduction and brutal mistreatment constitute duress through the implicit threat, to which explicit threats are usually added, of even greater harm in the event of disobedience; physical isolation and indoctrination produce profound ignorance; and youth, psychological manipulation, and drugs together diminish their capacity for responsible agency. I earlier expressed skepticism about the idea that partial excuses of various kinds could combine to form a full or complete excuse, but the number, variety, and strength of the excuses that typically apply to the action of child soldiers are such as to make it tempting to suppose that they are in general Excused Threats, if not Nonresponsible Threats. Certainly if there is any identifiable class of soldiers of whom it might be reasonable to *presume* that *all* are Excused Threats or perhaps even Nonresponsible Threats (on the ground that *most* really are), it is the class of child soldiers.

I think, however, that we should resist the suggestion that it is a reasonable presumption that child soldiers are Nonresponsible Threats. While some child soldiers are as young as 10, or even 8, they have also been forced to adapt to their circumstances and usually, as a consequence, have become precociously mature in various ways. In any

case, no one really supposes that a child of 10, even one who has been subjected to terrible abuse, is wholly lacking in moral responsibility for his action. No parent, for example, regards her child as an automaton. If her child torments the cat, she regards that differently from the way she does the dog’s efforts to harm the cat.

The great majority of child soldiers are, however, older than 10, and most are in their teens. In law, the category of child soldiers includes all those below the age of 18, which is the generally recognized age at which adulthood conventionally begins. Domestic law recognizes that in general people below the age of 18 have a lesser capacity for morally responsible agency than adults do; hence they are held to different legal standards and are generally punished less severely than adults for the same offenses; yet they are not treated as lacking the capacity for moral responsibility and are not exempted from punishment altogether. Indeed, if we believe that most 10-year-olds have some capacity for morally responsible agency, we should accept that most teenagers have that capacity to an even greater degree.

When child soldiers have been abused by those they serve, when they are threatened with terrible harms for refusing to fight, when they know they will be drugged before being sent to fight, when, as is often the case, their past missions have involved assaulting villages and killing unarmed villagers—in these conditions, they should be able to infer that those who command them are not trustworthy and that the likelihood that they are doing wrong is very high. Their best excuse is probably neither epistemic nor, except in the case of the very youngest, that their capacity for responsible agency is diminished, but that they act under great and in many cases irresistible duress. The reasonable presumption in the case of child soldiers seems to be that they are either Excused Threats or Partially Excused Threats, and that even in the latter case their excuses, though partial, are unusually strong.

As with adult unjust combatants, their excuses may not significantly affect the narrow proportionality calculation when the exercise of restraint in fighting against them would decrease the probability of defeating the unjust aims of those for whom they fight. But when just combatants could use lesser force against child soldiers without seriously compromising their ability to achieve their just aims, they may be morally required to fight with restraint, even at greater risk to themselves. This may be only partly because of the child soldiers’ excuses. For it also seems important that these soldiers are *children*—that is, individuals who have hardly had a chance at life and have already been

terribly victimized. There is, of course, little difference in this respect between an 18-year-old regular combatant and a 17-year-old child soldier. But when child soldiers are conspicuously young, there is moral reason to exercise restraint simply because of their special vulnerability to exploitation and loss. Just combatants should show them mercy, even at the cost of additional risk to themselves, in order to try to allow these already greatly wronged children a chance at life.

I personally find this highly intuitive and hope that others do as well. Contrary to Walzer's skepticism about the possibility of convincing soldiers to fight with restraint against some enemy combatants even while fighting without restraint against others, I suspect that any commander would earn the respect of his troops if he were to order them to take additional risks to try to drive back, incapacitate, subdue, or capture child soldiers, while sparing their lives.

## 5

### Civilian Immunity and Civilian Liability

#### 5.1 THE MORAL AND LEGAL FOUNDATIONS OF CIVILIAN IMMUNITY

In 1955, Graham Greene published an eerily prescient novel about the beginnings of American military involvement in Vietnam. The narrator, a civilian, is with a soldier when they discover the bodies of a woman and a small child who have been shot: "The lieutenant said, 'Have you seen enough?' speaking savagely, almost as though I had been responsible for these deaths; perhaps to the soldier the civilian is the man who employs him to kill, who includes the guilt of murder in the pay envelope and escapes responsibility."<sup>1</sup>

This is in some ways a curious suggestion. Because pacifists are few, and the doctrine of the moral equality of combatants is almost universally accepted among those who are not pacifists, few people think that there is any reason for soldiers to feel guilt for doing what they are paid to do, even when that involves fighting in an unjust war. Soldiers may feel guilt if they have committed atrocities in war, as some have done in Greene's story, but it would seldom be reasonable for them to suppose that the commission of war crimes was among the assignments that the civilian population expected them to fulfill to earn their pay envelope. And civilians do not in general think of themselves as shielded from guilt for an unjust war by the intervening agency of the soldiers—paid agents whose dirty hands enable the civilians to keep theirs clean. They very rarely feel any personal guilt, remorse, or even responsibility for the events in a war that their country is fighting, even if it is exposed as unjust, particularly if the war is occurring in a geographically remote area. And this is not because they think their soldiers obligingly relieve them of responsibility or guilt by taking it upon themselves. Rather, the general view, shared by civilians and soldiers alike, is that neither civilians nor soldiers are morally responsible, much less guilty, for unjust