

without its aid. Yet to do so we must sharpen our understanding of what justice demands of us in war and we must develop a new set of categories for enemy status, categories that adequately reflect the epistemic and moral factors that McMahan's work has done so much to illuminate.<sup>7</sup>

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## *Who is Morally Liable to be Killed in War*

JEFF MCMAHAN

I am very grateful to Gerald Lang, Michael Otsuka and Bradley Strawser for their astute comments on my book, particularly because they have let me off rather lightly. Otsuka and Lang offer arguments intended primarily to accommodate some elements of the traditional view I have challenged rather than to undermine the revisionist challenge altogether. And Strawser seeks to defend my account against a more radical challenge. Since I can regard the first two papers as ‘friendly fire’ and the third as covering fire, I will, rather than replying in great detail to these papers, devote the main part of my own contribution to the symposium to clarifying and further developing the account of liability to attack in war that I advanced in *Killing in War*.

Before proceeding, I must define some terms. I will refer to the account of killing in war that I defended in my book as the *Responsibility Account*. I give it this name because it asserts that moral responsibility for a threat of wrongful harm is the criterion of liability to attack in war. In general, I will use ‘attack’ to refer to a potentially lethal attack, and ‘liability’ to refer to liability to an intentional attack in this sense. *Unjust civilians* are simply civilians of a state that fights without a just cause. When variants of ‘proportionality’ end with the subscript *n*, they refer to what I call *narrow* proportionality – that is, proportionality in harms inflicted on those who are potentially liable to be harmed. Variants that end with the subscript *w* refer to *wide* proportionality, or proportionality in harms inflicted on those who are not liable, or ‘innocent’.

## 1. *Legal immunity and excuses*

### 1.1 Otsuka

Otsuka develops a subtle and ingenious argument for the claim that unjust combatants have a moral right to kill just combatants, even if just combatants retain their moral right not to be killed. The argument begins with the claim that the law of war that exempts unjust combatants from legal liability to punishment for killing just combatants is morally justified on the grounds I cite in *Killing in War*: in particular, that the difficulty of distinguishing between just and unjust combatants makes a neutral, symmetrical law of *jus in bello* a pragmatic necessity. Otsuka then argues that unjust combatants’ morally grounded immunity to punishment is correlated with a moral right to kill. ‘Unjust combatants have a moral right to kill just combatants’, he writes, ‘where this right is constituted by a morally justified immunity from punishment’.

Otsuka and I agree that unjust combatants ought not to be punished for killing just combatants. I argued that this is not only because certain mitigating conditions apply to their action but also because of a variety of pragmatic considerations that would make punishing them counterproductive. Otsuka argues that we would find it wrong to punish them even in the absence of these pragmatic considerations, and that the idea that they act within their rights provides a better explanation of their immunity than the idea that they are excused.

I interpret the situation differently. Unjust combatants are morally immune from legal punishment because it is morally impermissible to punish people who have not violated the law. But the reasons why the law exempts unjust combatants from punishment are pragmatic, based on the difficulty of distinguishing unjust from just combatants. These are different pragmatic considerations from those Otsuka suggests we imagine being absent in order to consider whether we would still think it wrong to punish unjust combatants.

So the basis for their immunity from punishment is ultimately pragmatic and does not support the claim that they have a moral right to kill, in the sense in which a right entails a permission. A right to kill of this sort cannot be derived from a legal permission to kill whose basis is compatible with the killing's being morally wrong.

### 1.2 Lang

Whereas I had sought to diminish the excuses commonly claimed for unjust combatants to mere mitigating conditions, Lang seeks to provide a novel basis for a full excuse. If he is successful, that would not show that, according to the Responsibility Account, unjust combatants are not liable to attack, but it would affect whether military action against them would be proportionate.<sup>28</sup> He appeals, not to familiar claims about duress, but to a combination of non-culpable ignorance and *conscientiousness*. I am sure that he is right to stress the significance of a form of conscientiousness commonly found among unjust combatants as a condition that at least contributes to an excuse. And his Amended Robbery Case is an illuminating analogy that is much closer to unjust war than the common analogies with unambiguously criminal activities. Yet how important a factor conscientiousness is depends on how often it is the case (1) that an unjust combatant 'would not be fighting at all were it not for the belief that he has a just cause', and (2) that 'it is a contingent matter' whether a conscientious combatant ends up fighting for a just or an unjust cause.

Lang concedes that his assumptions do not hold universally. But I suspect that unjust combatants who will fight only if they can believe that their cause is just are quite rare. And it also seems that there is much that a combatant can do to try to determine whether his cause is just; hence, it cannot be wholly contingent whether a conscientious combatant ends up fighting for a just or an unjust cause. I will not, however, pursue these factual matters but will instead register my puzzlement over one of Lang's central premises, which is that it contributes to their being excused that unjust combatants pose a threat to just combatants, thereby establishing for them the full justification that they would otherwise lack for pursuing their just cause by military means. Lang seems to assume that the unjust combatants are doing the just combatants a moral favour. But I do not see how. If the unjust combatants posed no threat, the just combatants could pursue their just cause unopposed. They could still act with full moral justification, but without either violence or risk. Surely that would be even better.

## 2. *The Responsibility Dilemma*

Some commentators argue that the Responsibility Account implies that many or most unjust combatants are not liable to attack. For many unjust combatants, they argue, pose little or no threat, while many or most of those

who do pose a significant threat fail to meet the conditions of responsibility necessary for liability. These critics charge that the Responsibility Account implies a non-absolute, or ‘contingent’, form of pacifism. But even more commentators have criticized the account on the ground that it implies that many unjust *civilians* are liable to attack because of their responsibility, however minimal, for the unjust threats their state poses. If this objection is correct, the Responsibility Account may permit extensive intentional attacks on civilians or, in other words, frequent resort to terrorism. Lazar states this objection by claiming that the account supports a doctrine of ‘total war’ (Lazar 2010: 188). Yet traditional defences of total war have tended to assert a freedom from constraint on both sides, while the Responsibility Account recognizes the possibility of civilian liability only, or primarily, on the unjust side. At most, therefore, it offers the option of total war to the side with the just cause. But that limitation of scope is small consolation for the account’s defenders.

Some critics have sought to combine these objections. They argue that, in general, there is little difference in the degree to which unjust civilians and unjust combatants are responsible for the threats their country poses. If, therefore, the conditions for liability are not met by most unjust civilians, they are also not met by many or most unjust combatants. Or, in contrast, if they are met by most unjust combatants, they are also met by many unjust civilians. The Responsibility Account thus implies either contingent pacifism or the permissibility of unilateral total war. Lazar calls this the ‘Responsibility Dilemma’.

In *Killing in War*, I defended the middle position: that most unjust combatants are liable, while most unjust civilians are not. I will devote the remainder of this essay to a further defence of this position. This is also the aim of Strawser’s contribution to this symposium. I am grateful to him for taking up cudgels on my behalf and will not challenge his efforts but instead try to reinforce them. While Strawser focuses primarily on epistemic problems and their implications, I will try to elucidate the conditions of liability, showing why an individual unjust combatant is more likely than an individual unjust civilian to satisfy them. There is thus a division of labour between Strawser and me, though I will address certain epistemic issues in the concluding section.

## 2.1 Why most unjust combatants are liable to attack

Some critics assume that it is a condition of the Responsibility Account’s plausibility that it imply that all unjust combatants are liable, for otherwise the difficulty of distinguishing between the liable and the non-liable will make *discriminate* warfare impossible. I will explain in the final section why this is not so. The Responsibility Account does *not* imply that all unjust combatants are liable. Liability depends on what a person does, not on a person’s membership in some group. To suppose that a person can be liable simply by

virtue of membership in a military organization is to embrace the idea of liability-by-association that enables a terrorist to believe that a person is liable to be killed by virtue of being, for example, an Israeli Jew.

According to the Responsibility Account, whether and *to what* a person is liable are functions of, *inter alia*, the following elements:

- (1) The expected wrongful harm that will occur unless the person is harmed. A *wrongful* harm is one to which the victim is not liable. An *expected* harm is the product of a harm of a certain magnitude and the probability of its occurrence.
- (2) The degree of the person's causal contribution to the harm.
- (3) Whether the harm is foreseeable and, if so, whether the person contributes to its occurrence intentionally, recklessly or negligently.
- (4) If the person meets the necessary conditions of responsibility for the harm, whether and to what extent excusing conditions mitigate the degree of that responsibility.
- (5) Whether there are others who are *more* responsible for the harm and if so by how much.
- (6) The extent to which the expected harm can be expected to be reduced by harming the person. (In the case of *defensive* harming, the extent to which successful defence will be effective in reducing the harm depends on the degree of the person's causal contribution to it.)

There is no single answer to the question of what these various elements together imply about the liability of unjust combatants. For unjust combatants vary in the degree to which they contribute causally to threats posed by their country, whether and to what extent they satisfy certain subjective conditions of responsibility, whether and to what extent their responsibility is mitigated by excusing conditions, and so on.

But some critics of the Responsibility Account, notably Lazar, claim that most unjust combatants make little or no causal contribution to the threats of wrongful harm posed by their side; for many of them are not in combat roles, while many of those who are will never actually kill or even wound anyone. And even among those who do engage in killing and wounding, many may reasonably believe that they are acting with justification, and so will be excused.

It is obvious, however, that *someone* kills or wounds a great many people in war and only rarely are the perpetrators civilians. And even though only a certain proportion of unjust combatants who have combat roles end up killing someone, it is true of almost all of the others that they go armed into a war zone and *would* kill just combatants rather than allow themselves or their comrades to be killed. That their circumstances do not prompt them to kill is a matter of luck in avoiding a situation in which they must kill or be killed. Because they are able and conditionally committed to kill, and because

the conditions that would prompt them to kill have a significant probability of arising, they significantly increase the objective risk that people who are not liable to be killed will be killed by them. They are therefore responsible for making it unavoidable that, unless they are killed, others will remain at significant risk of being wrongfully killed. That is the basis of their liability, even if it later turns out, in a way that no one could have predicted with confidence, that they have gone through the war without harming anyone.

When soldiers go armed into a war zone, they know that there is a significant probability that they may personally kill or seriously wound another person. They are therefore morally required to make a strenuous effort to determine whether such action would be morally justified. If their war is unjust and they kill innocent people, most cannot plausibly protest that there was no way they could have acquired sufficient evidence to support the conclusion that they ought not to have fought. Lazar argues, in opposition to the arguments in *Killing in War*, that many or most unjust combatants are fully excused for any killing they do. But even if that were true, that would not exempt them from liability to defensive killing according to the Responsibility Account, which rejects the idea that culpability is necessary for liability to defensive action.

There are, of course, many unjust combatants who fulfil support roles rather than combat roles. Lazar cites as an example the high proportion of the crew of an aircraft carrier who do not participate directly in combat. But many of these intentionally make immediate and necessary contributions to the ability of the flight crews and others to fight. Without the support personnel, the planes could not fly, or get within range of their targets. Most soldiers in support roles are also trained to fill combat roles, and will do so if necessary. In both their support role and their potential combat role, they substantially increase the objective risk that innocent people will be killed.

Finally, precisely because most unjust combatants impose a significant risk of serious harm, killing them or otherwise rendering them hors de combat is highly effective in diminishing the risk of wrongful harm to innocent people.

## 2.2 Why most unjust civilians are not liable to attack

Next consider how the elements of liability may be manifest in the action of unjust civilians. As Lazar and others note, civilians may contribute to an unjust war in various ways: by voting, paying taxes, sustaining their country's economic strength, failing to protest, and so on. But none of these activities makes more than a negligible causal contribution to the prosecution of an unjust war. Individual civilians almost never make an essential causal contribution to the killing of another person in war. And only rarely does the action of any civilian increase the risk of wrongful harm to an innocent person by more than a negligible amount. The difference in the risk imposed by most unjust civilians and that imposed by most unjust combatants is

comparable to the difference in the risk imposed on me by ordinary drivers (including those who drive recklessly) and that imposed by a driver in my area who intends to run over me if he finds me.

Most people vote on the basis of a variety of considerations. Often they vote when war is neither in progress nor in prospect, and hence is not an issue at all. It is, in any case, doubtful that an individual civilian's vote makes a causal difference at all; for in virtually every case the outcome would have been exactly the same had that individual voted differently or not voted at all. Similar remarks apply to the payment of taxes. The proportion of an individual's tax payment that is devoted to war is usually small. The financial contribution that most civilians make to a war is therefore comparatively small and inessential. It is also compelled. More importantly, tax payments serve a great many worthy aims and citizens are morally justified in making them. If, as I believe, moral justification for an act exempts a person from liability to defensive action on the basis of that act, then payment of taxes cannot be a ground of liability to attack in war.

The contributions that a person makes to the economic strength of his or her state are also usually justified. And for anyone who is productive, they are unavoidable. If they were a ground of liability to attack, a vast number of foreigners would be liable as well, since they also contribute to the state's economy through trade, loans, scientific advancement, and countless other forms of activity.

A citizen's failure to protest an unjust war is an improbable basis of liability to be killed. Most obviously, it makes no causal contribution to the war. Each citizen knows, moreover, that nothing that he or she does can make more than a tiny, probably negligible, contribution to ending the war. No citizen can, in any case, protest all the wrongful acts of his state. That would be more than a full-time job.

The subjective elements of liability are also weak in the case of most unjust civilians. This is primarily because they know that nothing they do has more than a negligible effect on whether a war will be fought, much less on whether any particular person will be killed. They therefore have a considerably weaker moral reason to try to determine whether their state's war is just than someone whose job it is to kill people in that war.

That individual civilians rarely make more than a negligible causal contribution to a war or to the killing of any individual explains why the killing of unjust civilians is not an effective *defensive* means of eliminating or mitigating the threat their state poses. If killing a person would be ineffective, that person cannot be liable to be killed, even if he has been a culpable supporter of the war. Yet the killing of unjust civilians might serve to end an unjust war by terrorist means – that is, by intimidating and coercing the survivors to capitulate. Although Lazar cites a recent book that claims that terrorism has

been an effective means of achieving its practitioners' ends, there is an a priori reason why it is less effective than defensive killing, which is that it must operate not through its effects on its immediate victims, but indirectly through the wills of others. I will return later to the moral significance of the fact that the killing of civilians must in general operate causally in this way.

Suppose that these brief remarks are sufficient to show that most unjust civilians are not liable to attack. There is then a further reason why attacks even on those who are liable are likely to be impermissible, which is that those who are liable are generally intermingled with a much greater number of those who are not. Hence, a military attack that would kill the former would kill far more of the latter and would thus be likely to be disproportionate.<sup>w</sup> This is, in contrast, unlikely to be true of attacks on unjust combatants, provided that most unjust combatants are liable. The ratio of liable to non-liable people in a group makes an important difference to whether it can be proportionate,<sup>w</sup> to attack them.

### 3. *The comparative dimension of liability*

There is, however, a comparative dimension to liability to which one might appeal in arguing that many or most unjust civilians are liable to attack. This dimension of liability can best be explained by reference to a case involving only two individuals. Suppose that some great harm is unavoidable. It will befall one or the other of two people; it cannot be divided between them. For example, one person will kill another unless the other kills him in self-defence. Suppose that there are no relevant differences between the two except that the threatener bears a very slight degree of responsibility for the fact that one of them must die. He is not culpable but permissibly chose to act in a way that involved a tiny risk that he would become a threat to another. Through bad luck alone, he now threatens a person who bears no responsibility at all for the fact that one of them must be killed. (It is easier to imagine that the threatener is the one who bears some responsibility; but one could just as coherently stipulate that it is the potential victim.) In these circumstances, the minimally responsible threatener is liable to be killed. Perhaps, if there were some way to divide the unavoidable harm between them, the responsible person would be liable only to suffer the greater share of it, though not all. Or if there were some other relevant and important difference between the two, the one's responsibility for their predicament might be outweighed. But in the circumstances as described, the responsibility of the one, though minimal, is nevertheless decisive.

This seems unfair, as there is a glaring disproportion between the minimal degree of the threatener's responsibility and the magnitude of the harm he



must suffer.<sup>1</sup> But what this shows is only that the concept of liability is quite different from the concept of desert. Whether one deserves to be harmed is independent of whether harm is avoidable, and what one deserves depends only on what one has done, not on what others have done or on what their options are. Liability, in contrast, arises only when harm is unavoidable and must be distributed. Whether one is liable to harm depends not only on what one has done but also on what others have done. Even if one bears some responsibility for an unavoidable harm that cannot be divided, one may not be liable to suffer the harm if someone else is *more* responsible.

This comparative dimension to liability may help to explain why some unjust combatants are liable even when their responsibility is minimal. When unjust combatants go to war, they make it unavoidable that some people will be seriously harmed. Just combatants must then choose between (1) allowing their innocent fellow citizens to suffer serious harms, (2) attempting to stop unjust combatants without harming them, thereby exposing themselves to a great risk of being killed and (3) attacking the unjust combatants. In these circumstances, the responsibility of the unjust combatants makes them liable to attack unless there are relevant differences between them and their potential victims that outweigh the fact that they are responsible for the predicament while their adversaries are not.

But claims about the comparative dimension of liability can also be invoked in an effort to show that the Responsibility Account implies an expansive doctrine of civilian liability. Thus, Lazar writes that ‘if the lives of just combatants or just non-combatants are at stake, as well as the just cause, and these lives can be saved by killing unjust non-combatants, then however minimal their responsibility for the threat their state poses, it is enough to make them liable to be killed’ (Lazar 2010: 204). In principle this is right, and in *Killing in War* I presented a fanciful example in which a significant number of unjust civilians are liable to be killed on the basis of only minimal responsibility for their state’s unjust war (McMahan 2009: 227–28). Yet in the conditions I described, that conclusion is not counterintuitive. Suppose that a just combatant can prevent a just civilian from being killed only by killing a minimally responsible unjust civilian. Does the Responsibility Account imply that killing the unjust civilian would be permissible, and if so is that counterintuitive? We cannot know the answer until we know how the killing would operate. If the killing would be defensive – if, for example, it would prevent the unjust civilian from making a small but necessary causal contribution to the unjust war that, together with the contributions of many others, would be just sufficient to cause the just civilian’s death – then it seems to me that it is not counterintuitive to suppose that the

1 Compare the remarks on minimal fault as a basis of liability to pay substantial compensation as a matter of corrective justice in (Coleman 1992: 224) and in (Waldron 1995: 396–97).

unjust civilian would be liable and the killing would be permissible, if there were no other relevant differences between them. But killing an individual civilian almost never operates in a defensive manner to diminish a threat posed by his state and its armed forces. Suppose, then, that the killing would have to operate in a terrorist manner, for example by intimidating and coercing someone else who would then forbear from killing the just civilian. In that case, the Responsibility Account may not imply that the unjust civilian is liable to be killed. For such a killing would be an instance of *opportunistic harming*, and the constraint against that is arguably stronger than the constraint against causing the same degree of harm by action that is defensive.<sup>2</sup> The conditions for liability to opportunistic killing are, intuitively, more demanding. It may be, indeed, that liability to opportunistic killing requires a significant degree of culpability rather than mere responsibility.

One might reply that if *enough* unjust civilians are killed, this can have a defensive effect through the elimination of a sufficient number of small contributions to the war. In the extreme case, suppose that killing *all* the civilians of the enemy state who are responsible for contributing, however slightly, to the unjust war would eliminate financial and logistical support for the unjust combatants, forcing them to stop fighting. Suppose further that this is the *only* way to prevent any further killing of just combatants and just civilians. Does it follow that, because of the comparative dimension of liability, all these unjust civilians are liable to be killed?

In this kind of case, in which individuals each make only a small causal contribution to wrongful harms and each is only minimally responsible for his or her contribution, the number of individuals makes a difference to proportionality<sub>n</sub>. Numbers do not, however, always affect proportionality<sub>n</sub>. Suppose that there are 1000 culpable threateners queued up outside the door and each will kill me unless I kill him. Since each is fully culpable (that is, there are no mitigating conditions) and killing each is necessary to preserve my life, each is liable to be killed and it is proportionate<sub>n</sub> for me to kill them all. How, then could the situation be different if the 1000 threateners who will otherwise kill me were minimally responsible rather than culpable? How could it be that, if there were only one minimally responsible threatener, he would be liable to be killed, but if there were 1000, it would *not* be the case that all would be liable to be killed (and, indeed, might be the case that *none* was liable to be killed)? How can numbers affect individual liability?

In some cases, it is because the numbers affect the degree of each individual's causal contribution to a threat. In such cases, the more people there are who contribute to a threat, the less each individual's contribution is; and the less each contributes, the less effective killing him will be in reducing the

2 For the distinction between opportunistic and eliminative harming, see (Quinn 1989: 344).

threat. And the less good killing him will do, the weaker his liability is. But the case of the 1000 minimally responsible threateners is not like this.

One way to try to explain why killing 1000 minimally responsible threateners in self-defence is disproportionate,<sub>n</sub> is to claim that, unlike deserved harms, harms to which people are liable are always bad: there is always *a* moral reason not to inflict them. A person's liability to suffer a harm does not render his suffering it morally inert. Thus, as the number of people who are liable to be killed increases, so does the badness of their deaths. Eventually, the effects on well-being outweigh considerations of liability. The problem with this suggestion, however, is that it should apply not just to those who are liable on the basis of minimal responsibility but also to those who are fully culpable. Even if harms to those who are fully culpable have less weight than equivalent harms to those who are only minimally responsible, this suggestion still implies that if the number of fully culpable threateners becomes large enough, it will become disproportionate,<sub>n</sub> to kill them in self-defence, so that I must allow them to kill me instead.

An alternative and perhaps more plausible explanation of why numbers are relevant to proportionality,<sub>n</sub> in the case of minimally responsible threateners is that the killing of such a person leaves a moral 'remainder' in a way that killing a culpable threatener does not. Suppose that a minimally responsible threatener will cause me to be paralysed unless I cause him to be paralysed instead. If I am wholly lacking in responsibility for the situation and other things are equal, the comparative dimension of liability implies that he is liable to be paralysed. But now suppose that I have the option of dividing the burden between us. I could, for example, defend myself in a way that would preserve his ability to use his arms, but only at the cost of losing one of my fingers. In that case, he may be liable only to be paralysed below the arms, and I must accept the loss of a finger. This is true, however, only on the assumption that he is minimally responsible. If he were a culpable threatener, he would be liable to total paralysis.

The assumption that in this second case he is liable only to paralysis below the arms is compatible with his being liable to total paralysis in the original case in which there is no option of dividing the burden. Yet even in the original case, I seem to have a reason to provide the minimally responsible threatener partial compensation for his paralysis, in order to make the final outcome as close as possible to what it would have been if I had been able to share the burden *ex ante*. (If this is right, we may have to reject the common assumption that there can be no liability to pay compensation for harming a person in a way to which he was liable.)

Assuming this is right, it may provide an explanation of the relevance of numbers to proportionality,<sub>n</sub> in cases involving minimally responsible threateners. Even if each minimally responsible threatener would be liable to be killed on his own, each killing would leave a moral 'remainder', based on the fact that it would have been more just to divide the burden had that been

possible. These remainders add up so that, given sufficient numbers, they may eventually outweigh the defender's claim to priority. This would not be the case, however, were the threateners fully culpable, for in that case the initial distribution of the entire harm to each culpable threatener is ideally just, and there is thus no remainder.

Whether or not this is the correct explanation of the relevance of numbers to proportionality<sub>n</sub> in defence against minimally responsible threateners, it is intuitively clear that the numbers *are* relevant. Assuming further that most unjust civilians make a significantly lesser causal contribution to threats of wrongful harm faced by combatants and civilians on the just side, so that killing them is much less effective in defensive terms than killing unjust combatants, and assuming that unjust civilians also bear a lesser degree of responsibility for the threats posed by unjust combatants than those combatants themselves do, it is clear that what I have called the comparative dimension of liability has far greater application in the case of unjust combatants than in the case of unjust civilians.

#### 4. *The epistemic dimension*

Suppose that, in most wars, most unjust combatants are morally liable to attack. The Responsibility Account recognizes that there will nevertheless be some who are not. Some may pose no threat, while some others who do pose a threat may not satisfy the subjective conditions of responsibility that are necessary for liability. There might be little problem if just combatants could distinguish those who are liable from those who are not. But they seldom can. Yet they may have reliable general knowledge of what proportion of the unjust combatants are liable. Suppose that, in a certain war, roughly 95% of the unjust combatants are liable and the just combatants reasonably believe this. This may be sufficient to make it permissible in what Parfit calls the evidence-relative sense for a just combatant to kill a person about whom he has no knowledge other than that he is an unjust combatant (Parfit 2011: 150-64). But suppose that this person is in fact unthreatening, and thus not liable. In *Killing in War*, I argued that the Responsibility Account implies that when a person attacks a non-liable victim and is not justified in the fact-relative sense, he may thereby make himself liable to defensive counter-attack, even if he *reasonably* believes that his victim is liable. The initial attacker may be liable, in other words, even if his action is justified in the evidence-relative sense. This implies that a just combatant who attacks an unjust combatant in the reasonable but mistaken belief that the unjust combatant poses a threat thereby makes himself liable to counterattack by the unjust combatant or third parties. I think, however, that this is false. The Responsibility Account requires revision.

A non-threatening unjust combatant is nevertheless an *apparent* threatener. And he is responsible for *appearing* to pose a threat of wrongful harm, for

he has chosen to be present in a war zone with the visible markers of a person *committed* to attacking enemy combatants. He is therefore responsible for making it reasonable for the just combatant to believe that, unless he attacks the unjust combatant first, the unjust combatant will threaten the lives of innocent people.

At least in some cases, when a person bears full responsibility for appearing to pose a threat of wrongful harm, the apparent victim does not make himself liable to counterattack by attacking in apparent self-defence. Suppose that a practical joker pretends that he is about to kill someone and the appearance he creates is indistinguishable by the victim from actually being threatened with murder. If the victim of the joke is unexpectedly armed and is about to kill the joker in apparent self-defence, it does not seem that he thereby makes himself liable to be killed, either by the joker or by a third party. Suppose a third party who knows all the facts is present but can intervene *only* by killing the apparent victim in defence of the apparent threatener. I think he must not kill the apparent victim. In these conditions, it is unavoidable that either the apparent threatener or the apparent victim will be killed. Although both parties bear some responsibility for this fact, the apparent threatener's share of the responsibility is significantly greater. If other things are equal, he rather than the apparent victim ought to suffer the harm that is now both unavoidable and indivisible. He seems to have forfeited the right he might otherwise have had to be defended by the third party.<sup>3</sup> A similar claim applies to defence against just combatants by initially unthreatening unjust combatants.

Lazar cites but rejects a second response to the problem of unthreatening or non-responsible unjust combatants suggested to him by Fabre and Frowe: 'they draw fire away from their more effective comrades' (Lazar 2010: 191). This is an important point. By appearing to pose a threat and thus functioning, whether intentionally or unintentionally, as decoys that force just combatants to disperse their fire unnecessarily, unthreatening unjust combatants increase the threat posed by other unjust combatants, thus making a significant causal contribution to their side's threat of wrongful harm. They may in this way straightforwardly satisfy the Responsibility Account's criterion of liability.

Traditional just war theory asserts that the constraint against intentionally killing innocent people as a means is significantly stronger than the constraint against foreseeably but unintentionally killing innocent people as a side effect. Killings of the first sort violate the requirement of discrimination,

3 One might argue that a *culpable* apparent threatener may be liable to be killed. In an earlier essay, I argued that it is intuitively plausible to suppose that a person making an unsuccessful attempt to kill an innocent person may be liable to attack despite posing no actual threat. That claim might be extended to cover the joker as well. If the joker were wounded rather than killed in apparent self-defence, it does not seem that he would have a justified complaint. See (McMahan 2005: 751–74).

while those that violate the second are a matter of proportionality<sub>w</sub>. Suppose the traditional theory is right about the relevance of intention. The difficulty of distinguishing between liable and non-liable unjust combatants then constitutes a serious challenge to the Responsibility Account if the killing of unjust combatants who merely *appear* to be threatening, and therefore liable, counts as the intentional killing of the innocent, in the sense relevant to the requirement of discrimination. If, however, the killing of non-liable unjust combatants is a foreseeable but unintended effect of the effort to kill those who are liable, it is merely part of the larger problem of ‘collateral damage’. Such killing may be proportionate<sub>w</sub> if, as I have argued, the proportion of unjust combatants who are liable is high.

It may seem obvious that when a just combatant kills a non-liable unjust combatant, he intends to kill an innocent person; for he intends to kill this person, who is innocent. But the issue is subtler than this. To understand how, consider some examples involving innocent civilians rather than non-liable unjust combatants.

- (1) Suppose a pilot in a just war sees roughly 100 people concentrated in an open area. He sees that one is clearly a civilian but that the others are uniformed unjust combatants. The latter are on a mission vital to the success of their unjust cause and will not surrender. The pilot’s only weapon is a bomb. If he drops it, it will kill all 100. Most people agree that if he drops it, he need not intend to kill the civilian. This is a typical example of proportionate<sub>w</sub> ‘collateral damage’. This could in principle be true even if the numbers were reversed. If a single unjust combatant would otherwise succeed in achieving his side’s unjust cause, it would be proportionate<sub>w</sub> for the pilot to bomb him even if he were surrounded by 99 people identifiable as civilians. The difference in numbers need not affect the pilot’s intention. The killing of the 99 innocent civilians would be a proportionate<sub>w</sub> side effect of avoiding defeat in a just war.
- (2) Next suppose that, in the original case in which the pilot sees 99 unjust combatants and one civilian, he circles back to drop his bomb, only to discover that the combatants have put a uniform on the civilian, so that he cannot be distinguished from them. This need not affect the pilot’s intention. He can still drop his bomb without intending to kill the civilian, even though he cannot identify him. And, as before, this could be true even if the numbers were reversed.
- (3) Finally, suppose again that it is known that of the 100 people below, one is a civilian who has been forced to wear a uniform and thus cannot be identified. But the just combatants are a helicopter crew who have no bomb but only a gun that fires bullets. They kill all 100, one by one. They know that one of their shots will kill an

innocent person. But they do not necessarily violate the constraint against intentionally killing an innocent person. Again the same could be true even if the numbers were reversed.

In case 1, the pilot can *distinguish* the civilian from the combatants but cannot *discriminate* between them in his attack. The reason he cannot discriminate is physical: they are close together and he has only a large bomb. In case 2, he can neither distinguish nor discriminate between them. There are both epistemic and physical obstacles that overdetermine his inability to discriminate. I have suggested that if, as most believe, the pilot need not intend to kill the civilian in 1, he need not do so in 2 either. The difference between 2 and 3 is that in 3 the basis of the crew's inability to discriminate is epistemic only, rather than both physical and epistemic. This difference does not necessitate a difference in intention.

In 2, but even more clearly in 3, the agents intend to kill *each* of the 100. One might contend that the agents intend to kill each as a *means* of killing all the combatants, and therefore that the killing of the civilian is intended as a means of killing the combatants. But this is not so. What one intends as a means is what one believes is causally necessary, under the most perspicuous description, for achieving one's end. In these cases, the just combatants do not believe that killing the civilian is causally necessary for killing the combatants. They do not need the civilian to be present in order to kill the combatants, as they would if killing him were a causally necessary means. But neither is it necessary for the achievement of their end that the civilian *not* be present (as it might be if their aim were to preserve themselves from a threat he posed). In all three cases, the civilian's presence is wholly incidental to the just combatants' purpose.

It is true, though, that when the crew member aims the gun at the civilian and pulls the trigger, he intends to kill him. How could it be that he does not violate the constraint against intentionally killing an innocent person? It is not a sufficient explanation to say that he does not violate the constraint because he *believes* his target is liable. A terrorist may believe that the Israeli child he kills is liable, or non-innocent, by virtue of being an Israeli Jew. He nevertheless violates the constraint against intentionally killing the innocent. The difference between the terrorist and the crew member who kills the civilian is that they make different types of mistake. The terrorist makes an unreasonable mistake about *moral status*: he believes that he is killing a liable person but knows he is killing a child. The crew member makes a reasonable mistake about *identity*. He knows he is killing a person but reasonably believes this person is a unjust combatant. These differences explain why the terrorist violates the constraint while the crew member does not.

All the claims I have made about killing civilians who are mingled with unjust combatants apply equally to the killing of non-liable unjust combatants mingled with ones who are liable.

For the reasons I have given – that unjust combatants who are unthreatening are responsible for appearing to pose a threat, that their presence diminishes the effectiveness of military action by just combatants, that killing them is a matter of proportionality<sub>w</sub> rather than discrimination, and that the proportion of unjust combatants who are not liable is low – it seems that the general inability of just combatants to distinguish between liable and non-liable unjust combatants is a comparatively minor problem.<sup>4</sup>

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