

Self-Defense Against Justified Threateners

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.

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 five 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 six inhabitants as a side effect.
2. Although these six 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 that other would be permitted to cause in his 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 six 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 just 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.

6. Because the bombers aim is just and their action is necessary and proportionate, their bombing 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 to me 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 six villagers.

If the tactical bombers complete their mission, the ratio of innocent people saved to innocent people killed will be approximately 17 to 1. Most people find it permissible in the familiar trolley case to turn the trolley when the ratio of innocents saved to innocents killed as a side effect is only 5 to 1. This supports the assumption stated as point 5 that the bombers' action is proportionate.

There are in fact close parallels between the trolley case and the case of the tactical bombers. In both it is possible for a third party to save a greater number of innocent people but only in a way that will kill a lesser number of other innocent people as a side effect. For this reason I will sometimes appeal to trolley cases as a means of elucidating certain claims. But there are at least two potentially morally relevant respects in which the case of the tactical bombers differs from the trolley case. One is that the tactical bombers create a threat to the villagers in the course of saving the 100 civilians, whereas the bystander who diverts the trolley away from the five on the main track does not create a threat to the person on the branch track but instead redirects a preexisting threat. The other is that tactical bombers arguably have, in their role as combatants, a professional duty to accept certain risks and make certain sacrifices to avoid harming innocent bystanders in the course of their operations, whereas the bystander in the trolley case has no such professional duty. It will be well to bear these differences in mind when I use trolley cases for purposes of illustration.

The claim in point 6 above 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.

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.¹ It seems that the six 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 six 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.² 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. But there are certain exceptions, at least if “a right of self-defense” is understood to mean “may permissibly act in self-defense.” 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.

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 six villagers permitted to kill the six 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 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 share this intuition, at least to some extent, and once sought to defend it.³ 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.

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 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. 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.⁴

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 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 involve killing 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 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.

Although they are rare, there are cases in which it is impermissible to kill a person who is liable to be killed because of the harmful side effects that the act would cause to others. Suppose, for example, that in the case of the terrorist agent who intends to disarm the hidden bomb, the police sniper knows that killing the agent to prevent the murder would result in the deaths of hundreds of innocent people, who would then be killed by the bomb rather than saved by the agent. In these circumstances, it would be wrong for the sniper to prevent the murder by shooting the agent, even though the agent would be liable to be killed. The reason the sniper's defensive action would be wrong is not that it would violate the agent's right but that it would prevent the saving of hundreds of innocent people.

Suppose, then, that 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 that 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 higher than it is in the case of the tactical bombers (100 to six). 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 six 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 six as a side effect of saving 100, it may seem that it must be disproportionate to save those six 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 six villagers would unavoidably *kill* 100 innocent bystanders as a side effect, that action would indeed be disproportionate in what I call the "wide" sense – that is, disproportionate in the harms that it would inflict on those who are not liable to be harmed either as a means or a side effect of achieving the aim of the action. 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.⁵ 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 would make it impermissible for the six 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 six 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.

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.⁶ 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.⁷

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 six villagers are permitted to kill the six 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. 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.⁸ 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.⁹ 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 six 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 six innocent people they are responsible for putting at risk, the unjust combatants are permitted to kill another six people who are attempting to save 100 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 six 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 six 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 six 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. And 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. There is one rare type of case that constitutes an exception to the claim that a person who is liable to suffer a certain harm is not permitted to prevent that harm, either by defensive harming or through a harmless means of prevention. The exceptions are cases in which the liable person 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.¹⁰ 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.¹¹ 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.

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 would have been in no position to demand compensation from anyone. The sacrifice of the insulin would 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.¹² 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 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. 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 does not seem 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.

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 XX.) 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."¹³ But the case of the insulin shows that the intuitions about compensation to which Steinhoff appeals are not so robust as he supposes.

4 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.¹⁴ What I suggested is that the villagers have an *agent-relative* permission to defend their right not to be attacked even against justified infringement, 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 six morally justified agents, thereby also preventing the saving of 100 innocent people, as a means of preventing the justified killing of only six other innocent people – that is, the same deeply 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 to whom one is specially related, when that permission is also not agent-neutral. One's relation to oneself is morally quite different from one's relation to others to whom one is specially related. Although some people believe that there are special duties to oneself, others think that there are at most agent-relative permissions, so that self-sacrifice is always permissible, provided that it is not worse for others. It may be prudentially irrational, but it is not immoral. Yet most of those who hold either of these views accept that one has special duties to at least some people to whom one is specially related, duties that one does not have to others to whom one is 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. But associative permissions are different from agent-relative permissions.

If one 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 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. It is possible that there are no agent-relative permissions but that there are associative permissions. If that is true, there could be cases in which a person does not have even an agent-relative permission to defend himself and yet someone specially related to him has an associative permission, or perhaps even an associative duty, to defend him – for example, a case in which, while a person has no right of self-defense against a justified threatener, his parent is nevertheless permitted to defend him.

My principal concern in this paper 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 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. 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 it is unlikely that both will succeed. 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.

FROM THIS POINT ON, THE TEXT IS FRAGMENTARY, CONSISTING MAINLY OF NOTES TO BE USED IN WRITING THE FINAL SECTIONS.

(1) 100 civilians presumably have an agent-relative permission to kill villagers preemptively – and intentionally. They have a right not to be prevented from being saved and they have an agent-relative permission to protect that right.

(2) It seems implausible to suppose that the tactical bombers' right not to be killed, which has not been waived, forfeited, or overridden, simply *yields* to an agent-relative permission. For that to be true, rights that have *not* been overridden (such as the tactical bombers' right not to be killed) must yield to rights of the same type (such as the villagers' right not to be killed) that *have* been overridden. It is hard to make sense of the idea that an overridden constraint can, on agent-relative grounds, trump a constraint that has not been overridden.

(3) If the tactical bombers are not liable and the villagers shoot down their plane, they will be intentionally killing people who are not liable to be killed as a means of saving themselves. The choice they face is between the intentional killing of people who are not liable to be killed and unintentionally allowing people to be killed who are not liable to be killed. In general, in an unavoidable choice between intentionally killing innocent or nonliable people and unintentionally allowing the same number of nonliable people to die, one must choose the option of allowing people to die.

(4) 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 a wholly innocent person to kill an innocent bystander in self-preservation.¹⁵ 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.¹⁶ 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.¹⁷ 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-preservative killing of an innocent bystander when other relevant considerations are equal. For the constraint against the killing of an innocent bystander is stronger because the agency 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. 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 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 and 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, it seems that if one has the kind of agent-relative permission that would justify killing a nonliable justified threatener in self-defense, one must be permitted to kill the bystander in 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 my original objection after all.

More recently still, however, Jonathan Quong has argued, in effect, 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.¹⁸ On this 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 get on 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. To get on the bridge is therefore to violate the stronger constraint against harmful opportunistic agency after all.¹⁹ If this is true in the first version of the bridge case, it must be true in the second as well, in which one clearly intends to affect the bystander in a harmful way.

As I noted, Quong seems right to claim that opportunistic using can include using not just a person but 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 is plausible to suppose that he has violated the constraint against harmful opportunistic using. But it does not seem implausible to me 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 that is hers.

But even if Quong were right about this, the appeal to an agent-relative permission would still prove too much.

The agent-relative permission would justify killing an equal number of innocent people as a side effect of self-preservative action. Just as the constraint on opportunistic intentional killing is stronger than that on eliminative intentional killing, so the constraint on eliminative intentional killing is stronger than the constraint on foreseeable killing as a side effect. If, therefore, the intentional and eliminative killing of a nonliable justified

threatener is justified on the basis of an agent-relative permission, the foreseeable killing of an innocent bystander as a side effect of individual self-preservative action must be as well.

It seems that if the agent-relative permission of the villagers would justify their intentionally killing the six nonliable bombers, it must also justify their killing six innocent bystanders as a side effect of action that would jam the bomb doors. This alone seems implausible. Any killing of an innocent bystander as a side effect of an act of individual self-preservation must be permissible if one has an agent-relative permission that justifies the *intentional* killing of a nonliable person such as a nonresponsible threatener or a justified threatener.

Against the agent-relative permission

But suppose the villagers have an agent-relative permission. That does not entail that third parties must not intervene at all. It seems that they may intervene on behalf of the tactical bombers, both because ... and because, if they have a lesser-evil justification for dropping the bomb, it seems that that justification should extend to third parties. The lesser-evil justification is impartial and agent-neutral whereas the villagers' supposed right of defense is merely agent-relative. On the other hand, the tactical bombers' agent-neutral justification for killing the villagers is subject to a weaker constraint because their killing them would be unintended, whereas if a third party were to intervene to protect them, that person would intend the killing of the villagers as a means of defending the tactical bombers and their mission. So the constraint against a third party's killing of the villagers is stronger than that against the tactical bombers' killing them as a side effect of the bombing.

Is the tactical bombers justified in killing the villagers preemptively if they sees that they are about to shoot them down? If so, then a neutral third party would have the same justification.

Killing the tactical bombers without preventing the saving of the 100

(i) Ex ante killing as a means

Assume that though the bombers cannot do this by themselves, the villagers can cause the bombers' plane to crash into the military facility, destroying it without throwing up a mass of debris. This saves both the 100 civilians and the six villagers.

Ex post

(ii) Suppose the villagers had the ability to destroy the tactical bombers' intended target, thereby saving the 100, in a way that would throw the debris away from themselves but toward the bombers' plane. It would clearly be permissible for them to preempt the bombers' action by saving the 100 in this way, thereby making it the case that the bombers, rather than they, suffer the costs of the saving.

(iii) Unintended killing via deflection of a threat

In the tactical bombers case, suppose the 100 have been saved and the debris is in the air. It seems that the villagers may deflect it back to the tactical bombers. This is redirection, as in the trolley case. Perhaps the tactical bombers may deflect it back to the villagers. Perhaps this is a genuine symmetrical defense case when both sides are engaged only in deflection. Each deflection, if successful, would be an instance of killing

rather than letting die, but the fact that the mode of agency is deflection seems intuitively significant.

(iv) Unintended killing via creating a threat

Suppose, by contrast, that the villagers can save themselves only by creating an explosion that will deflect the debris but also blow up the tactical bombers' plane. This would be case killing as a side effect, though through the creation of a threat rather than the redirection of a preexisting threat.

(v) Intended killing as a means

Or suppose the villagers can save themselves only by taking over the tactical bombers' plane by remote control and flying it into the debris, thereby preventing it from landing on them. This is intentionally using the tactical bombers as a shield. Compare pulling someone in front of oneself to stop a bullet rather than deflecting the bullet toward that person. Deflection is unintended killing in these cases; it does not use as a means. But remotely controlling the plane does harmfully use the tactical bombers as a means.

Case for the permissibility of self-defense by the villagers

But there *is* a reason for thinking that it's permissible for the villagers to kill the bombers.

Variant: two ways of attacking

Imagine one further variant of the tactical bombers case. Suppose the bombers can attack their target in either of two equally effective ways.

(i) If they attacks it in one way, the debris thrown up will land on and kill the villagers.

(ii) But if they attacks the target in another way, the debris will instead collide with their plane, killing him and their crew. (Alternatively, suppose they have the option after having destroyed the target of flying their plane into the debris, thereby preventing the debris from falling on the villagers but also causing the destruction of their plane.)

Both options involve killing

We might think that the bombers *ought not to kill innocent people* in making their attack, if they can avoid it.

But of course if they conduct the attack in the way that will cause the debris to collide with their plane, they'll be killing innocent people. So either way, they'll kill the same number of innocent people as a side effect. The asymmetry between killing and letting die doesn't seem to favor either option.

But shouldn't the bombers and crew pay the costs of their own action rather than imposing them on innocent bystanders?

Against the claim that the tactical bombers must pay the cost

Here's an analogous case that suggests that they *aren't* required to direct the debris to themselves.

3-option trolley case

(1) Standard trolley: permissible for B1 (bystander at the switch) to divert to B2 (the one on the branch track).

(2) B1 can divert the trolley but only against himself. Not required. Permissible not to divert.

(3) In 3-option case: there are two branch tracks. Bystander 1 is trapped on one track and Bystander 2 is trapped on the other. But B1 has the switch. She can divert the trolley onto *either* track. According to 1 above, she may divert it toward B2. According to 2 above, she is not required to divert it toward herself. Hence in this case she may divert it toward B2 rather than toward herself.

(Challenge to the logic of this argument: there may be what Kamm calls contextual interaction in the third case that is not present in the first two – for example, considerations of fairness may arise in the third.)

One can argue that the same is true in the case of the tactical bombers: even if they can conduct their mission in such a way as to direct the debris toward themselves, they are not required to do so but may direct it against the villagers instead.

Failure of analogy: professional role-based duty

But the tactical bombers are different: combatants typically have a professional, role-based duty to accept risks and harms to themselves rather than to impose them on innocent bystanders.

They often get this duty by consent, by voluntarily becoming soldiers when part of the job description is that they're to be paid to take risks and accept harms in the course of their work rather than imposing risks and harms on others.

Even conscripts have it. If they let themselves become soldiers, they let themselves acquire the duties that come with the role.

Another failure of analogy

This is one way in which the case of the tactical bombers differs from the trolley case: the tactical bombers are a professional rescuer while the bystander at the switch is not.

There is another failure of analogy as well: the tactical bombers creates the initial threat while none of the people in the trolley case created the threat of the runaway trolley. The bombers creates the threat to the villagers while the bystander merely redirects a preexisting threat toward the one on the branch track. (In the ex post version of the tactical bombers case, the villagers redirect a preexisting threat – the debris – but it was created by the tactical bombers.)

But suppose that the tactical bombers are not professional combatants but ordinary civilians who volunteer to forfeit their civilian immunity in order to carry out this military mission (perhaps because the air force has no military pilots available at the time). They have no professional role-based duty to take risks or accept harms in order to spare ordinary civilians. They do not become professional soldiers with a professional soldier's duties just by offering to fly one mission.

But it seems arbitrary to suppose that a military pilot would have a duty to fly into the debris but that a civilian volunteer would not, so that the villagers would be permitted to deflect the debris toward the military pilot but not toward the civilian pilot and crew.

If the bombers fails to direct the debris toward their plane

Suppose that the bombers have this duty, and that in this final variant they *ought* to attack the target in the way that will direct the debris to themselves rather than the villagers.

If they fail to do this and attack in the way that directs the debris toward the villagers, *that does* seem to make it justifiable for the villagers to redirect the debris toward their plane, if they can. That, indeed, seems to make them liable to defensive attack.

If they *can't* direct the debris to their plane, do the villagers still have the same right they *would* have if the bombers had the option and didn't take it?

Now return to the earlier variant in which they *don't have* the option of attacking in the way that will send the debris toward their plane. If they attack, the debris will unavoidably go toward the villagers. But they can deflect it with an explosion that will also destroy their plane.

I'm assuming that *if* they had the option to direct the debris toward their plane and didn't take it, that would license the villagers to deflect it in a way that would kill him.

Do the villagers have the same permission even when the bombers *don't* have that option?

I'm not sure. It's not clear to me that the fact that they *would* have a role-based duty to take the harm if they could entitles the villagers to kill them when they haven't defaulted on any professional duty.

What I say earlier about the insulin owner suggests that I should agree with Victor here. Since he would have been required to give the insulin without compensation if he had been there, he's not owed compensation by the passerby, who simply fulfills the duty the owner would have had had he been present. The same seems true of the villagers: they can enforce the tactical bombers' duty.

Suppose that even though the tactical bombers cannot on their own fly into the debris, thereby deflecting from the villagers, the villagers could somehow move either their plane or the debris in such a way as to make it possible for the bombers to fly into it. It seems that it would be permissible for them to do that and then, if they fail to fly into it, deflect it toward them because they would have made themselves liable to that. It may be that it is permissible to ensure that they have the opportunity to choose but not permissible to shoot them down if they have not had the opportunity to choose.

One might think: if they can't fulfill their duty to take the harm, they ought to get anyone who can fulfill their duty for him to do it. So they ought to consent to the villagers blowing up their plane. = Tadros's view

Two challenges to the Tadros view

(1) The tactical bombers do not have a duty to conduct this mission as a suicide mission. Sometimes we are permitted to impose costs on others that we are not required to impose on ourselves. This seems true in the trolley case: B1 may impose the cost on B2 even when she could impose it on herself instead.

(2) The right to do wrong. It may be that even if I have a duty to give money to the poor, they are not permitted to steal it from me if I do not give it to them. My right to the

money is a claim right rather than a liberty right. It is not permissible for me to keep it but it is also not permissible for others to take it from me. My right is against interference. Victor's argument about enforceable duties threatens to eliminate (or at least contract) the category of a right to do wrong – that is, a claim right to do X that is not also a liberty right to do X.

On the Tadros view: diabetic case and ex post tactical bombers case

I claim earlier that in the case of the diabetic, it may be fair to allow the loss to lie with the owner, as the owner would have a duty to give the insulin if he were home. The passerby simply fulfills the owner's duty in the owner's absence. But this has no application in the case of the tactical bombers, since I have stipulated that the villagers have no duty to sacrifice themselves for the sake of the 100 civilians. (Tactical bombers = passerby, villagers = owner, and 100 civilians = the diabetic.) It is also not true in the Trolley case, since the one on the branch track has no duty to redirect the trolley toward himself.

But if we assume that the tactical bombers have a professional duty to direct the side effects of their attack toward themselves, then they are analogous to the owner in the diabetic case: they have to duty to sacrifice and the villagers can fulfill it for them if they cannot – same claim I accept about the owner and the passerby in the diabetic case.

This argument depends on two controversial assumptions:

- (1) that the bombers ought to direct debris toward themselves if they can, and
- (2) that even if they can't the villagers can impose the harm on him that they would be required to impose on themselves if they could.

Against the first assumption

We expect combatants to take risks but not to do what they know will kill them. See the Counterinsurgency Manual, which says that combatants have a duty to accept risks to avoid harming innocent people but do not have a duty to sacrifice their lives to do so.

Against the second assumption

(1) Suppose you ought to give some money to the poor in some area but don't do it. Does it follow that it's permissible for them to steal it from you if they could?

(2) Suppose you *would* be required to give some money to the poor in some area if you could but you can't do it. But they can steal it from you via the internet. Is that permissible?

“Beneficiaries Pay” rule applied to tactical bombers, trolley, & diabetic

Compare trolley: permissible for one to jam mechanism but not to kill the bystander at the switch. Better to deflect to beneficiaries, or to require them to compensate. Better to harm one of the five. Not worse than no intervention. Does it make it too easy to say that the trolley should be redirected so that it kills one of the five that he would have died anyway? That this is just saving 4 rather than 5? Better case: It would be better to kill one of the 5 as a side effect of saving the other 4 than to kill the one as a side effect of saving all 5. Maybe even better to kill 2 of the 5 as a side effect of saving the other three

than to kill the one. (This keeps the Trolley case analogous to the tactical bombers case: what kills the lesser number is different from what would have killed the greater number.)

Details of how beneficiaries compensate in the 3 cases

Not worse for the diabetic to be saved and then be required to compensate the owner. Not worse for the 6 of the 100 to have the debris deflected on them. Not worse for one of the 5 in Trolley to be killed as a side effect of the means of saving the other 4.

(Then other cases, such as Kosovo, in which some of the potential beneficiaries are actually made worse off. Expectedly better for each, but actually worse for some.)

Apply “beneficiaries pay” rule to the tactical bombers

In the case of the tactical bombers, the claim that the beneficiaries of a rescue should pay or at least share the costs of their own rescue may seem to have no application, as the 100 civilians could not compensate the six villagers, who would be dead. (This is not to say that the dead can never be compensated; but it is reasonable to assume that in this case they cannot be.)

Suppose that the bombers can destroy their target in either of two ways. They can attack it in such a way that the debris will be hurled onto the villagers, or they can attack it in another way that will instead hurl the debris in the direction of the 100 civilian beneficiaries, predictably killing six of them. In this case the bombers ought to conduct their attack in the second way,

Ex ante, it would have been in the interest of the 100 to agree to accept that the debris would kill 6 of them as the cost of the bombing on their behalf.

Villagers may deflect to the beneficiaries – the civilians

Suppose the villagers can deflect the debris in either of two directions. If they direct it in one direction, it will destroy the bombers’ plane. If they deflect it in the other direction, it will land on 6 of the 100 civilians whose defense required the bombing. Ex ante, it would have been in the interest of the 100 to agree to accept that the debris would kill 6 of them as the cost of the bombing on their behalf. It seems that the villagers are permitted to deflect the debris toward the 6 civilians and not permitted to deflect it toward the bombers.

This parallels my intuitive understanding of the insulin case. In that case, the diabetic beneficiary owes compensation to the owner, not the passerby.

¹ Derek Parfit, *On What Matters*, Volume One (Oxford: Oxford University Press, 2011), p. 184.

² 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 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): 257-261.

³ Jeff McMahan, “The Basis of Moral Liability to Defensive Killing,” *Philosophical Issues* 15 (2005): 386-405.

⁴ 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.

- ⁵ 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): 277-295.
- ⁶ Judith Jarvis Thomson, "Self-Defense," *Philosophy and Public Affairs* 20 (1991): 283-310.
- ⁷ 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.
- ⁸ 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): 495-512, p. 501.
- ⁹ For a defense of this claim, see Uwe Steinhoff, "Jeff McMahan on the Moral Equality of Combatants," *The Journal of Political Philosophy* 16 (2008): 220-226.
- ¹⁰ *Killing in War*, pp. 38-51.
- ¹¹ See, for example, Uwe Steinhoff, "Jeff McMahan on the Moral Inequality of Combatants," *Journal of Political Philosophy* 16 (2008): 220-226; Uwe Steinhoff, "The Moral Equality of Modern Combatants and the Myth of Justified War," *Theoretical and Applied Ethics* 1 (2012): 35-44, esp. p. 37; and Hosein, "Are Justified Aggressors a Threat to the Rights Theory of Self-Defense?"
- ¹² 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).
- ¹³ Uwe Steinhoff, "Rights, Liability, and the Moral Equality of Combatants," *Journal of Ethics* (forthcoming).
- ¹⁴ Jeff McMahan, "The Basis of Moral Liability to Defensive Killing," *Philosophical Issues* 15 (2005): 386-405. 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): 507-537.
- ¹⁵ Jeff McMahan, "Self-Defense and the Problem of the Innocent Attacker," *Ethics* 104 (1994): 252-290, pp. 268-271.
- ¹⁶ *Killing in War*, pp. 170-173.
- ¹⁷ Warren S. Quinn, "Actions, Intentions, and Consequences," *Philosophy and Public Affairs* 18 (1989): 334-51, p. 344.
- ¹⁸ 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.
- ¹⁹ "Killing in Self-Defense," p. 531.