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Self-Defense Against Justified Threateners

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7.1 The Tactical Bombers

The *tactical bomber* is a well-known figure in philosophical iconography. He usually appears along with the *terror bomber* in discussions of the Doctrine of Double Effect. But I want to use him, together with his crew, to explore a different issue: the permissibility of self-defense against a person who acts with moral justification in posing a threat of harm to which the victims are not liable and that would infringe their rights.

The tactical bomber usually appears as a lone figure but I would like for him to have a crew. I will refer to him and his four crew members as the *tactical bombers* or, for brevity, the bombers. Assume that they conduct all of their military decision-making collectively and that in all the cases I will consider they reach their decisions unanimously and then act in concert.

The tactical bombers are fighting in a just war of humanitarian intervention in a distant country. Their mission, if successful, will prevent 100 innocent civilians in the state in which the intervention is occurring from being killed by soldiers of that state. These civilians are strangers to the bombers; they bear no special relation to them.

Here are some of the other features of the example, along with some assumptions I will make.

1. It is unavoidable that when the tactical bombers bomb their military target, which is located on the enemy's border with a neutral country, the explosion will hurl heavy debris onto a tiny village across the border, killing its five inhabitants as a side effect.
2. Although these five neutrals live in the same village, they are not otherwise specially related to one another. They are not, for example, members of the

same family. We might suppose that they have chosen to live in this remote village because each is reclusive. Because of the absence of special relations among them, there is no reason to suppose that the harm that any one of them is permitted to cause in defense of another exceeds what the other would be permitted to cause in her own self-defense.

3. The only two effects that are relevant to the permissibility of the bombing are the intended saving of the 100 civilians and the foreseen but unintended killing of the five villagers. Although the bombing will destroy a military target, it will not kill or incapacitate any enemy soldiers or otherwise impede their war effort. The just cause of the war in which the tactical bombers are fighting is the saving of the lives of civilians in the enemy state; thus the success of the tactical bombers' mission would constitute a partial achievement of the just cause.
4. The bombers' mission is necessary for the saving of the 100 civilians. There is no other way the civilians can all be saved, and indeed no other way that *any* can be saved.
5. I will assume that the number of civilians that would be saved sufficiently exceeds the number of villagers that would be killed to make the bombers' action proportionate in what I call the "wide" sense—that is, proportionate in the relation between its relevant good effects and its harmful effects on people who are not liable to suffer those harms, or indeed any harms.
6. Because the bombers' aim is just and their action is necessary and proportionate, their bombing of the military target is morally justified in the fact-relative sense. Assume that they know this, so that their action is justified in the evidence-relative and belief-relative senses as well. Although the villagers' right against attack has been neither waived nor forfeited, it is overridden—that is, there is a lesser-evil justification for killing them as a foreseen but unintended effect of the bombers' action.
7. The bombers might or might not be morally *required* to drop the bomb. The position I will defend would be more plausible if the bombing were morally required, but the position seems correct even if the bombing is merely justified but not required.
8. The villagers would not be morally required to act on their own to save the 100 civilians at the cost of bringing about their own deaths, either as a means or a side effect. That is, they would not be required to actively sacrifice their lives to achieve the tactical bombers' mission.
9. Those involved in the immediate conflict—the tactical bombers and the villagers in the neutral state—know all the relevant nonmoral facts, such as that dropping the bomb is necessary for saving the 100 innocent civilians but will kill the five villagers.

If the tactical bombers complete their mission, the ratio of innocent people saved to innocent people killed will be approximately 17 to one. This seems proportionate even when the asymmetry between killing and letting die is taken into account. Compare the familiar Trolley case in which a runaway trolley is careering down the main track where it will kill five people unless it is diverted onto a branch track where it will kill only one. Most people believe that it would be permissible, and therefore proportionate, for a bystander to divert the trolley even though the ratio of people saved to people killed is only five to one. This supports the claim that the bombers' action is also proportionate, given its significantly higher ratio of people saved to people killed. But the comparison is not conclusive because there is another seemingly relevant difference between the cases—namely, that the killing in the trolley case is done via the redirection of an existing threat while that by the bombers is done via the creation of a new threat. If killing via the creation of a new threat is substantially more objectionable morally than killing via the redirection of a threat, then the fact that killing one to save five is proportionate in the trolley case may not show that killing one to save 17 is proportionate in the case of the tactical bombers. I suspect, however, that even if the difference between creating and redirecting a threat is significant, it is not sufficiently significant to outweigh the difference between the two cases in the ratio of people saved to people killed. (Despite this difference between the two cases, as well as another that I will discuss later, I will sometimes appeal to trolley cases to elucidate certain claims.)

The claim made earlier in point 6 is that the tactical bombers' action is justified. I mean by that more than that it is permissible. An act is *permissible* if it is not wrong, all things considered. An act is *justified* if it is permissible *and* there is a positive moral reason to do it. (That it is permissible presupposes that the positive reason or reasons to do it outweigh any and all countervailing moral reasons not to do it.) An act is *required* if one has decisive moral reason to do it, so that not to do it would be wrong, or impermissible.

The claim that the tactical bombers' action is morally justified is supported by what Parfit calls the *Consent Principle*, which says, roughly, that an act is wrong if it treats people in a way to which they would not have sufficient reason to consent (Parfit (2011), p. 184). It seems that the five innocent villagers could rationally consent to be killed as a side effect of saving the much greater number of civilians. But the 100 civilians could not rationally consent to be allowed to be killed in order that the five not be killed. The Consent Principle therefore seems to imply not only that the bombers are justified in dropping their bomb but that they are morally required to do so. I take no position on the validity of the Consent Principle, but the fact that it is not obviously implausible and has this implication provides some

support for the assumption that it is at least morally justifiable for the bombers to drop their bomb.

The tactical bombers are what I call *justified threateners*—that is, people who act with moral justification but whose justified action will wrong or infringe the rights of others—in this case, the villagers’ right not to be killed. (I distinguish between *violations* of rights, which are all things considered impermissible, and *infringements* of rights, which are all things considered permissible. Judith Thomson uses these terms differently. She uses “infringement” to refer to all acts that contravene rights and “violation” to refer to those instances of infringement that are all things considered impermissible.) A justified threatener differs from a *just threatener*, who threatens to inflict a harm to which the victim is *liable*, or that the victim *deserves*. Just threateners do not wrong their victims.¹ Their victims have no right not to be harmed—at least in a certain way, for a certain reason, and by certain agents—and normally have no right of self-defense against the harm to which they are liable. There are, however, cases in which a person who is liable to be defensively killed may permissibly engage in harmful defensive action against a just threatener. Suppose, for example, that an agent of a terrorist organization has just learned that the organization has hidden a large bomb where its detonation tomorrow will kill hundreds of innocent people. He has decided, on moral grounds, to go during the night to disarm and destroy the bomb. But there are limits to his moral scruples and at present he is about to commit a murder. He sees that a police sniper is about to shoot him. He can save himself only by killing the sniper. Although he is liable to be killed by the sniper, he has, and can be motivated by, a lesser-evil justification for killing the sniper in self-defense if his own survival is both necessary and sufficient for preventing the detonation of the bomb. (This is also a case in which the sniper’s liability justification for killing the agent is overridden by considerations of consequences. If the police sniper knew that killing the agent would prevent the saving of hundreds of innocent people, it would be wrong for him to shoot the agent, despite the fact that the agent had forfeited his right not to be killed.)

The tactical bombers are not just threateners vis-à-vis the villagers. Unless the bombers are prevented from doing so, they will wrong the villagers, or infringe their rights. Suppose the villagers have access to an anti-aircraft weapon and can shoot down the bombers before they drop their bomb. Are the five villagers

¹ I have elsewhere suggested that we should distinguish between a *pure just threatener*, who would cause harms only to people who are liable to suffer them, and an *imperfectly just threatener*, who would intentionally cause harms only to those who are liable to them but would also unavoidably cause unintended but proportionate harms to some people who are not liable to them. See Jeff McMahan, “Just War,” *Ethical Perspectives* 19 (2012), pp. 257–261.

permitted to kill the five bombers in self-defense, when this will thwart the latter's morally justified action?

The problem of defense against a justified threatener does not often arise in war. But it can occur both as an *in bello* problem and an *ad bellum* problem. As an example of the latter, suppose that the best or perhaps the only way that a country can effectively defend itself against an unjust aggressor is to fight from prepared defensive positions in the territory of a small neighboring country. Because this would involve destructive fighting on its territory, the small country refuses to permit the threatened country to take up positions there. And suppose that it is morally permitted to refuse. But suppose also that the country faced with aggression nevertheless has a lesser evil justification for going to war against the small country as a means of securing access to its territory for defensive operations. May the small country fight in defense? Most people think it may.

One historical example that has at least some of these features is the Winter War between the Soviet Union and Finland. The Soviet Union needed access to a section of Finnish territory to be better able to defend Leningrad against the Nazis. It offered an exchange of territory that would have given Finland an area of the Soviet Union larger than the area of Finland that the Soviets were requesting. The Finns refused and the Soviet Union then went to war to seize the relevant territory. Suppose the Finns were morally permitted to refuse but that the Soviets nevertheless had a compelling lesser evil justification for trying to secure effective defenses against a Nazi attack. The later Nazi siege of Leningrad, in which more than a million civilians died and another million Red Army soldiers were killed, shows that the Soviets' fears were justified. Yet virtually everyone outside the Soviet Union thought the Finnish defensive war against the Soviet Union was just and admirable, and even today the war is regarded among Finns almost as a holy war.

Most people with whom I have discussed the case of the tactical bombers and the villagers believe that the villagers are permitted to shoot down the bombers' plane, killing the crew and thwarting the mission. I am sympathetic to this intuition and once sought to defend it (McMahan (2005), pp. 386–405). But the more I have thought about the case, the more I have come to distrust my intuitions about it. I now think that the balance of reasons favors the conclusion that the villagers are not morally permitted to kill the bombers in self-defense. (As I will indicate later, however, there are variants in which it is more plausible to suppose that they are permitted to shift the costs of the bombers' action to them.) But I do not claim to have decisive arguments for the conclusion that the villagers may not shoot down the bombers' plane. At a minimum, however, my arguments do show more clearly what is at issue in this case.

7.2 Proportionality in Defense Against Justified Threateners

There are various possible justifications for defensive killing. Several of these clearly do not apply to defense by the villagers against the bombers. Some people, for example, believe that it can be a justification for killing that a person deserves to die, or be killed. Many and perhaps most defenders of capital punishment believe this. But the fact that the tactical bombers do not intend to kill the villagers, together with the fact that their action is justified in all three senses (fact-relative, evidence-relative, and belief-relative), rules out the possibility that they deserve to die.

Consent may also have a role in justifying certain killings. Defenders of euthanasia generally claim that, when a person is capable of giving or withholding rational consent, her consent is a necessary condition of the permissibility of euthanasia. And some just war theorists argue (mistakenly, in my view) that in general the justification for killing in war is that when people adopt the role of soldier, they thereby tacitly consent to be attacked by enemy combatants in conditions of war.² But even these theorists do not claim that combatants consent to be attacked by enemy civilians threatened as a side effect of their justified military action.

Another form of justification for killing is that it is, in the circumstances, the lesser evil, impartially considered. This does not mean simply that the harm inflicted through killing is less than the harm that is thereby averted. It means, rather, that there is no way other than killing some innocent people to avert a *substantially* greater harm to other, more numerous, innocent people. The bombers, for example, have a lesser-evil justification for killing the villagers as an unavoidable and unintended side effect of their action. It is, indeed, because of this that the villagers cannot have a lesser-evil justification for killing the bombers if that would prevent them from carrying out their mission. Self-defense by the villagers would intentionally kill the same number of people it would save and would also prevent an additional 100 people from being saved. (Although this is irrelevant here, most people believe that the proportionality constraint on a lesser-evil justification for intended killing is stronger than that which applies to a lesser-evil justification for killing that is foreseen but unintended.)

Although self-defense by the villagers cannot be justified on grounds of desert, consent, or lesser evil, there remain two possible grounds of justification: first, that

² For criticism of the claim that soldiers consent to be attacked by enemy combatants, see Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009), pp. 51–59; and Jeff McMahan, “Duty, Obedience, Desert, and Proportionality in War,” *Ethics* 122 (2012), pp. 146–151.

the bombers are liable to be attacked and, second, that even if the bombers are not liable, the villagers have an agent-relative permission to defend themselves. I will consider both these possible justifications, but we should first consider whether defensive action by the villagers is ruled out on the independent ground that it would prevent the saving of the 100 civilians. If it is, it is then irrelevant whether the bombers are liable to attack, for thwarting the mission would be wrong even if it could be done without harming the bombers.

Suppose the villagers have a remote control device capable of jamming the bomb doors of the bombers' plane. They can use it to save themselves without harming the bombers, though at the cost of preventing the 100 innocent civilians from being saved. Is it permissible for them to use this device? In describing the example, I stipulated that they would not be required to act to save the civilians at the cost of their own lives. From this it seems a short step to the conclusion that they are also not required to allow themselves to be killed by action that would save the civilians, provided that they can prevent that action in a way that causes no additional harm.

Consider, by way of analogy, a variant of the familiar *Trolley case*. A runaway trolley is careering down the main track where it will kill five people trapped on that track. A bystander has access to a switch that can turn the trolley onto a branch track on which a single person is trapped. Most people believe that the bystander has a lesser-evil justification for turning the trolley, thereby killing the trapped man rather than allowing the five to be killed. But suppose the trapped man has access to two switches, one that can turn the trolley onto the track on which he is trapped and another than can jam the action of switch controlled by the bystander. Virtually everyone accepts that it is permissible for the trapped man not to use the first switch that would turn the trolley so that it would kill him rather than the five. But if this is true, it seems that it should also be permissible for him preemptively to block the bystander's use of the other switch that would turn the trolley toward him.

In this case, *of course*, the ratio of people who are prevented from being saved to those who avoid being killed (five to one) is lower than it is in the case of the tactical bombers (100 to five, or 20 to one). So one might argue that while it is permissible for the trapped man to jam the bystander's switch, the difference in numbers in the case of the bombers makes it impermissible for the villagers to jam the bomb doors. One might argue, in particular, that action that saves only five lives but ensures that 100 people will be killed rather than saved is *disproportionate*, even if it does not directly kill anyone. The alleged disproportionality of the villagers' action might be seen as a corollary of the proportionality of the bombers' initial action. If it is proportionate for the bombers to kill five as a side effect

of saving 100, it may seem that it must be disproportionate to save those five at the cost of preventing the saving of the 100.

But proportionality is not merely a matter of numbers, even when all those whose lives are at stake are equally innocent, or have an equal right not to be harmed or killed. Proportionality is also sensitive to facts about agency. If effective defensive action by the five villagers would unavoidably *kill* 100 innocent bystanders as a side effect, that action would indeed be disproportionate in the wide sense. But the same conclusion does not necessarily hold when their defensive action would not kill 100 people but would instead prevent them from being saved. A pair of simple examples will illustrate this point. Suppose that I am about to be killed by a culpable threatener. If the only way I can defend myself is through defensive action (perhaps the use of a grenade) that will kill two innocent bystanders as a side effect, then I am not permitted to engage in effective defensive action. Such action would be disproportionate in the harm it would inflict on people who are not liable to be harmed in my defense. But suppose that I am about to be killed by a culpable threatener in different circumstances. I can kill him without killing anyone else. But I know that he is a celebrated surgeon who is scheduled to perform two life-saving surgeries tomorrow that no one else in the world is capable of performing. If I kill him today, I will prevent him from saving two innocent people tomorrow. But in this case it is intuitively permissible, and therefore not disproportionate, for me to kill him in self-defense.

The explanation seems to be that the deaths that my action will cause by preventing people from being saved have less weight in the assessment of proportionality than deaths that I might cause by killing.³ This difference between killing people and preventing people from being saved may be sufficiently important to make defensive action by the villagers proportionate as well. If the bombers' action is proportionate even though it kills people, the villagers' jamming the bomb doors may also be proportionate given that it only prevents people from being saved. This may be true even though the villagers' action results in a significant net loss of lives, while the bombers' action results in an equally significant net saving of lives. The mere fact that the villagers' defensive action would bring about the greater evil is insufficient on its own to make that action disproportionate.

This is of course not to say that the numbers are irrelevant. There is *some* number of innocent people whose lives would be saved by the bombers' action that

³ For a plausible general defense of the idea that "preventing from saving" is a conceptually and morally distinct category from killing and letting die, and that it is morally closer to letting die than to killing, see Matthew Hanser, "Killing, Letting Die, and Preventing People from Being Saved," *Utilitas* 11 (1999), pp. 277–295.

would make it impermissible for the five villagers to defend their lives by jamming the bomb doors. If, in other words, the number of innocent people who will otherwise be killed is sufficiently large, morality can require people to allow their right not to be killed to be infringed by a justified threatener. Indeed, the number of innocent people who will otherwise be killed might be so large that the five villagers could be morally required to act to save them even at the cost of sacrificing their own lives, either as a means or a side effect. Whether this number is larger than the number that would require the villagers to *allow* themselves to be killed is a question I leave open here.

7.3 Liability to Be Killed

My provisional conclusion is that it would be permissible for the villagers to defend their own lives at the cost of thwarting the tactical bombers' mission, provided they do so without causing bad effects other than preventing the saving of the 100 innocent civilians. Perhaps this is wrong; certainly if the number of innocent people whom the villagers' defensive action would prevent from being saved were significantly larger, their defensive action would be wrong. But I will assume that 100 is below the threshold at which thwarting the bombers' mission becomes impermissible.

Given this assumption, it is important to determine whether the tactical bombers, in the original case in which jamming the bomb doors is not an option, make themselves liable to be killed by justifiably threatening to infringe the right of the villagers not to be killed. If they do, the case for the permissibility of defense by the villagers may seem conclusive, for their defensive action would be discriminate (in that it would not infringe the rights of those it would intentionally kill), proportionate, and necessary. But if the tactical bombers are not liable, defensive action by the villagers seems presumptively wrong, as it would kill certain people who retain their right not to be killed as a means of saving an equal number of other people, and it would have significantly worse consequences overall, impartially considered.

Whether the tactical bombers make themselves liable to be killed in defense of the civilians is a disputed issue within the ethics of defense. Some philosophers argue that the bombers are not liable, others that they are. While most of the contending theories of self-defense imply that they are not, some imply that they are. Curiously, the theory of self-defense that has perhaps been most influential—the *rights-based account*—has no explicit implication about the case at all. This theory, originally advanced by Judith Thomson, holds that a person who will otherwise violate another person's right not to be killed has no right

not to be killed if killing him is necessary to prevent him from violating the other's right (Thomson (1993), pp. 383–310). While Thomson claims that defensive action is permissible to prevent *violations* of rights, she says nothing about the permissibility of defensive action to prevent permissible *infringements* of rights. There is, therefore, a sense in which the theory is silent about whether the villagers may shoot down the bombers. Yet, because it purports to be a complete account of self-defense but provides no basis for claiming that the bombers are liable, it seems to imply that they are not liable. There would have to be an addition to the theory for it to imply that justified threateners lose their right against attack or become liable to attack.

One of the most restrictive accounts of self-defense, the *culpability account*, holds that a person can be liable to defensive killing only if he culpably poses (or is culpably responsible for) a threat of serious harm to someone who is not liable to that harm. Because the bombers are not culpable for the threat they pose to the villagers, they cannot be liable to defensive attack according to the culpability account. If the villagers attack them, therefore, they will be acting wrongly because they will be threatening to violate the bombers' right against attack. If the villagers are even minimally culpable for their attack, they are then liable to preemptive defensive killing by the bombers. Perhaps, however, the fact that they will be killed by being buried under a mound of debris if they do not attack in self-defense is sufficient to make their defensive action excusable. If their defensive action would be fully excused, they would not be culpable, in which case they too would not be liable to defensive action by the bombers. Hence the bombers, though justified in dropping their bomb, would have no justification *grounded in self-defense* for preemptively killing the villagers before the villagers could kill them. They might, of course, have a justification for preemptively and intentionally killing the villagers grounded in the importance of achieving their mission. And, like the villagers, they might be excused for killing people who will otherwise kill them without justification.

The culpability account is, in my view, excessively restrictive. It forbids self-defense in cases in which there is good reason to believe that the target of defensive action is liable. These are cases in which one person acts permissibly (at least in the evidence-relative sense) in a way that foreseeably imposes a small risk of harm on others but through bad luck ends up threatening the life of an innocent person. In such a case, when the threatened person can either allow herself to be killed or kill the person who threatens her, the fact that the initial threatener made the choice to expose other people to risk makes him liable to suffer the costs of his own choice, even though he has acted neither wrongly (in the evidence-relative sense) nor culpably.

Another account of self-defense, the *responsibility account*, holds that the criterion of liability to defensive attack is moral responsibility for a threat of wrongful harm to another. This account therefore seems to imply that the tactical bombers are liable to be killed by the villagers, for they do seem to be responsible for a threat of wrongful harm—namely, harm that would infringe the villagers’ rights. And if the bombers are liable to be killed, it seems that they can have no right of defense against the defensive action of the villagers.⁴

I find these implications counterintuitive. Many people, of course, will not find it counterintuitive to suppose that the villagers are permitted to shoot down the bombers in self-defense. But what is counterintuitive is the claim that, while the five villagers are permitted to kill the five bombers in self-defense, the bombers are not permitted to kill the villagers in self-defense. For that to be true, it seems that there must be some significant moral asymmetry between the villagers and the bombers. Yet on the assumptions most favorable to the villagers, both groups act with moral justification in threatening to harm the other. The only difference is that the bombers have attacked *first*. But that is of course precisely what they were morally justified in doing.

There is a further way in which the claim that the bombers make themselves liable to attack is counterintuitive. Recall that if the bombers are liable to attack, attacking them does not wrong them or infringe their rights; for they have forfeited their right against attack. Any necessary and proportionate defensive action taken against them does not, therefore, threaten them with *wrongful* harm. According to the Responsibility Account, such defensive action cannot be a basis of liability. As we have seen, these claims imply both that the villagers have a liability justification for killing the bombers in self-defense and that the bombers have no liability justification for killing the villagers in self-defense. But because the reasons grounded in liability seem in this case to be agent-neutral, these judgments apply not only to action by the villagers but also to action by third parties. In that case, wholly impartial and disinterested third parties should be justified in killing the bombers in defense of the villagers. (This presupposes the earlier conclusion that the killing of the bombers is not ruled out solely because it would prevent the saving of the 100 civilians.) But because third parties would not, by hypothesis, be posing a threat of *wrongful* harm, the bombers would have no liability justification for attacking them in self-defense. This seems highly implausible. For in attempting to drop their bomb, the bombers are acting on the basis of impartial moral reasons—reasons that might even ground a moral *requirement* to drop the bomb.

⁴ For a powerful defense of this view, see Adam Hosein, “Are Justified Aggressors a Threat to the Rights Theory of Self-Defense?” in this volume.

Their action would not violate anyone's rights (though it would justifiably infringe those of the villagers). Indeed, even if what they do is not morally required, it is nevertheless morally admirable, for they are exposing themselves to risk in order to do what they have most moral reason to do. Self-defense by the villagers, by contrast, would be based entirely on reasons of self-interest and would produce a significantly worse outcome, impartially considered. It is therefore implausible to suppose that morality permits neutral third parties to act in support of the villagers' self-interested aims but forbids the morally motivated bombers to act in self-defense.

The implications of the assumption that the bombers make themselves liable to be killed in defense of the villagers become even more implausible when we consider defense by third parties who are not disinterested. It is, for example, utterly implausible to suppose that the bombers' own compatriots, or their allies in their just war, could have an agent-neutral liability-based justification for killing them.⁵ But perhaps—though I think this is unlikely—one could argue that, although such people would actually have a liability justification, it would be wrong for them to act on it because they share the aim that justifies the bombers' action.

A more telling objection is that, if there is an agent-neutral liability justification for killing the bombers, it seems that it must extend even to the unjust combatants against whom the bombers are fighting, who do not share the bombers' aim.⁶ That, however, is deeply counterintuitive. These unjust combatants are among those who threaten the 100 civilians, among others, with death. It is their wrongful action, or the wrongful action of those with whom they are colluding, that has made the bombers' action, including the threat it poses to the villagers, both necessary and justified. They are, in other words, among those who not only are responsible for the threat to the 100 civilians but also bear primary responsibility for the threat to the five villagers. Admittedly, this latter responsibility gives them a special reason to protect the villagers. But it also gives them a special reason not to kill the bombers, as they—the unjust combatants—are also among those who bear primary responsibility for the situation that the bombers are now in. If the unjust combatants were not fighting an unjust war, the bombers would have no reason to drop the bomb that will kill the villagers. It is counterintuitive to suppose that, to save five innocent people they are responsible for putting at risk, the unjust combatants are permitted to kill another five people who are attempting to save 100

⁵ For a point that does not address the issue of liability but is nonetheless related, see Stephen R. Shalom "Killing in War and Moral Equality," *Journal of Moral Philosophy* 8 (2011), pp. 495–512, at p. 501.

⁶ For a defense of this claim, see Uwe Steinhoff, "Jeff McMahan on the Moral Equality of Combatants," *The Journal of Political Philosophy* 16 (2008), pp. 220–226.

different innocent people whom the unjust combatants, or their collaborators, will otherwise intentionally and wrongly kill.

One might agree that the unjust combatants are not permitted to kill the bombers but also claim that this is not because the bombers are not liable to be killed. One could argue that even though the bombers are liable to be killed, the unjust combatants may not prevent the killing of only five villagers at the cost of preventing the saving of the far greater number of innocent civilians whose lives they, or their fellow soldiers, now threaten. To assess this suggestion, consider a variant of the case in which the 100 civilians are no longer threatened by the unjust combatants. Suppose that the unjust combatants who can shoot down the bombers also have the power to ensure that the 100 civilians will not be killed, either by simply not killing them, or perhaps by preventing their fellow soldiers from killing them. And suppose that they have had a change of heart and want to do what is right. Assuming that they cannot communicate with the bombers, they have two options. They can kill the bombers, thereby saving the villagers, and then spare the lives of the 100 civilians. Or they can refrain from killing the bombers, who would then save the 100 civilians, though at the cost of killing the villagers as a side effect. What ought they to do? Either way, the 100 civilians will be unharmed. So their choice is effectively between (1) intentionally killing five people who are acting in a way that is morally justified in the belief-relative, evidence-relative, and fact-relative senses (and whose justification derives from the unjust combatants' own prior wrongdoing) and (2) unintentionally allowing five innocent bystanders to be killed. It seems that those who accept that there is a general moral asymmetry between killing and letting die, and those who believe that intention is relevant to permissibility, should conclude that the unjust combatants ought not to kill the bombers. But if the bombers have made themselves *liable* to be killed, then presumably the unjust combatants ought to kill them rather than allow them to kill the villagers as a side effect. Yet this seems wrong. Given the background to this choice, it is hard to believe that the bombers have no right not to be killed *by the unjust combatants*, who are morally responsible for the threat of wrongful harm that their justified action is intended to prevent.

Those who claim that the bombers are liable to self-defensive action by the villagers might argue at this point that it is possible to forfeit one's right not to be killed vis-à-vis some but not others. Thus, the bombers might forfeit their right vis-à-vis the villagers but not vis-à-vis the unjust combatants. But it seems that this strategy will have to become implausibly complex and ad hoc if it is to yield reasonable conclusions about this case. One would have to claim that the bombers forfeit their right not to be killed vis-à-vis the villagers themselves, their friends and families and perhaps their civilian compatriots generally, as well as vis-à-vis

disinterested third parties, but *not vis-à-vis* the bombers' own compatriots and allies or the unjust combatants against which they are fighting. It would be hard to explain and defend such a claim. Those who want to defend the permissibility of self-defense by the villagers would do better to pursue an alternative justification that does not claim that the bombers are liable. (I will consider the most promising such justification in the next section.)

Some people may be more troubled by the idea that the bombers lack a right of self-defense than by the claim that it is permissible for the villagers to attack them in self-defense. Such people might argue that even if the bombers are liable, their liability consists only in their forfeiture of the right not to be attacked in defense of the villagers. Their loss of this right does not entail the loss of their right of defense as well. Thus, although the villagers and third parties have a liability justification for killing the bombers, the bombers retain their right of defense against those who would attack them.

This claim is doubtfully coherent. The logic of liability is that if one is liable to be harmed in a certain way, for a certain reason, by certain people, one can have no right of defense against being harmed in that way, for that reason, by those people. (As the earlier example of the agent of the terrorist organization shows, it is possible, though rare, for a person who is liable to be harmed to have a lesser-evil justification for self-defensive action. But that is not what is generally meant by a right of self-defense. In the example, the innocent person about to be murdered by the agent would have a right of self-defense while the agent would not, though it might be wrong, all things considered, for the victim to act on that right and justifiable for the agent to act in self-defense despite lacking a right to do so.) That liability to suffer a certain harm excludes a right of defense against that harm is explained in part by the fact that the determination of liability to defensive harm is a matter of justice in the *ex ante* distribution of unavoidable harm. One cannot have a moral right to harm people as a means of preventing them from acting justifiably to produce a more rather than less just distribution. One cannot have a right to harm people to prevent them from justifiably doing to one what one has no right that they not do to one. So if the tactical bombers are morally liable to be harmed in defense of the villagers, they cannot have a right to inflict defensive harm on those who have a liability justification for harming them.

If I am right that liability is determined by considerations of justice in the distribution of unavoidable harm, it may well be true, in addition, that those who are liable to a certain harm are not permitted to prevent that harm even in a way that would not require them to cause harm to anyone. This seems true at least in most cases that are likely to occur. But, as we saw in the case of the terrorist agent, a person who is liable to be harmed may have a lesser-evil justification for engaging

in self-defense. And there is at least one other type of exception—namely, when a person who is liable to be harmed has a better distributive option than any available to those who would otherwise harm him in accordance with his liability. If the liable person could, through preventive or defensive action, achieve a more just distribution of the unavoidable harm than others are capable of achieving, then he or she can be justified in engaging in preventive or defensive action to achieve that distribution.

Thus far it may seem that the responsibility account has the implausible implications I have described: that the tactical bombers are liable to be killed in defense of the villagers, that neutral third parties therefore have a liability justification for killing them, and that the bombers have no right of self-defense either against the villagers or against third parties (though they might have a different justification for defensive action derived from the importance of achieving their mission). Some proponents of the responsibility account, myself included, have sought to qualify the account to avoid being committed to these implausible implications. In earlier work, I have suggested that if one is objectively morally justified, or morally justified in the fact-relative sense, in acting in a way that will cause wrongful harm to others, the justification exempts one from liability to defensive action (McMahan (2009), pp. 38–51). If that is right, the responsibility account does not imply that the bombers are liable to defensive attack either by the villagers or by third parties.

But the claim that justification excludes liability is controversial and has been vigorously challenged.⁷ Perhaps the strongest objection comes from the domain of corrective justice, in the form of putative counterexamples from the law of torts that are held to reflect the requirements of morality. Suppose, for example, that a passerby finds a person in a diabetic coma. If the diabetic does not receive a shot of insulin within minutes, he will die. The passerby knows that the house immediately across the street from where the diabetic lies belongs to someone who has a bountiful supply of insulin. That person not being home, the passerby breaks in, takes some insulin, and saves the life of the diabetic. He has acted with moral justification but is nonetheless legally liable to compensate the owner of the insulin for any damage done to the house and for the taking of the insulin without the owner's consent. As I indicated, many people think that tort law here expresses the demands of morality—that is, that the passerby's liability to compensate the owner is not merely legal but moral as well.

⁷ See, e.g., Uwe Steinhoff, "Jeff McMahan on the Moral Inequality of Combatants," *Journal of Political Philosophy* 16 (2008), pp. 220–226; Uwe Steinhoff, "The Moral Equality of Modern Combatants and the Myth of Justified War," *Theoretical and Applied Ethics* 1 (2012), pp. 35–44, esp. p. 37; and Hosein, "Are Justified Aggressors a Threat to the Rights Theory of Self-Defense?" (in this volume).

One possible response to this challenge is that there is a fundamental difference between liability to pay compensation and liability to suffer defensive harm, so that while justification does not exclude liability to compensate those one has harmed, it does exclude liability to defensive harm. One reason why this might be true is that to hold a justified threatener liable to compensate his victim is not to permit anyone to prevent his justified action, whereas to hold him liable to defensive action is to permit others to prevent the justified action. In the case of the diabetic, for example, even if one thinks that the passerby owes compensation to the owner of the insulin, one should accept that the owner, had he been home and reluctant to part with any of his insulin, would not have been permitted to engage in harmful defensive action against the passerby to prevent her from taking the insulin. The passerby's moral justification does seem to exempt her from liability to defensive harm. So even if the general claim that justification excludes all forms of liability is false, it may still be true that justification excludes liability to defensive harm, and that is all that is necessary to rule out the claim that the bombers are liable to defensive action either by the villagers or by third parties.

Another possibility is that the original, stronger claim that moral justification excludes all forms of moral liability is true and that the law of torts departs from corrective justice when it holds an agent who has acted with moral justification liable to compensate those whom his justified action has wronged. In the case of the diabetic, for example, it is not unreasonable to suppose that no one is liable to pay compensation to the owner of the insulin. If he had been at home and had seen the diabetic in need of insulin outside his door, the owner would have been morally required to give up some of his supply to save the diabetic's life, in which case he may not have been able to demand compensation from anyone. The sacrifice of the insulin may simply have been what morality required of him. But given that he was not at home at the time the insulin was needed, the passerby acted in his absence to fulfill the duty he would have had if he had been at home.⁸ Thus no one is liable to compensate the owner for the loss of what he was morally required to sacrifice.

It may, however, seem unfair to the owner to force him to bear the full cost of saving the diabetic. Perhaps the ideally fair way to deal with problems such as the rescue of the diabetic is to have a fair scheme of social cooperation that requires everyone in a society to make a contribution, proportional to their income or wealth, to a fund for the compensation for people who suffer a loss through brute bad luck. Since it is brute bad luck for the owner of the insulin that the diabetic

⁸ On the permissibility of a third party's fulfilling another person's enforceable duty, see Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford: Oxford University Press, 2011).

collapsed where he did, the burden of the rescue ought not to be imposed on the owner alone. It should also not be imposed on the passerby alone, who acquired the moral duty to take the insulin by the entirely fortuitous circumstance of being present where the diabetic collapsed. Rather, the burden of the rescue should ideally be shared by everyone in the society (or indeed by everyone in the world). When the cost of the rescue is dispersed in this way, the loss to any one person is negligible. Though anathema to libertarians and members of the American Republican Party, such a scheme could work to the expected benefit of the great majority of citizens in a society. The more antecedently egalitarian the society, the more likely it would be that the scheme would work to the expected benefit of all.

But what if there is no such scheme in place? No existing society has such an arrangement and none is likely to have one anytime soon. One might therefore argue that although the passerby would be exempted from liability if there were such a scheme, she is liable to compensate the owner in conditions in which no such scheme exists. There is nothing puzzling in the idea that liability can be conditional in this way. Yet even in the absence of an ideal redistributive scheme, there are other ways of allocating losses caused by the action of morally justified agents that are more just than holding such agents liable to compensate the victims of their justified action. One such option is to require the beneficiaries of the justified action to compensate the victims. For example, rather than allowing the cost of saving the diabetic to be imposed on either the owner or the passerby, the diabetic ought to pay that cost himself by compensating the owner. This is not ideally fair, assuming that the diabetic's misfortune was itself the result of brute bad luck, but it is fairer than having the benefit go to the diabetic while the burden goes to someone else. When a burden is borne by someone who on balance benefits from it, it is compensated for in a way that it is not when it is borne by someone who derives no benefit.

To claim that those who have suffered a loss to prevent others from suffering an even greater loss ought to be compensated by the beneficiaries of their sacrifice is not necessarily to claim that the beneficiaries are *liable* to provide such compensation. In the case as I have presented it, the diabetic is unconscious; he has not done anything that could make him liable to any sort of harm, whether compensatory, retributive, or defensive. That he has a duty to compensate the owner therefore cannot be a matter of liability. But it is a matter of justice nonetheless. Not all considerations of justice in the distribution of harm are a matter of liability. The diabetic has been greatly benefited at the cost of someone else. Even if he fully compensates that person, the resulting situation will be vastly better for him than it would have been if the person had not been harmed for his benefit. The diabetic can therefore have no reasonable objection to being required to restore the owner

to the position he would have been in had he not made (or been forced to make) the sacrifice, when the outcome of this would still be much better for the diabetic than what would have happened to him in the absence of the sacrifice.

One might reasonably draw a different conclusion in a variant of the case in which the diabetic's predicament is not a matter of brute bad luck. If the diabetic acquired the disease from overeating, in the knowledge that obesity is a significant risk factor, or if he had left his own supply of insulin at home through recklessness or negligence, his duty to compensate the owner might well be a matter of liability rather than a matter of simply paying the cost of benefits he has done nothing to deserve. It is even more obvious in this version than it is in the original that the duty to compensate the owner lies with the diabetic rather than with the passerby.

Suppose the diabetic had been able to save himself by breaking into the owner's house and taking the insulin he needed. In that case it seems reasonable to suppose that he would thereby have made himself liable to compensate the owner—though, significantly, not liable to defensive action. If that is right, this may seem to be a counterexample to the claim that justification excludes liability. But that claim is that *moral* justification excludes liability. And it may not be that in taking the insulin the diabetic would be acting for a moral reason. Even though the outcome in which he takes the insulin is impartially better, his justification seems prudential rather than moral. He would be acting irrationally, but not immorally, if he refrained from breaking in. If that is right, then this is not a counterexample to the claim that moral justification excludes liability. That is, the diabetic would be liable to compensate the owner but the passerby would not be. In contrast to the diabetic, the passerby would be acting immorally if he failed to break in and take the insulin for the diabetic.

What if the diabetic, having been saved by the passerby, is incapable of compensating the owner? Assuming there is also no social scheme for spreading the costs of brute bad luck, one might think that the passerby would then be liable to compensate the owner. But it seems no more just to transfer the costs of the rescue to the passerby, who has already devoted her time to the rescue, than to allow them to lie with the owner. While the best outcome in these restricted circumstances might be for the owner and the passerby to divide the costs evenly between them, it does not follow that the passerby is liable to compensate the owner for half of his losses. Indeed, it seems implausible to me, regardless of what the law says, to suppose that third parties would be morally permitted to coerce the passerby to provide that compensation, given that she has acted with full moral justification. If third parties have any reason to intervene, it is to make some voluntary contribution of their own to the compensation to the owner.

The main point of the discussion in this section has been to suggest that action that is morally justified does not, on its own, make the agent liable to compensate those who are harmed by the action in ways to which they are not liable. (I say “on its own” because there may be background conditions that, together with the justified action, make the agent liable. One such condition might be that the agent’s prior wrongdoing has created the conditions that now justify his infliction of harm on someone who is not liable to that harm. Another might be that he has a professional or other special duty to pay or take on himself the costs of his own justified action. I will return to this second consideration in Section 7.6.) I have sought to defend this claim by arguing that in the case of the diabetic and other cases of the same sort, the justified agent is not liable to compensate the victim. This, in turn, supports the more general claim that justification excludes liability (in the absence of special background conditions of the sorts just noted).

It is worth noting, however, that the case of the diabetic differs in one important respect from the case of the tactical bombers. Whereas the owner would have a duty to provide the needed insulin were he at home, I have stipulated that the villagers (who are the cost-bearers in this case, as the owner is in the diabetic case) would not be required to act in a way that would sacrifice their own lives to save the 100 civilians. But the owner’s duty in the case of the diabetic does not substantially affect the morality of the redistribution of costs. Suppose that the cost to the owner of saving the diabetic’s life were substantially greater, so that if he were at home he would have no duty to provide the life-saving resource. It would instead be a matter of supererogation. The passerby could nevertheless still be justified in taking the resource necessary to save the diabetic. That the owner would have had no duty to surrender that resource does seem to make it more imperative that he be compensated for the loss. But it does not affect my earlier conclusion that, in the absence of a social arrangement for spreading the costs of brute bad luck, the duty of compensation would lie with the diabetic, who is the beneficiary of the owner’s loss, rather than with the passerby. It also seems plausible to suppose that, even if the owner had no duty to provide the life-saving resource, the passerby’s justification in taking it would shield her from liability to harmful defensive action by the owner. The owner would, it seems, be permitted to thwart the passerby’s efforts by other means, but not by means that would involve the infliction of serious or substantial harm on the passerby.

There may, of course, be contingent reasons why it would be undesirable for the law to require involuntary beneficiaries of the sacrifices of others to compensate their benefactors. I will not consider those reasons here, as they are largely irrelevant to the question whether justified threateners are liable to defensive harm or liable to compensate the nonliable victims of their action. It is worth noting,

however, that there is also a contingent reason not to hold justified threateners such as the passerby liable to compensate those on whom they impose proportionate losses. This is that the anticipation of a duty to pay compensation might deter potential rescuers from saving people whom they should be encouraged to save. And of course holding justified rescuers liable to defensive action would do even more to deter rescues that should instead be encouraged.

In concluding this discussion of the possible liability of justified threateners, it is perhaps worth noting that some writers have assumed that it is intuitively obvious that justified threateners are liable to compensate their nonliable victims, while if the potential victims manage to defend themselves preemptively, they owe no compensation to the justified threateners they have harmed. One such writer, Uwe Steinhoff, thinks that this reveals a moral asymmetry between the tactical bombers and the neutral villagers. He writes that “the fact—if it is a fact, and I think it is—that the innocent victims of the bombers can demand compensation for the mutilations and losses they have suffered from the bombers while the bombers cannot demand compensation for the losses and harms they have suffered due to the defensive action of the innocents, shows that a moral asymmetry is at play here. The bombers have wronged the innocents, and not vice versa” (Steinhoff (2012), p. 360). But the case of the insulin shows that the intuitions about compensation to which Steinhoff appeals are not so robust as he supposes.

7.5 Self-Defense as an Agent-Relative Permission

I have argued that the tactical bombers’ justification for dropping the bomb exempts them from liability to defensive killing by the villagers. But it does not follow from this that it is impermissible for the villagers to kill them in self-defense. Even though the bombers have neither waived nor forfeited their right not to be killed, and even though that right has not been overridden (that is, even though the villagers cannot justify killing them by appeal to a consent-based justification, a liability justification, or a lesser-evil justification), there remains one way in which it might be argued that defensive killing by the villagers would be justified. This alternative form of justification once seemed plausible to me and I defended it in earlier work (McMahan (2005), pp. 386–405).⁹ What I suggested is that the villagers have an *agent-relative* permission to defend their right not to be attacked even against justified infringement,

⁹ For an ingenious defense of a general account of self-defense based on the assumption that there are agent-relative permissions, see Jonathan Quong, “Killing in Self-Defense,” *Ethics* 119 (2009), pp. 507–537.

provided that they would not be required to sacrifice their own lives for the sake of the tactical bombers' goal. To say that their permission is "agent-relative" is to say that it does not extend to third parties. Only the villagers themselves are permitted to kill the bombers.

I noted at the beginning of this section that the rights-based account of self-defense advanced by Thomson does not address the question whether those who threaten another's right with justified infringement thereby lose their own right against necessary and proportionate defensive action. If Thomson's rights-based account were extended to justify not only defense against rights violations but also defense against justified infringements, it would be too permissive. In the case of the tactical bombers, it would permit neutral third parties to intentionally kill five morally justified agents, thereby also preventing the saving of 100 innocent people, as a means of preventing the justified killing of only five other innocent people—that is, the same implausible conclusion that is implied by the supposition that the bombers are liable to be killed. It is more plausible to suppose that if there is a permission to defend a right against justified infringement, it applies only to the possessor of the right—in this case, that it applies only to the villagers themselves.

It is tempting, however, to suppose that if a person has an agent-relative permission to defend her right against justified infringement, that permission must extend as well to those who are specially related to her, such as her parent or spouse. The permission, in other words should extend to the agent and to certain third parties to whom the agent is specially related, though not to unrelated third parties. But this suggestion creates various problems. One is a slippery slope problem—namely, where is the line to be drawn between special relations that are sufficiently important to justify the extension of the permission and those that are not? But a more important objection is that a permission to defend *oneself*, when that permission is not agent-neutral, has a different source from a permission to defend someone else to whom one is specially related, when that permission is also not agent-neutral. One's relation to oneself seems morally quite different from one's relation to others to whom one is specially related.

Most of us accept that we have special duties to at least some people to whom we are specially related, duties that we do not have to others to whom we are not specially related in the relevant way. Such duties are often referred to as "associative duties." If there are associative duties, there must also be associative permissions—permissions to give some degree of priority to the interests or well-being of certain people to whom one is specially related.

Most people also believe that there are agent-relative permissions—permissions to give a certain priority to the objects of one's own special concern, including

oneself. It is, however, more problematic to suppose that there are duties to oneself in addition to a permission to give some priority to oneself. It seems, for example, that self-sacrifice is always permissible, provided that it is not worse for others. It may be prudentially irrational, but it is not immoral. But that is difficult to reconcile with the idea that one has duties to oneself. It might be claimed that, as the object of these duties as well as their subject, one could always waive one's right to the performance of the duty by oneself. But that would mean that such duties could never be binding. The notion of a duty to oneself would, at least in practice, be empty.

If a person has an agent-relative permission to defend himself, someone specially related to him might have an associative permission or duty to defend him as well. But the sources of the two permissions are different. They derive from different relations: self-identity in the one case and some other relation, such as the parent-child relation, in the other. If a potential victim who has only an agent-relative permission to engage in self-defense may be defended by someone specially related to her, that is because the other person has an associative permission, not because the potential victim's agent-relative permission extends to the specially related person as well.

It is possible that there are no agent-relative permissions but that there are associative permissions. If that is true, there can be cases in which a person has neither an agent-neutral nor an agent-relative permission to defend herself and yet someone specially related to her does have an associative permission, or perhaps even an associative duty, to defend her—for example, a case in which, while a person has no right of self-defense against a justified threatener, her parent is nevertheless permitted to defend her.

My principal concern here is to determine whether victims of justified threateners who are not liable to the harms they would suffer are permitted to act in *self-defense*. So I will continue to concentrate on what it is permissible for potential victims to do rather than on what it might be permissible for third parties to do, whether they are specially related to the potential victims or not.

When, in earlier work, I sketched the argument that the villagers have an agent-relative permission to defend themselves from the bombers, I assumed that their permission was also an agent-relative *justification*. Then on the further assumption that justification exempts an agent from liability to defensive action, I argued that the villagers' defensive action against the bombers would not make them liable to counter-defensive action by the bombers. Yet because the bombers are also not liable to attack, they retain their right not to be attacked. Since the villagers threaten to infringe their right against attack, they too have an agent-relative permission to attack the villagers as a means of self-defense.

Since each party to the conflict has an agent-relative permission to attack the other in self-defense, I suggested that the situation might be referred to as a “symmetrical defense case.” This term was meant to indicate a rough moral parity between the parties. Most accounts of the morality of self-defense imply that there cannot be such cases. They assume that if one person has a right to attack another, the other must lack a right not to be attacked and therefore cannot have a right of defense against what he has no right not to have done to him. I think, however, that there are symmetrical defense cases.

It is comparatively easy to imagine cases in which it is permissible in the evidence-relative sense for each of two people to attack or kill the other. All that has to be true in such cases is that each person is epistemically justified in believing that the other threatens to harm her in a way that is unjustified in the fact-relative sense. It is more difficult, however, to find cases in which each of two people is justified in the fact-relative sense in attacking or killing the other. But there do seem to be cases of this sort. Suppose that two captured Roman prisoners of war are credibly threatened by the guards at the Colosseum that unless they fight to the death as gladiators, they will both be killed.¹⁰ Suppose that there is no difference between them that would give one of them a duty to sacrifice himself for the sake of the other. And it cannot be the case that each of them is morally required to sacrifice himself to the other, for in that case if both tried to do their duty, neither would kill the other and both would be killed by the guards. Perhaps the ideal solution would be for them to agree to a random procedure, such as a coin toss, to determine which would have to allow himself to be killed by the other. But we can imagine that they cannot communicate, or that the Emperor has threatened to have them both killed if there is the slightest evidence of a thrown match. In these circumstances it seems wrong to insist that neither may kill the other, so that they will both be killed. It is better that one should live than that both should die. It seems, therefore, that each has a lesser-evil justification for trying to kill the other, at least if that makes it more likely that one will survive than it would be if they were both to refuse to fight. If this is right, this is a symmetrical defense case in which each is justified in the fact-relative sense. So in principle such cases are possible. But while I once thought that the conflict between the bombers and the villagers is such a case, I no longer think so.

To explain why the conflict between the tactical bombers and the villagers is not a symmetrical defense case, and in particular why self-defense by the villagers cannot be justified by an appeal to an agent-relative permission, it will be helpful to

¹⁰ I borrow this example from *Killing in War*, p. 58. The same point might be illustrated by a case in which two people simultaneously climb into a lifeboat that will sink with more than one occupant.

review a particular line of argument in the history of the debate about self-defense and agent-relative permissions. In earlier work, I defended the culpability account of self-defense but was disturbed by its apparent inability to justify the self-defensive killing of someone who wrongly but nonculpably threatens one's life. I suggested that one might appeal to the claim that, in cases in which both the threatener and the potential victim are entirely innocent, so that considerations of justice favor neither, the victim may be permitted to give priority to her own life—that is, that she may have an agent-relative permission to engage in self-defense. But I then rejected this suggestion on the ground that it also implies, implausibly, that it is permissible for an innocent person to kill an innocent bystander as a means of self-preservation (McMahan (1994), pp. 268–271).¹¹ If this is right, the same objection applies to the idea that one can appeal to an agent-relative permission to justify the killing a justified threatener in self-defense. That appeal would justify too much. But more recently I noted that a promising response to this objection is that the relevant difference between intentionally killing an innocent (or, as I would now say, nonresponsible) threatener in self-defense and intentionally killing an innocent bystander in self-preservation is that whereas the first form of killing does not use the victim as a means, the second does (McMahan (2009), pp. 170–173). Borrowing a distinction first introduced by Warren Quinn, I noted that the first form of killing is merely “eliminative,” while the second is “opportunistic,” and that it is plausible to suppose that the constraint against opportunistic harming is stronger than that against eliminative harming (Quinn (1989), p. 344). This could also explain why the appeal to an agent-relative permission might justify the self-defensive killing of a justified threatener without also justifying the self-perservative killing of an innocent bystander when other relevant considerations are equal. This is because the constraint against the intentional killing of an innocent bystander is stronger because that killing is opportunistic.

I went on to argue, however, that there are instances in which the agency involved in the intentional killing of an innocent bystander in self-preservation is eliminative rather than opportunistic. Suppose, for example, that to avoid being killed by a culpable threatener, one must quickly cross a narrow, wobbly public bridge.¹² Yet there is an innocent bystander sitting in the middle of it enjoying the view. In one version of this example, if one runs onto the bridge, this will jostle the bridge, foreseeably causing the bystander to plunge to her death. In another

¹¹ The same point was made independently at roughly the same time by Michael Otsuka, who also rightly defended the responsibility account when I mistakenly defended the culpability account. See his “Killing the Innocent in Self-Defense,” *Philosophy and Public Affairs* 23 (1994), pp. 74–94.

¹² I take this example from Thomson, “Self-Defense,” p. 290. It is also discussed in Noam J. Zohar, “Collective War and Individualistic Ethics: Against the Constriction of ‘Self-Defense,’” *Political Theory* 21 (1993), pp. 606–622, at pp. 612–613.

version, one must deliberately shake the bridge to dislodge her. Few believe that it would be permissible to do either. In the first case one's harmful agency seems neither opportunistic nor eliminative, for these are forms of *intended* harming. In the first case the harm one causes is not intended at all but is merely foreseen. In the second case, one does intend to affect the bystander in a way one knows will be harmful but one's agency seems eliminative rather than opportunistic, for one does not need to *use* the bystander in any way; indeed, one would survive if she were not there at all. In either case, therefore, if one has the kind of agent-relative permission that would justify the eliminative killing of a nonliable justified threatener in self-defense, one must be permitted to kill the bystander either as a side effect or even as a means of self-preservation. Hence the appeal to an agent-relative permission to justify self-defense against a nonliable threatener, such as a nonresponsible threatener or a justified threatener, cannot escape the original objection after all. For if there were an agent-relative permission, it *would* justify killing innocent bystanders as a means of self-preservation in certain cases, such as the second bridge case, in which it is counterintuitive to suppose that killing is justified.

~~More recently still, however,~~ Jonathan Quong has argued that the notion of opportunistic using must be extended to include the harmful using not only of a person but also of that to which the person has a right, or claim (Quong (2009), pp. 525–532).¹³ On the general point about the concept of harmful opportunistic agency, Quong seems right. But his application of this broader notion to the bridge cases seems strained. He discusses only the first version of the bridge case. What he says is that “because the bridge . . . is so wobbly that it cannot sustain two people at the same time, it seems best to treat the bridge as an amount of physical space that can only feasibly contain one person. To get on one part of the bridge is effectively to seize the whole bridge.” For one to run onto the bridge in an effort to flee from the threatener is thus to use a space to which the bystander “has a prior claim,” grounded presumably in prior occupancy. Merely to run onto the bridge as a means of escape, and certainly to shake it to dislodge the bystander, are, Quong claims, instances of the intentional and harmful using of something to which the bystander has an exclusive right, at least at that time. They are therefore instances of harmful opportunistic agency in Quong's extended sense. They are not, after all, counterexamples to the claim that the intentional killing of an innocent bystander in self-preservation must violate the constraint against opportunistic using, as I intended them to be.

¹³ ~~See his “Killing in Self-Defense,” pp. 525–532.~~ Quong does not articulate his view in quite this way but for consistency of exposition I have paraphrased his view by reference to Quinn's distinction.

As I noted, Quong seems right to claim that opportunistic using can include using not just a person but also her property. Suppose, for example, that two people need a certain medicine to survive and one of them owns it. If the other seizes it and administers it to himself, it may be plausible to suppose that he violates the constraint against harmful opportunistic using. But it seems implausible to suppose that the bystander has anything like a comparable right or claim to the space occupied by the public bridge, so that stepping into that space constitutes the use of something to which she has an exclusive right at the time. Merely running onto the bridge does not seem morally tantamount to harmfully *using* the bystander as a means of saving one's life. Even shaking her off seems clearly the elimination of an obstacle rather than the strategic use of her resource for one's own benefit. Indeed, even if one were the legal owner of the bridge, it seems that it would be impermissible to run onto it knowing that that would kill the bystander (unless, perhaps, she had been explicitly warned against trespassing) and certainly impermissible to shake her off of it. If that is right, the second bridge case remains a counterexample to the claim that the killing of an innocent bystander in self-preservation must be an instance of opportunistic agency.

So, again, the original claim stands: if the appeal to an agent-relative permission can justify the villagers in killing an equal number of nonliable people (the bombers) in self-defense, it can also justify people in killing an equal number of innocent bystanders in self-preservation, provided that the form of agency involved is not opportunistic—that is, provided that the innocent bystanders are killed either as a side effect or eliminatively, as in the two bridge cases.

When advocates of the agent-relative permission claim that it can justify the killing of a justified threatener in self-defense, they are claiming that it can override two distinct constraints: the constraint against harming and the constraint against intending harm (because eliminative killing in self-defense is intended killing in the sense relevant to the constraint).¹⁴ For convenience we can say that these two constraints combine to form the constraint against intended harming, which is stronger than the constraint against foreseen but unintended harming. Because of the comparative strengths of the two constraints, the advocates' view has further implausible implications concerning numbers. They claim that even on the assumption that the five bombers are not liable to be killed, the five villagers may intentionally (that is, eliminatively) kill them in self-defense. Assuming that the constraint against intended harming of nonliable people is significantly rather

¹⁴ For what I, following Quinn, take to be the relevant sense, see Quinn, "Actions, Intentions, and Consequences;" and Jeff McMahan, "Revising the Doctrine of Double Effect," *Journal of Applied Philosophy* 11 (1994), pp. 201–212.

than only marginally stronger than the constraint against the foreseen but unintended harming of nonliable people to an equal degree, it seems to follow that if the villagers could jam the bomb doors (leaving the bombers unharmed) only in a way that would kill six or more innocent bystanders as a side effect, they would be permitted to do so. For while the number of victims would be greater, the constraint that would be overridden is much weaker. If the villagers' only defensive option were to kill the bombers eliminatively, the claim that there is an agent-relative permission implies that that option would be permissible. If their only option were to jam the bomb doors, killing six innocent bystanders, or perhaps even more, as a side effect, they must have an agent-relative permission to do that as well. It is unclear which option would be permitted if both were possible.

Because they accept that there is a general moral asymmetry between doing and allowing, *may* deontologists believe that it is impermissible for people threatened with death to kill an equal number of innocent bystanders as a side effect of self-preservative action. Many others accept a stronger restriction, claiming that the killing of innocent bystanders as a side effect of self-preservation can be permissible only when the number saved is greater than the number killed. Some think the number saved must be significantly greater than the number killed. But few believe that it is permissible for people threatened with death to kill a greater number of innocent bystanders as a side effect of self-preservation. Yet if the claim that there is an agent-relative permission is to imply that it can be permissible to kill a nonliable justified threatener defensively in self-defense, it must also imply that acts of self-preservation can be permissible when they kill, as a side effect, more nonliable people than they save (and even when the killings occur through the creation of a threat rather than through the redirection of an existing threat). Those who find this counterintuitive should reject the claim that the villagers have an agent-relative permission to kill the tactical bombers in self-defense.

7.6 Killing in Self-Preservation Without Thwarting the Justified Action

Although I have argued that the villagers' killing of the bombers in self-defense cannot be justified by appeal to an agent-relative permission, it does not follow that there are no agent-relative permissions. I suggested that it is plausible to suppose that the villagers are permitted to jam the bomb doors if they could do that without harming the bombers. But it would not be permissible for a disinterested bystander to do that—that is, it would not be permissible for a neutral third party to do what would save five nonliable people, in a way that would prevent the saving of

100 nonliable people. Indeed, it might even be permissible for a third party to prevent the villagers from jamming the doors (though not, I think, by killing them). If the villagers are permitted to jam the bomb doors, therefore, their permission must be agent-relative. They are not required to allow themselves to be sacrificed for the sake of the greater number. They may have an agent-relative permission to prevent the saving of a greater number, but not by killing an equal number.

In the case as I initially presented it, the villagers have two distinct moral reasons not to shoot down the bombers. They have a reason not to thwart the mission and a reason not to kill people who are not liable to be killed. By appealing to a variant in which the mission could be thwarted without killing the bombers, I suggested that the first of these reasons may not be decisive on its own. We can now examine the second reason on its own by considering variants in which the villagers can defend their lives by killing the bombers but without thwarting the bombers' mission.

One can imagine a number of such variants involving different modes of agency. Here are four.

- (1) Although the bombers cannot do this themselves, the villagers can cause the bombers' plane to crash onto the military target, thereby killing the bombers but also saving both the 100 civilians and the five villagers. This would be an instance of opportunistic killing.

In the remaining three variants, the military target has been destroyed and the debris from the explosion is heading toward the villagers.

- (2) The villagers can shield themselves from the debris by using a remote control device to fly the bombers' plane into it. This too would be an instance of opportunistic killing.
- (3) The villagers can create an explosion that would deflect the debris away from them but also destroy the bombers' plane. This would be an instance of foreseeable but unintended killing via the creation of a threat.
- (4) The villagers can somehow deflect the debris away from themselves but only in a way that will cause it to collide with and destroy the bombers' plane. This would be an instance of foreseeable but unintended killing via the redirection of an existing threat.

Given the assumption that the bombers are not liable to be killed in defense of the villagers, it seems that neither instance of opportunistic killing can be justified. Even those who believe that the killing of the bombers in the original case can be justified by appeal to an agent-relative permission may agree with this if they also accept that self-preservative killing of a nonliable person via opportunistic agency can be justified, if at all, only as the lesser evil.

In the third variant, the killing of the bombers would be neither opportunistic nor eliminative but merely a side effect, albeit one caused by the creation of a new threat. One might think it relevant in this case that the bombers are responsible for the threat the villagers can avert via the creation of a threat to the bombers. But if my earlier argument that the bombers' responsibility for the threat does not make them liable to defensive harm because their action was justified (in both the evidence-relative and fact-relative senses), then the fact that they created the debris seems irrelevant.

It may help in thinking about the third variant to consider a parallel trolley case. Suppose a runaway trolley is heading for five people trapped on the track. The only way they can prevent it from killing them is to detonate a bomb that will both derail the trolley and kill five innocent bystanders standing near the track. Defenders of the agent-relative permission in the original version of the tactical bombers case accept that it is permissible for them to detonate the bomb. But if my argument in the preceding section is correct, that is in fact impermissible. A neutral third party would certainly not be permitted to detonate the bomb, saving five but also killing five. If this trolley case is relevantly analogous to the third variant, then it is not permissible for the villagers to deflect the debris by a means that will kill the bombers.

It may also help in evaluating the fourth variant to consider an analogous trolley case. If the five people who are trapped on the main track have access to a switch that will direct the trolley onto a branch track on which five other equally nonliable people are trapped, may they pull it? Again, it seems that a neutral third party may not. Yet it may seem intuitively plausible to suppose that the five potential victims may. If they may, that must be because they have an agent-relative permission to kill when the numbers are equal and the killing is unintended and brought about via the redirection of an existing threat. Perhaps the redirection of a threat away from oneself but toward another is morally intermediate between failing to save a person at great cost to oneself and other ways of killing a person to avoid a great cost to oneself. I am uncertain what to think about either the fourth variant or the analogous trolley case.

One might argue that the villagers are permitted to kill the bombers in the fourth variant, and perhaps even in the third, on the ground that the bombers ought to bear the cost of their own voluntary action. Suppose, for example, that the bombers can attack the military target, thereby saving the 100 civilians, in either of two ways. If they attack it in one way, the debris will land on the villagers, but if they attack it the other way, the debris will collide with and destroy their plane (and they have no parachutes). Call this the *Two-Option Bombing* case. Some would say the bombers have a duty not to impose the costs of saving the civilians on innocent bystanders rather than on themselves and thus must attack the target in the second

way. And it is this same duty that justifies the villagers in refusing to bear the costs of the mission and imposing them on the bombers instead.

Yet again it may be illuminating to consider a sequence of simple trolley cases. The first is the standard trolley case in which a bystander, B₁, can pull a switch to divert the trolley away from the five and onto a track that branches off to the right where it will kill another innocent bystander, B₂. Assume, as most people believe, that it is permissible for B₁ to turn the trolley toward B₂. In the second case, B₁ is himself trapped on a track that branches off to the left. There is no branch to the right. B₁ has the switch and can divert the trolley away from the five but only onto the track on which it will kill him. Assume, as most people believe, that it is permissible for him not to pull the switch. Finally, in the third case, B₁ has the switch and is trapped on the left branch track while B₂ is trapped on the right branch track. B₁ can do nothing, allowing the trolley to kill the five, divert the trolley toward himself, or divert it toward B₂. Call this third case the *Three-Option Trolley case*.

It is tempting to argue that because the first case shows that B₁ is permitted to divert the trolley toward B₂ while the second case shows that he is permitted not to divert it toward himself, it follows that he is permitted in the third case not to divert it toward himself but to divert it toward B₂ instead. If this is correct, it may seem that a parallel conclusion follows in the Two-Option Bombing case—namely, that it is permissible for the bombers to conduct the attack in the way that will direct the debris toward the villagers rather than toward themselves.

Although I believe this is the correct conclusion about the Three-Option case, it does not follow from the claims about the first two cases. What it is permissible to do can depend on what alternatives there are. It might, therefore, be permissible for B₁ to divert the trolley toward B₂ when there is no alternative other than allowing it to kill the five, but not permissible when B₁ can also save the five by diverting it toward himself. When there is this additional option, there may be what Frances Kamm calls “contextual interaction.” For example, an issue of fairness may arise that is not present when the only alternative to allowing the five to be killed is to divert the trolley toward B₂.

It seems to me that B₁ is nevertheless permitted to divert the trolley toward B₂ in the Three-Option Trolley case. We may sometimes do unto others what we are permitted not to do unto ourselves.¹⁵ But it also seems to me that if B₁ has diverted the trolley toward B₂ and B₂ can divert it away from herself, though only in such a way that it will end up on the left branch track and kill B₁, it is permissible for B₂ to save herself by diverting it in this way. (This seems true even though B₁, unlike the bombers, has merely redirected a threat toward B₂ rather than creating a new threat to her.)

¹⁵ Judith Jarvis Thomson disagrees. See her “Turning the Trolley,” *Philosophy and Public Affairs* 36 (2008), pp. 359–374.

To the extent that this is plausible, it supports the claim that the villagers may deflect the debris toward the bombers in the fourth variant noted earlier.

These remarks about the fourth variant of the bombers case, the Two-Option Bombing case, and the Three-Option Trolley case presuppose that the bombers have no special duty to bear the costs of their action that B1 does not have. But the tactical bombers are professional combatants fighting in a just war. Such people are almost universally recognized to have a special duty to take certain risks and even accept certain harms during their military operations to avoid causing harm to innocent bystanders. Indeed, the special duty is generally acknowledged even by combatants themselves. Thus, the *U.S. Army/Marine Corps Counterinsurgency Field Manual* 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” (*U.S. Army / Marine Corps Counterinsurgency Field Manual* (2007), p. 244). This may be a reason for thinking that in the Two-Option Bombing case, they must attack their target in the way that will cause the debris to strike them rather than the villagers.

Suppose the bombers have a special duty to bear the costs themselves but that they instead attack the target in the way that sends the debris toward the villagers. In that case, they are responsible for unjustifiably creating a lethal threat to the villagers and that makes them potentially liable to be killed in any one of the three ways by which the villagers might protect themselves from the debris, including opportunistically killing the bombers by flying their plane by remote control into the debris.

Suppose, however, that although the bombers *would* have a duty to attack the target in the way that would send the debris toward their plane, they do not have that option. Their only option is to attack the target in the way that will hurl the debris onto the villagers. In that case, when they justifiably drop their bomb in the only way that is possible in the circumstances, they do nothing to make themselves liable to be killed. But the claim that they *would* have a professional duty to impose the cost of their action on themselves rather than on innocent bystanders may still be relevant to whether it is permissible for the villagers to deflect the debris away from themselves when this would unavoidably redirect it toward the bombers. One might argue that if the duty that the bombers would have to impose the cost on themselves if they could would be an enforceable duty, the villagers can be understood to be permissibly enforcing that duty when they deflect the debris, even when the bombers have been unable to fulfill that duty themselves. Indeed, one might think that the bombers ought even to consent, if they could, to the redirection of the debris.¹⁶ For

¹⁶ The view that rights of defense can be grounded in the enforcement of duties that people have not to cause harm is developed with great ingenuity by Victor Tadros in *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford: Oxford University Press, 2011).

their situation is analogous, not to that of B1 in the Three-Option Trolley case, but to that of the owner of the insulin in the example discussed in Section 7.3. It is in part because the owner would have a duty to provide the insulin if he were home that it is permissible for the passerby to take it in his absence.

It is important to note that this argument, if successful, would have limited application in the debate about the permissibility of defense against justified threateners. The scope of the argument is limited to cases involving justified threateners who have a special professional duty to bear risks and harms rather than impose them on innocent bystanders. If the tactical bombers were not professional combatants but civilian pilots who had decided to undertake this justified mission on their own initiative, perhaps because no professional combatants were available to do it, the villagers would not be justified in deflecting the debris on the ground that the pilots had a professional duty to bear the costs of their action. This is because these civilian pilots would not have had a professional duty to conduct the attack, if they could have, in a way that would have sent the debris toward themselves.

There are two reasons for doubting whether this argument for the permissibility of deflection by the villagers is successful. One is that it is doubtful whether the special duties of professional combatants include a duty to sacrifice their lives to avoid killing innocent bystanders. Even professional duties have limits. Thus, the *Counterinsurgency Field Manual* that recognizes a duty of combatants to take risks also explicitly says that “combatants are not required to take so much risk that they fail in their mission or forfeit their lives” (*Counterinsurgency Field Manual* (2007), p. 245). And even if B1 were the Safety Officer for the trolley company, it is not obvious that in the Three-Option Trolley case he would have a special duty to divert the trolley toward himself rather than toward B2.

But suppose that in the Two-Option Bombing case the tactical bombers do have a professional duty to attack the target in the way that will direct the debris toward themselves rather than toward the villagers. It still does not follow that, if their only option were to attack in a way that would direct the debris toward the villagers, the villagers would then be permitted to deflect the debris on the ground that they were simply enforcing the bombers’ duty to bear the costs of their own action. For not all moral duties are enforceable. This is recognized in the idea that there can be a “right to do wrong”—that is, the idea that a person can have a claim-right against others not to prevent him from acting wrongly.

The duty that the insulin owner would have if he were at home to provide insulin to the diabetic does seem enforceable even when he is not at home. But suppose that I have a moral duty to contribute a large sum of money to a charity organization but cannot fulfill that duty because I am away on an extended mountain-climbing expedition. It does not seem that it would be permissible for the organization to take the money from my bank account, supposing it were able to do so. I am not sure what

makes this duty different, if it is, from that of the insulin owner. If we had a criterion for distinguishing between enforceable and unenforceable duties, it might explain why this case seems different from the insulin case. And it would tell us whether the alleged special duty of the tactical bombers to bear the costs of their mission to save the civilians was enforceable by the villagers (or a third party) even when the bombers do not have the option of attacking in a way that would send the debris in their direction rather than toward the villagers. This is an issue about which I am uncertain.

But suppose, for the sake of argument, both that the bombers have a professional duty to bear the costs of their mission when they can and that this duty is enforceable by potential victims and third parties in circumstances in which the bombers are unable to fulfill the duty on their own. There must still, it seems, be restrictions on the means by which they might be made to bear those costs. Granting these assumptions, it seems permissible for the villagers to deflect the debris from themselves, even if it will then unavoidably kill the bombers. It is less clear, however, that it would be permissible for them to deflect the debris by detonating a bomb that would also kill the bombers as a side effect. And it is doubtful whether it would be permissible for them to use the bombers as a shield by taking remote control of their plane and flying it into the debris.

7.7 Conclusion

It is difficult to say whether the villagers may kill the bombers in self-preservation even when their doing so would not thwart the bombers' justified mission. Whether that would be permissible depends on, among other things, the villagers' mode of agency, whether the bombers have a professional duty to bear the costs of their justified action rather impose them on innocent bystanders, and, if so, whether that duty is enforceable. Insofar as the justification for self-preservative killing depends on the bombers' professional duty, it does not apply to other cases in which justified threateners do not have such a duty. That the justification for the killing of the bombers is precarious even when killing them would not thwart their mission reinforces the earlier conclusion that the self-defensive killing of the bombers in the original case is impermissible.¹⁷

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