

# Killing Soldiers

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A riddle in the ethics of war concerns whether lethal defensive force may be justifiably used against aggressing soldiers who are morally innocent. In this essay I argue that although there might be reasons for excusing soldiers as individuals, one may be justified in using defensive force against them provided that they have initiated threatening behavior and that our interpretation of that behavior as threatening is reasonable. I go on to investigate various implications of being in conflict with aggressing soldiers who are morally innocent, arguing that different restrictions apply to the use of defensive force when the aggressors cannot be held morally responsible for being aggressors.

My argument has important practical implications both for deciding whether to go to war and for deciding how to fight a just defensive war. Concerning the ongoing Iraq war, for example, it suggests that if it were only a matter of killing culpable members of the Republican Guard, invasion could perhaps have been justified. Since any attack would involve killing innocent conscripted soldiers as well as innocent civilians, however, there were good reasons to wait to see whether options other than intervening militarily would become available. If we are engaged in a just defensive war, my argument implies that we must accept a higher level of risk and more harm if we can assume that the aggressors are innocent rather than morally responsible for their harmful or threatening behavior.

## *Preliminaries*

The just war tradition is peculiar in that while its proponents think morality applies to war, they insist that soldiers from each side of a conflict may be justified in killing soldiers from the other side.<sup>1</sup> According to Michael Walzer, a

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<sup>1</sup> A recent example was presented by Michael Walzer in *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 3rd ed. (New York: Basic Books, 2000). According to Walzer, the “first principle of the war convention is that, once war has begun, soldiers are subject to attack at any time (unless they are wounded or captured)” (p. 138). This represents the standard view of the modern just war tradition, and it corresponds well with current international law.

central principle of war is that soldiers have an equal right to kill.<sup>2</sup> In becoming a soldier, one gains the right to kill other soldiers but loses one's immunity against being killed by soldiers of the opposing side.<sup>3</sup> That soldiers defending themselves and their state against unjust aggressors may permissibly have recourse to defensive force is not peculiar; the peculiarity is that, even when just war theory distinguishes between just and unjust sides in a war, it still grants equal rights to kill and liabilities to be killed to each individual soldier, regardless of which side he or she is on.

The implication of granting soldiers an equal right to kill is not immediately clear, however. It could be taken to mean either (or both) that they have a *claim against others* that they not be prevented from killing, or that they have a *privilege to kill*—that is, they have no duty not to fight with lethal means.<sup>4</sup> If we say that having a right to do X implies that others must not prevent the doing of X, it would imply that a soldier who is attempting to kill enemy soldiers has a claim against others, including those enemy soldiers, that he or she not be prevented from attempting this killing. But this implication is not very promising. We cannot seriously conceive of soldiers on opposing sides of a war as having parallel claims against each other that they each refrain from preventing the others' attempts to kill them.

Walzer may have had in mind the other element of having a right—namely, that by saying someone has a right to do X, it implies that the person has no duty not to do X. Saying that soldiers fighting an unjust war have a right to kill enemy soldiers could then be taken to mean that soldiers on the unjust side have no duty not to fight the unjust war and kill enemy soldiers. This may seem puzzling as well. It would imply that soldiers fighting for an unjust side have no duty not to kill other soldiers who justly defend themselves against the former's unjust aggression. Consider, as proposed by Jeff McMahan, an unjust combatant who knows that his country's aggressive war is unjust but who decides nonetheless to

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<sup>2</sup> Walzer, *Just and Unjust Wars*, p. 41. According to Walzer there is no license for war-makers, yet he maintains that "there is a license for soldiers, and they hold it without regard to which side they are on; it is their first and foremost war-right" (p. 36).

<sup>3</sup> This accords with what Jeff McMahan has labeled the "Orthodox View" in "Innocence, Self-Defense, and Killing in War," *Journal of Political Philosophy* 2, no. 3 (1994), p. 195.

<sup>4</sup> For the view that rights are claims against others, see Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), p. 188, who argues that "most cases when we say that someone has a 'right' to do something, we imply that it would be wrong to interfere with his doing it, or at least that some special grounds are needed for justifying any interference." For a treatment of rights as claims and privileges, see Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, Walter Wheeler Cook, ed. (New Haven: Yale University Press, 1966), pp. 35–50.

participate, perhaps because he prefers the risks of combat to the obloquy suffered by peaceniks in his society. Is it really plausible to suppose that he does no wrong in attacking and killing morally innocent victims of his country's aggression? Is it plausible to suppose that, by justifiably taking up arms to defend themselves and their compatriots against this unjust aggression, these victims thereby lose their moral immunity, making it justifiable for the unjust combatant to kill them?<sup>5</sup>

One way to imagine how such equal privileges to kill could be generated would be to regard soldiers as good sports. All participants could have agreed upon certain rules, of which killing the enemy was one of their tenets. In such cases, participants could have no duty not to kill enemies, although they would have no claim against others (at least not other participants) that these others not prevent them from doing so. Such an activity could well be permissible for informed, noncoerced adults, and perhaps knights in the medieval era could qualify as examples, but to say that modern warfare is anything like this is less than plausible. I maintain, therefore, as has been proposed by some philosophers in recent years, that soldiers who fight on the unjust side in a war have no right to do so and no right to kill enemy soldiers.<sup>6</sup>

One immediate objection to this view might be that if we do not grant soldiers an equal right to kill, "war as a rule-governed activity would disappear and be replaced by crime and punishment."<sup>7</sup> But that is not true. We can distinguish between those who can be excused for fighting an unjust war and those who cannot. If it makes sense to assume that some soldiers who fight on an unjust side have an excuse for being in battle, then it makes sense to treat those unjust combatants differently from ordinary criminals. We can therefore support the view that such soldiers should not be punished but rather should be held as prisoners of war, at arm's length from the battlefield, and should be set free when peace returns. Soldiers who take part in unjust aggression and who know what they are doing, or perhaps ought to have known, however, may be treated as criminals. No principled reason explains why such soldiers should not be so treated. Of course, to punish a large percentage of a country's young

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<sup>5</sup> McMahan, "Innocence, Self-Defense, and Killing in War," p. 198.

<sup>6</sup> See, for example, McMahan, "Innocence, Self-Defense, and Killing in War"; Jeff McMahan, "The Ethics of Killing in War," *Ethics* 114, no. 4 (2004); Richard Norman, *Ethics, Killing and War* (Cambridge: Cambridge University Press, 1995); and David R. Mapel, "Innocent Attackers and Rights of Self-Defense," *Ethics & International Affairs* 18, no. 1 (2004).

<sup>7</sup> Walzer, *Just and Unjust Wars*, p. 41.

population may have severe and unwelcome consequences, and to run trials of this scale could be rather cumbersome, to put it mildly.<sup>8</sup> But those, and other, practical consequences aside, soldiers culpably engaged in impermissible actions may in principle be treated accordingly.<sup>9</sup>

Throughout this essay I discuss using force to prevent invading armies on grounds of self-defense and defense of others, and I take national defense to be reducible to individuals' rights to use defensive force. This view has been challenged recently. David Rodin proposes the following *reductio* argument: If national defense were reducible to personal self-defense, "it would be presumptively legitimate to form private armies to fight private defensive wars."<sup>10</sup> The answer is, of course, that it is legitimate. If there is no army individuals can join, or if fighting in private armies is the best strategy to fend off an aggressor, then people may form private armies to fight private defensive wars against unjust invaders.<sup>11</sup>

To support the view that national self-defense can be explained by individuals' rights to self- and other-defense, McMahan asks us to imagine cases in which increasing numbers of people act with increasing coordination to defend both themselves and each other against a common threat. As the threats become more complex and extensive, the threatened individuals more numerous, and their defensive action more integrated, we eventually reach a scale of violence that is constitutive of war. He then claims that "if war, at least in some instances, lies on a continuum with individual self- and other-defense, and if acts of self- and other-defense can sometimes be morally justified, then war can in principle be morally justified as well."<sup>12</sup> I believe this is perfectly correct, and I shall offer no further comment on it.

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<sup>8</sup> One could, perhaps, remedy some of these unwelcome consequences by punishing only a low percentage of the culpable unjust soldiers by using a random selection mechanism.

<sup>9</sup> It may pay to observe that although the soldiers in question might be innocent enough to escape punishment, they might very well be responsible enough in the sense that they ought to take the brunt of the unfortunate situation they have created. Excuses may have different purposes.

<sup>10</sup> David Rodin, "Beyond National Defense," *Ethics & International Affairs* 18, no. 1 (2004), p. 95.

<sup>11</sup> The right to resort to armed force in the just war tradition has been defined through seven moral concepts: just cause, competent authority, right intention, reasonable hope of success, overall proportionality of good over harm, last resort, and the goal of peace (see James Turner Johnson, *Morality and Contemporary Warfare* [New Haven: Yale University Press, 1999], pp. 27–38). The observation that people can form private armies indicates that the requirement of right authority should be given up. The focus on right intention on the part of the agent is misleading as well, but is not something I take up in discussion here.

<sup>12</sup> Jeff McMahan, "War as Self-Defense," *Ethics & International Affairs* 18, no. 1 (2004), p. 75.

## KILLING INNOCENT AGGRESSORS

Just war theorists are at odds about killing innocent soldiers. McMahan has rejected much of the just war tradition, and has given convincing arguments for why we should do so, but he has doubts about finding a justification for killing innocent aggressors.<sup>13</sup> David R. Mapel, on the other hand, believes there is a moral right to kill innocent attackers in individual and national self-defense when they fight an unjust war.<sup>14</sup> He labels his preferred justification “Anscombe’s objectively unjust danger justification” of self-defense.<sup>15</sup> This theory states that whenever someone attacks someone else without an objective justification for doing so, defensive force is justified. My proposal is a variant of the unjust aggressor theory. But in place of merely stating that certain actions are objectively unjust, I describe the particular acts that would qualify as such—initially threatening behaviors—and explain the moral significance of this feature on contractual grounds.<sup>16</sup>

In what follows, I discuss the criteria for deciding when aggressors are innocent and what the appropriate rules for deciding when innocents may kill other innocents should be. Although the question of conditional threats—those that might result in minor negative consequences if the threat is obeyed—is an interesting one, I cannot discuss it here.

### *Innocence*

We never really know whether enemy soldiers are morally at fault for being unjust aggressors, though there may be good reasons for suspecting that they are indeed innocent—or at least partly so. To start, soldiers tend to be young and lacking in higher education, and their state’s ultimate reasons for going to war may be concealed from them.<sup>17</sup> These facts seem insufficient, however. We do not, in general, excuse such people when they perform impermissible actions outside the context of war. Imagine that John and Bill come from the same neighborhood. John joins the army and ends up killing enemies in an unjust war. Bill stays home and kills a shopkeeper who attempts to stop Bill from making off

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<sup>13</sup> See Jeff McMahan, “Self-Defense and the Problem of the Innocent Attacker,” *Ethics* 104 (1994), p. 288.

<sup>14</sup> Mapel, “Innocent Attackers and Rights of Self-Defense,” p. 81.

<sup>15</sup> *Ibid.*, p. 83.

<sup>16</sup> For an earlier account of this proposal, see my “Self-Defense Among Innocent People,” *Journal of Moral Philosophy* 2, no. 2 (2005).

<sup>17</sup> See Walzer, *Just and Unjust Wars*, p. 127.

with the day's cash balance. We would be more inclined to grant John an excuse than Bill for their respective killings of people who justly defend themselves. One reason is that John has had prominent authorities telling him that what he is doing is the right thing. Not so with Bill. We think that Bill has had an ample supply of information telling him that shoplifting is not a permissible activity and that killing shop owners is a rather bad thing to do. Clearly, there is something special about fighting in war that separates this activity from other potentially impermissible activities.

In addition to being young, uneducated, and swayed by their superiors and public authorities, soldiers fight out of loyalty to their country and out of lawful subservience to it.<sup>18</sup> In certain situations they may be fighting under duress.<sup>19</sup> The latter is particularly likely for conscripted soldiers who fight for a tyrannical regime, as was the case for many soldiers in the two latest Iraqi wars. Of course, one could maintain that no unjust combatant is ever fully innocent; every combatant on an unjust side can probably be faulted in some way. After all, going to war is a serious matter, and we should expect those who choose to fight in a particular war to take every possible measure to determine the justice of its cause. Notwithstanding this, I contend that at least some of the soldiers fighting an unjust war might at least sometimes be morally excused for their activities.<sup>20</sup>

A variant of this position would be to say that although we might not be convinced that soldiers are completely innocent for being unjust aggressors, there might be reasons for saying that the soldiers on both sides are equally blameworthy. Soldiers often fail to take steps to ensure that they take part only in just wars. It may therefore simply be a matter of luck, unrelated to the quality of their moral characters, that some soldiers end up fighting on the unjust side and others on the just side of wars. Thus, even if soldiers should not be fully excused for being unjust aggressors, one can recognize that they are no more to blame than those with whom they fight.

If soldiers are morally responsible for the unjust threats they pose, or more so than the defending party, there is no problem justifying the use of defensive force against them. It is widely accepted that it is permissible to use defensive

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<sup>18</sup> Ibid.

<sup>19</sup> Be aware that no situation of duress generates a right to wrong by the person exposed to it. Although A threatens to kill B or his children unless B kills C, B has not thereby obtained a right to kill C, and C clearly has a right to defend herself.

<sup>20</sup> For a similar view, see Mapel, "Innocent Attackers and Rights of Self-Defense," p. 83. For an opposite view, see David Rodin, *War and Self-Defense* (Oxford: Oxford University Press, 2002), pp. 88–99.

force against culpable aggressors. As I argue above, however, soldiers at war for an unjust cause may be excused for being loyal to their own government, and, being so excused, should not be blamed for failing to put down their weapons. This proposal appears to generate an impasse. By excusing soldiers on the unjustified side, we invoke their innocence. And since moral innocence is significant for a variety of moral assessments, one must ask whether a defending party would be morally justified in killing innocent soldiers who take part in unjust aggression.

Such a line of questioning could start with the claim that any person has a right not to be killed, and that one cannot lose this right as a result of accidental events in the world. According to David Rodin, “to take the language of rights seriously, is to be committed to the idea that a person’s right may be infringed or forfeited only on the basis of something that the person is or does as a moral subject.”<sup>21</sup> I don’t believe we should take the language of rights that seriously. Though rights may be altered by culpable acts committed by rights holders, they may also be altered by nonresponsible acts and events in the world. If you kick my shin in order to satisfy the whims of a villain who is threatening to kill you unless you kick me, it is not the case that I have violated any of your rights up-front—that is, I have not acted as a moral subject in a way that would result in waiving my own rights. It seems, nevertheless, that you would be justified in kicking me. And even though I, under normal circumstances, have a right not to have my shin kicked by anyone, I may lose this right if people around me are put in jeopardy unless I am kicked. Perhaps you would say that this is true for trivial rights, but not about the right of not being killed. But, then, what should we say about steering a runaway trolley toward one person on a side track in order to save five other people standing in our way? Although most people would find such acts permissible, the sacrificed person has not violated anyone’s rights. Our conception of rights should not be so strong as to prevent accidental events outside the control of the moral subject from sometimes invalidating those rights. We can therefore not simply claim that innocent aggressors—soldiers, for instance—never can be killed as a function of their innocence.

The general question is what to say when unfortunate circumstances bring about a situation in which it appears that if one innocent person does not kill another innocent person, then the latter will kill the former. Such situations can

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<sup>21</sup> Rodin, *War and Self-Defense*, p. 88.

occur when one who appears to be an aggressor is not in fact an aggressor at all (the case of an *apparent aggressor*)—for instance, someone waving a gun toward you in a theater play that you do not know is a play; or when circumstances outside a person’s control have made her into a threat to another person (the case of an *innocent threat*)—for instance, someone blown by the wind against you; or when a person has good, but ultimately mistaken, reasons to believe there is a justifying cause for aggression (the case of an *innocent aggressor*)—for instance, someone who has been manipulated to believe that killing you is justified.<sup>22</sup>

The typical innocent aggressor acts on reasonable grounds, and should therefore not be held morally responsible for the aggression, although the reasons are based on a misinterpretation. An innocent threat, on the other hand, is a person who is causally involved in a threat of harm to another person, though not through his or her own agency. Ultimately, I believe things that merely happen to a person may justify another person’s use of defensive force if what happens puts the second person in danger. Such instances are rare, however, and with regard to warfare, it is the actions of some that put others in jeopardy.<sup>23</sup> The question of apparent aggressors may on occasion be relevant to our topic. It is not always clear whether or not soldiers constitute a real threat or only an apparent one. In such cases I shall argue that if it is reasonable to interpret one party as threatening, this may justify the use of defensive force against them provided they stand for the initiating behavior.

### *Initiating Behavior*

If the aggressing soldiers in fact are morally innocent, we have two innocent parties confronting each other with lethal means. How, then, should we decide who is justified in using lethal force? I begin by considering situations in which there are an equal number of people on both sides. My proposal is that in such

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<sup>22</sup> People lacking the required mental capacity to evaluate their actions can be regarded as innocent aggressors or threats, depending on their level of incapacity.

<sup>23</sup> As for innocent threats, there might be reasons for singling out innocent threats who ultimately have become threats through responsible actions—for instance, by taking up driving and thereby taking the risk of becoming a threat to others if one’s brakes fail, and those who have done nothing to become a threat to others (see Jeff McMahan, “The Ethics of Killing in War,” and “The Basis of Moral Liability to Defensive Killing,” *Philosophical Issues* 15 [2005]). To support this view, imagine that you can survive by killing either of two people. One is an innocent threat hurtling toward you in his car; the other is an innocent threat being thrown against you. In this case, one better kill the person in the car. Imagine next, however, that one is an innocent aggressor who falsely but reasonably believes that he must kill you in order to save others; the other is again an innocent threat being thrown against you. In this case, McMahan’s view seems to propose that you better kill the innocent aggressor. That seems wrong. There should be no reason for you to choose to kill the one rather than the other; deciding by a coin toss could be appropriate.

conflicts we should *give preference to the party who has not initiated the lethal conflict*. In order to be justified in using defensive force, the defender must respond to the behavior of the apparent aggressor, or steps or circumstances caused by him.

One problem in assigning justification to the party who responds to initiating behavior is that a response might be disproportionate or triggered by a variety of irrelevant factors. Should I, for example, regard your hand absentmindedly tapping on the desk as an attempt to blow up the building, my reaction would not be deemed justified if I tried to thwart your tapping with all my force. And this is true despite my responding to something you are doing—namely, tapping the desk. A standard of reasonableness must therefore be required. In order for one person to be justified in using defensive force, the other party would have to initiate the apparently threatening behavior, but the defender's interpretation of that behavior, as being threatening, must be reasonable.

The reason why the response must be reasonable is that we need to know that it was the apparent aggressor who caused the situation to escalate in the first place, and not particular beliefs on the part of the defender. It must make sense to say that what initially set the wheels of escalation in motion can be traced back to one of the two parties. When that is possible, we can determine which of the two should be deemed justified in using defensive force—namely, the one who responds to an initiating action. The qualification of reasonableness applies particularly to situations with apparent aggressors. That said, in complex situations, such as conflicts between states, distinguishing between apparent and real aggressors may be difficult.

The proposal is nevertheless that whenever it makes sense to say that one party's action is a *response* to the actions of another party, the first party, who initiated the conflict, will have to be sacrificed if it comes to a question of saving one of two innocent parties. Be aware, however, that although one party is identified as being justified in resorting to defensive force, it only implies that whenever we face a decision to impose a particular harm on one person or *comparable harm* on another to prevent the death of both, we have to impose harm on the initiator. In the second part of the essay I propose that the defending party may be required to endure higher risk and more harm to its own troops in order to reduce casualties among the aggressing soldiers when these are innocent.

In war, the initiating party will be the unjustified side unless their "initiating actions" are justified by some previous threatening behavior by the other party,

who would then be the initiator. I focus for the most part on initiating behavior in terms of waging war against a defending party, but initiating behavior could also involve human rights violations perpetrated by a government on its own population, or an invasion of a weaker state by a stronger one, in which others offer assistance. In such a case, although the intervening party has not been threatened, someone else has. The essential point is that the initiating behavior must threaten some important value or be reasonably interpreted as constituting such a threat.

Regarding the ongoing Iraq war, there are two ways to view Iraq as the initiator of the conflict. First, there was a concern about Iraq's pursuit of weapons of mass destruction. This type of concern could have amounted to a justification of a preventive strike in self-defense or defense of others. Second, there was the question of a tyrannical regime massively violating its population's human rights, which could have amounted to a case for humanitarian intervention. In both cases one would have identified the initiating behavior with the Iraqi government, and if either of them were true, *proportional* intervention could have been justified.

It may pay to observe that the justification for harming innocent people in the process could be very different in the two cases. In the former case, one would be exposing some people—namely, the Iraqi people—to risk in order to save others—namely, those threatened by the weapons of mass destruction. In the latter case, those one would expose to risk—namely, the Iraqi people—would be identical with those one would assist. If people have reason to see their country's government overturned, and if doing so means putting these very people's lives at risk, it could be permissible on contractual grounds, as it would be in their interest that it was done.

### *The Moral Significance of Initiating Behavior*

Having proposed that in situations of conflict between innocent people we should give priority to the defending party at the cost of the initiating party, my aim at this point is to explain the moral significance of initiating behavior on contractualist grounds. In what follows, I shall indicate why contracting participants have reasons for selecting a rule that permits the killing of innocent aggressors in self-defense.

Assuming that it is permissible to kill the culpable to save the innocent, only innocent people need to participate in the contractual position. I shall therefore investigate the reasons innocent people have for accepting a decision procedure

that gives priority to the defending party. Clearly, their reasons would depend on their interests. It is plausible to assume, though, that a main interest of the contracting parties would be to reduce their risk of dying. Reasons for accepting rules for regulating actions of self- and other-defense would therefore be to avoid deaths of the innocent while expending the lives of the culpable.

The contracting parties can choose between the following alternatives: First, it is permissible for the initiating party to kill the defending party; second, it is permissible for the defending party to kill the initiating party; and third, it is equally permissible for each party to kill the other. Granted that third parties would have to intervene on the side of the one that is permitted to kill the other, the first alternative implies that third parties would be obliged to intervene on the side of the defending party in situations of equal harm; the second implies that third parties would have to save the initiating party; and the third implies that third parties would have to use a randomizer, such as a coin toss, in order to decide to whom to give priority.<sup>24</sup>

In determining which alternative the contracting parties would choose, we can first observe that being an initiator will often serve as a proxy for culpability. And, since being an initiator is a discernible external feature, as opposed to moral culpability, sacrificing the initiator is likely to save more innocent people in the long run as we are less likely to get it wrong. This implies that there is a presumption in favor of having a rule that gives priority to the defending party since such a rule will give the (innocent) contracting parties a higher chance of survival.

Second, it is difficult for people under attack to know whether aggressors are innocent. This is notoriously true of aggressing soldiers: outsiders never really know whether they should be regarded as innocent or not. A rule that gives priority to those who respond to initiating behavior will, therefore, enable people to avoid giving up their lives on wrong occasions. Wrong occasions are instances in which the defender erroneously believes the aggressors are innocent and therefore fails to defend himself. If we were to choose a rule exclusively permitting self-defense in cases in which the aggressors were known to be fully innocent, there would be instances in which innocent people were killed while the culpable got off scot-free. To avoid such developments, it is wise to adopt a rule permitting

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<sup>24</sup> By saying that we should give priority to the defending party when there is a question of equal harm, I take it to mean that it is permissible to use (proportional) defensive force against the initiator; that if the defending party acts for the right reason he or she is justified in doing so; and that third parties would have to intervene on the side of the defending party.

defendants to use defensive force against initiators. People therefore have a good reason to allow a rule permitting self-defense against initiators inasmuch as compliance to the rule would not cause innocent deaths while saving the culpable. On the contrary, it would sometimes save the innocent at the cost of the culpable.

One might object that we need not worry about innocent people allowing themselves to be killed by mistaking culpable aggressors for innocent aggressors, as it is unlikely that people would actually refrain from killing in self-defense for this reason. The worry is, therefore, not a genuine practical concern. But observe that one reason why innocent people never refrain from using defensive force against innocent aggressors is that they—correctly—believe that it is morally permissible to do so. Hence, this practical concern would only arise if it in fact were not permissible. Moreover, it would in fact constitute a practical concern with regard to coordination of third-party intervention. As third parties might lack the time and ability to coordinate their intervention, they need a simple rule to follow when determining on which side to intervene. Being an initiator is a discernible external feature that could be used for this purpose.

From time to time the defending party might misperceive genuinely innocent aggressors as being culpable aggressors. But according to my proposal, misperceiving innocent aggressors as culpable is a limited problem, as it implies giving priority to those who defend themselves against initiators anyway. It would only fail to direct the defenders to accept a higher risk and more harm in order to avoid killing the aggressors. Such misperceptions would therefore be a more serious problem for a view that required defenders not to defend themselves at all against genuinely innocent aggressors.

We might observe an incentive argument as well. Adopting a rule that it is the initiating person who eventually has to carry the cost of an escalating situation is a good way to minimize the likelihood of such situations arising in the first place, since people would do their utmost to avoid becoming initiators. This incentive seems appropriate for soldiers engaging in war. A rule giving priority to the party who is not to blame for escalating the situation would provide soldiers with an incentive to avoid becoming unjust aggressors.<sup>25</sup>

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<sup>25</sup> This third goal could admittedly be achieved by taking an expansive conception of responsibility—for example, by saying that those who initiate a threat are not fully innocent unless they have taken every reasonable precaution against becoming initiators, and saying further that only fully innocent initiators are without liability. This would give people the same incentive to take all reasonable precautions not to become initiators, and would treat only those who have done so as innocent. I owe this observation to Jeff McMahan.

Now, to decide who lives and dies on the basis of initiating behavior could seem arbitrary, like deciding by flipping a coin. If both sides are innocent, it follows that the person or people who engaged in the initiating behavior are not responsible for it. So this proposal seems to make them liable by virtue of factors for which they are not responsible. And that is the point. In situations in which none of the parties is morally responsible for the escalation, there are contractual grounds for having a rule of shifting the burden to the one who can be said to have initiated the danger. And if no one can be said to be the initiating party, no one is justified in killing the other. In such cases, we better toss a coin in order to decide whom to save if the alternative is to let the two parties kill each other.

So far I have indicated reasons for selecting a rule that gives priority to the defending party. The argument has traded on the epistemic uncertainty of knowing which party should be deemed (more) innocent. On some occasions there might be no uncertainty. And although initiating behavior often is correlated with culpability, there could be instances in which we know that that is not the case. Why should we put any significance on initiating behavior in such cases? Ultimately, the only viable alternative to giving priority to the defending party is to give priority to no one. In a forced choice between saving either the aggressor or the defendant, one would have to toss a coin. The basic reason against this procedure from the perspective of the contracting parties is that there is nothing to gain by it, and, given the plausible assumption of epistemic uncertainty, a lot to lose by it. There is therefore no good reason for a second randomizer on top of nature's.<sup>26</sup> Moreover, coordination between prospective interveners will be cumbersome if one has to use a randomized procedure.

## THE IMPLICATIONS OF INNOCENCE

Up to this point, I have defended the view that it is permissible to kill innocent aggressors in self-defense. One might therefore come to think that moral fault has no role to play when assessing this permissibility. Such a conclusion would be amiss, however. Claiming that it is permissible to use defensive force against innocent aggressing soldiers does not imply that their innocence never has implications for the amount of force it is permissible to use against them.

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<sup>26</sup> There could be, if some parties had such a high probability of ending up among the initiators that the contractual reasons alluded to would not suffice to give them reason to support a rule that gave priority to the defendant. That procedure is only in the interest of all participants if it increases the survival chance for all. If that were not the case, a second-best option for all participants would be a coin toss.

We can imagine different scenarios in which a lack of culpability on the part of the aggressors would be morally significant.<sup>27</sup> First of all, there might be a *culpable cause* behind the actions of innocent aggressors.<sup>28</sup> A culpable cause refers to culpable action in the past that is the cause of the current or a future threat. Granting that it is permissible to kill initiating innocent aggressors because it helps us reduce situations in which innocent people are killed, we might expect that whenever we have a choice between killing culpable causes and innocent aggressors we should opt to kill the former, provided that killing the cause will remove the threat as well. In war, the option of killing culpable causes in place of innocent soldiers might imply that we kill civilians. Civilians may have contributed to the threat soldiers represent to another party, and they are not immune simply because they do not carry arms when they send soldiers as their representatives.<sup>29</sup> I have argued this point elsewhere, and shall not consider it again here.<sup>30</sup>

### *Number*

The number of innocent aggressors will impinge upon the permissibility of using defensive force. If the number of aggressors is higher than the number of victims, or perhaps the ratio of innocent aggressors to victims exceeds a certain threshold, one may have to downplay the fact that they are aggressors and give priority to the higher number. Accordingly, although it is permissible to kill one innocent aggressor in self-defense, one might believe it to be wrong to kill three, ten, or one hundred innocent aggressors in self-defense.

The contractual argument could be restricted to situations of even numbers. Although the argument would favor giving innocent defending individuals priority against an equal number of innocent aggressors, it is not obvious that it would do so if the number of (innocent) aggressors were higher than the number of defenders. Remember that the reason for accepting rules for regulating actions of self- and other-defense is to reduce one's risk of dying as innocent. When there is a difference in number, the parties could have reason to favor giving priority to the greater number. For instance, if three people are picked up from the street and thrown against a fourth person, it is reasonable to assume complete

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<sup>27</sup> For a related discussion, see McMahan, "Self-Defense and the Problem of the Innocent Attacker," p. 281.

<sup>28</sup> I have the term "culpable cause" from McMahan, "Self-Defense and the Problem of the Innocent Attacker."

<sup>29</sup> We should also observe that some features that help excuse soldiers do not excuse civilians. Civilians do not, for example, tend to be young and uneducated, nor do they vote under duress.

<sup>30</sup> See Gerhard Øverland, "Killing Civilians," *European Journal of Philosophy* 13, no. 3 (2005).

innocence on both sides. The contractual argument here supports saving the greater number, because doing so increases the contracting parties' chances of survival.

Notwithstanding this, it is hard to give up the idea that it is permissible to kill more than one innocent aggressor in self-defense from time to time. Imagine you are being menaced by a group of three people. Fortunately, you happen to control an effective weapon. Before you are able to use it, however, you get a call informing you that the aggressors are in fact innocent and are being manipulated by a villain who wants to see you dead. Do you, on the basis of this new information, have an obligation to put down your weapon? Clearly, there is a good reason for you to do so; you would be saving three innocent lives. But if there are no other alternatives apart from being killed or killing the aggressors, should we then say—given the number of innocent aggressors—that you *ought* to let yourself be killed? Clearly, those who believe that it is impermissible to use defensive force against one innocent aggressor would say that it is also impermissible in the case of three aggressors, and that you therefore ought to put down your weapon. But it is not clear that those who agree with me about the permissibility of killing one innocent aggressor should think that a slight increase in number would be enough to render defensive force impermissible.

One proposal would be to say that though you do not have an obligation to put down your weapon, third parties would have to intervene on the side of the greater number. This would imply splitting the triadic terminology of permissibility, justification, and third-party intervention. I do not see why we should do so, even if we want to allow intervention to save the greater number, as we could say, instead, that you would be fully excused for not putting down your weapon. We could simply grant you a moral excuse for not doing what you ought to do, but nevertheless insist that what you really ought to do would be to side with the interveners, and let the greater number survive.<sup>31</sup>

The contractual argument could, however, support giving priority to the defenders even in cases in which there are slightly more aggressors than defenders. It is easy to judge wrongly with regard to innocence. And if, in fact, determining priority on the basis of slightly greater numbers would not save more innocent people than would be saved by giving priority to the defending party—because,

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<sup>31</sup> One might wonder why third parties should assist at all. Why not simply let sleeping dogs lie? Well, we might imagine that if they do not intervene all four will be killed.

perhaps, some of the aggressors are culpable—the contracting parties would have reason to support a rule that gave priority to the defending party when there are (minor) asymmetries in numbers. This holds true only if there are enough instances in which we would make a mistake when judging the innocence of the aggressors, and that such interventions on false premises would in fact save more culpable individuals at the cost of the innocent. It is obviously difficult to come to anything near a precise estimate about how this trade-off would turn out. I shall therefore simply assume that it is true for differences below a certain threshold, without trying to indicate the threshold.

But though the contracting parties could have reason to give priority to the defending party even against a slightly higher number of innocent aggressors, they would not have reason to do so when the difference reaches above the particular threshold. When the number of innocent aggressors exceeds this threshold, it is therefore impermissible to assist the defender. And, again, the threshold would be set by the interest of the contracting parties—namely, such that it gives them the highest possible chance of survival.

To take stock, there are contractual arguments for giving priority to the defending party when there is symmetry in numbers on the two sides. There might be reasons to extend it to slight asymmetries. This will then justify killing innocent aggressors in slightly asymmetrical situations. But when the difference in number becomes significant, there seem to be contractual reasons for giving priority to the greater number, as this would reduce the number of innocent deaths and thereby increase the participants' likelihood of survival.

### *Asymmetry of Harm*

When numbers are even, a person's being an initiator is a sufficient criterion for deciding that that particular person has to carry the cost, given a choice between imposing equal harm on either the initiator or the defendant. As it stands, however, this principle tells us nothing about choices involving *unequal* harm. When there is asymmetry of harm, the fact that the initiators are innocent must be taken into consideration.

George Fletcher claims that linking the culpability of the aggressor with the permissible degree of defensive force is to confuse the institutions of punishment and self-defense.<sup>32</sup> Roderick T. Long has similarly denied the assumption that

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<sup>32</sup> See George Fletcher, "The Individualization of Excusing Conditions," in Michael Louis Corrado, ed., *Justification and Excuse in the Criminal Law* (New York: Garland Publishing, 1994), p. 145.

wrong intentions influence the permissible use of force in a preventive act. According to him, “the presence or absence of responsibility on the part of the wrongdoer makes no difference to the degree of force that may legitimately be used in response to her.”<sup>33</sup>

In line with what we could call a “principle of symmetry,” a person’s intention for a particular wrongful deed does not impinge on the range of means it is permissible to use in order to prevent it. In accordance with this view, there is symmetry between the permissible harm we may impose upon innocent and culpable aggressors alike for preventive purposes. Long and Fletcher appear to defend such a principle. But in their discussions, the symmetry is only apparent because the range of permissible means to use against culpable and innocent aggressors who are about to kill an innocent person extends to the killing of the aggressor or the threat (as the principle of initiating behavior is meant to justify). If we reduce the wrongdoing, however, a difference emerges—in other words, an *asymmetry*. For instance, if a person intends to sever another person’s arm from the latter’s body without good reason, it would seem permissible to kill him to prevent that specific wrong from taking place provided that that would be the least intrusive means available. With innocent aggressors, the means it is permissible to use appear to become fewer.

Imagine the following example: Mary has good reasons to believe that in order to prevent Bill from killing Care, she has to cut off Bill’s arm. Unfortunately, this is not true. Bill is not about to kill anyone—it only appears to be so to Mary. Nevertheless, when Mary is about to separate the innocent person from his arm, she is herself innocent. In another situation, Tom just feels like cutting people’s arms off. With Pete in the vicinity, Tom is prompted to enact his desire. The only way to prevent Mary is to kill her, and the only way to prevent Tom is to kill him. It does appear permissible to prevent Tom by killing him, if that is the least intrusive means available. That it is permissible to prevent innocent Mary by killing her, however, is not at all obvious. The reason seems to be that the culpability of an agent impinges on the range of means it is permissible to use in preventing impermissible conduct.<sup>34</sup>

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<sup>33</sup> Roderick T. Long, “The Irrelevance of Responsibility,” in Ellen F. Paul, Fred D. Miller, and Jeffrey Paul, eds., *Responsibility* (Cambridge: Cambridge University Press, 1999), pp. 145, 125.

<sup>34</sup> It might, as well, look as if we have a reason to accept more harm to innocent third parties when attempting to prevent innocent aggressors without killing them, than when the aggressors are culpable.

Similar observations seem to be true about risk. Defenders may have to accept more risk in order to avoid killing an innocent aggressor compared to a culpable one. Situations where we are rightly apprised of the culpability of the aggressor, but where there is some probability that the threat will not materialize, can be illustrated with a story of Russian roulette. Here, varying the number of loaded chambers will alter the probability of the outcome. Suppose that we know someone is playing Russian roulette with a six-chambered gun, only one chamber of which is loaded. This gives a probability of one in six that the person at whose head the gun is pointed will be killed. Assume, moreover, that the player in this version of Russian roulette is aiming at a person who does not wish to participate. In that case, although there is only a probability of one in six that he will be killed, it appears it would be permissible to shoot and kill the person holding the gun if that was the least intrusive means to prevent him from pulling the trigger, assuming there is no justification for his actions. And this is true even though we know that five out of six times the gun holder will be killed in vain. Moreover, if the player of Russian roulette has constructed a device that gives his victim a probability of being killed one time out of one hundred, or one thousand, or perhaps more, it still seems to be permissible to use lethal force to prevent the wrongdoer from pulling the trigger—assuming again that the player has no good reason for imposing the risk on the target.

Things would look different should it turn out that the aggressor (the Russian roulette player) is innocent. Assume, for example, that a person is not playing Russian roulette because she has a passion for hazards, but because she has good reason for believing that she ought to pull the trigger. Assume that she has been manipulated to believe that doing so is necessary to save other people from being attacked by the person in front of her. Unbeknownst to the innocent aggressor, however, the gun she is operating has been fixed in a Russian roulette manner and will only fire a bullet with a certain probability (and cannot be used a second time). In this scenario, the defender would only be killed with a probability of one out of  $n$ , where  $n$  is the total number of possible bullets. Knowing that the aggressor is innocent, the defender may be required to accept some risk—that is, some magnitude of  $n$ —in order to avoid killing the aggressor. It is difficult to state numerically the probability of being killed that people ought to be willing to accept to avoid killing their innocent aggressor. But it seems uncontroversial that they must accept a higher probability, a higher percentage of  $n$ , when the aggressor is innocent than when the aggressor is culpable.

These observations are relevant when considering how to approach enemies in war. We may have to expose our own soldiers to a higher level of risk and more harm if we can assume that the aggressors are innocent compared with situations in which we know them to be morally responsible for some threatening initiating behavior. I am here considering accepting more risk as long as the overall outcome is the same, and not a risk of losing a particular battle; though that might also be required if the consequences of losing are within acceptable limits. Accepting a higher risk implies that one might have to tolerate a higher number of dead soldiers if it is plausible to assume that the aggressors are innocent. For instance, if one can choose between either winning a battle by killing a thousand enemies at the cost of losing no defending soldiers or winning by killing only one hundred aggressing soldiers but then losing ten of one's own troops, one could be required to choose the latter.

Concerning the 1991 war in Iraq, we would have to be willing to accept a higher level of risk when confronting forcibly conscripted soldiers than would be required when confronting soldiers of the Iraqi Republican Guard. Members of the Republican Guard could reasonably be regarded as culpable aggressors, while it would be reasonable to assume innocence on the part of the conscripted soldiers. We should therefore have to accept more risk and harm in order to avoid killing the latter than the former. Unfortunately, the latter were used by the former as frontline troops and suffered heavily from the air campaign before the land offensive started.<sup>35</sup>

### *Future Threats*

A classic question is how it can be permissible to kill soldiers who do not pose an immediate threat—a naked soldier taking a bath, say. One often-cited requirement of the permissibility of self-defense is that threats be immediate. A plausible ground for the requirement of immediacy is the importance of avoiding situations in which people are killed in vain. One way to avoid such instances is for the defenders to wait as long as possible before defensive force is used. Unnecessary deaths could then be avoided from time to time because less

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<sup>35</sup> Be aware that accepting that soldiers have an equal right to kill does not imply that one holds that soldiers always have a right to kill other soldiers. Necessity and proportionality may very well make it impermissible to do so. Proponents of an equal right to kill may therefore also regret that “the Iraqi army disintegrated in a chaotic retreat from Kuwait, and were mown down by Allied air strikes as they retreated. Iraqi military casualties were estimated by the U.S. Defense Intelligence Agency to be between 50,000 and 150,000” (Norman, *Ethics, Killing and War*, p. 202).

intrusive means may prove equally efficacious, or simply because what appeared to be an aggressor was in fact not one at all. I want, nevertheless, to suggest that the requirement of immediacy is not well founded. Whether or not defensive force may be used against an aggressor does not depend upon the immediacy of the threat but its certainty.

Clearly, immediacy is often a proxy for certainty. The only way to know that someone is going to kill a particular person might be to wait and see. But if the threat is serious, and if there is no prospect of thwarting it, it seems inappropriate to require that the threat be immediate. As long as some people are likely to pose a threat at some future time, or it is reasonable to reach that conclusion on the basis of past or present threatening behavior, that should suffice to justify taking action against them now, provided that one has good reason to believe no other possibility exists to prevent the threat, or that, if there is, waiting will raise the risk to the defender to intolerable levels. Envisage that you are together with friends in the forest. In the evening you are attacked by bandits. You manage to fight off the attackers, but your friends have been wounded. During the night you go for help. While passing the camp of the attackers, you hear them making lethal plans for tomorrow morning. You are not sure if you will be able to fetch help before that time. By chance, there is a big stone nearby, which, with a little nudge, will roll down onto the aggressors and kill at least some of them. Would it be permissible for you to give it that nudge? Be aware that the threat is not immediate in this case, though you are reasonably sure of its existence. It seems permissible to set the boulder rolling. In general, we should accept that it might be permissible to kill people who pose a lethal threat in the future. It all depends on the reasonableness of the interpretation of them as future threats. And, with regard to enemy soldiers, such an interpretation will typically be reasonable. A naked soldier is likely to get dressed and be deployed at the front; that's why he or she is a soldier.

Reasons for waiting to see how dangerous a situation can become bear down on us as soon as there is some prospect that the threat will taper off or even cease to exist, or that it might be prevented with less force later on. The weight and content of these reasons depends on the moral responsibility of the aggressors. To wait and see is to take on a risk, and for reasons discussed above it seems reasonable to require that a defender accept more risk in connection with innocent aggressors than with culpable aggressors. A longer period of waiting and seeing should therefore be required before deciding to use lethal force when confronted with innocent future threats.

This observation is again relevant when considering how to approach enemies in war, and will have similar implications as those originating from an asymmetry of harm. A higher risk to our own soldiers must be accepted if the aggressors are innocent. We would have good reason not to act now, but to wait and see if something less intrusive could be done later. Concerning the ongoing Iraq war, one could maintain that if it were only a matter of killing culpable members of the Republican Guard, invasion could perhaps have been justified (on grounds of humanitarian intervention, preferably). Since any attack, however, would involve killing innocent conscripted soldiers—as well as innocent civilians—there were good reasons to wait to see whether other options would become available.<sup>36</sup>

## CONCLUDING REMARKS

A central point of discussion in this essay concerns the implications of being confronted with innocent aggressing soldiers. I have argued that it is permissible to kill innocent aggressing soldiers when there is symmetry in numbers on the two sides. When the asymmetry becomes significant, there is reason to give priority to the greater number, as this would reduce the number of innocent deaths and thereby increase the participants' likelihood of survival.

Clearly, in war it is important to consider what the consequences would be if the defending party were to lose a battle. If a loss would have serious consequences over and above those happening on the battlefield, this should be taken into account when deciding whether the innocence of unjust aggressing soldiers should imply that the defending party should accept a higher risk. I have been assuming that victory is not threatened by exposing one's own soldier to a higher risk, or that a loss is not serious over and above losing. Given this and that the attacking soldiers are innocent, the defending party must endure higher risk and more harm to its own troops in order to reduce the casualties among the innocent aggressing soldiers.

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<sup>36</sup> Observe that even though you might not think soldiers in general should be deemed fully innocent, you might accept that they should be judged innocent to such a degree that it will have implications for what permissibly may be done toward them as partially excused aggressors.