

‘Combatants, non-combatants and opportunistic killings’

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Introduction

In my work on just war theory, I adopt a reductive individualist approach to war. This approach is reductivist because it holds that the moral rules of war are reducible to the moral rules of ordinary life. It is individualist because it holds that it is individuals – and not collectives, such as states – who are the proper focus of moral evaluation.¹

One implication of this view is that individuals who are morally responsible for the unjust threats posed in an unjust war can be morally liable to defensive harm, just as an individual who is responsible for an unjust threat in ordinary life can be morally liable to defensive harm. Furthermore, the reductivist view does not support any intrinsic moral distinction between combatants and non-combatants: what matters is what an individual does – whether she’s morally responsible for unjust threats – rather than which group she belongs to. This means, *prima facie*, that if a non-combatant on the unjust side of the war is morally responsible for an unjust threat, she can be liable to defensive harm – that is, to be targeted by just combatants as they fight their just war.

However, the most prominent reductivist – Jeff McMahan – has suggested that even if a non-combatant responsibly contributes to an unjust war, she may not be liable to defensive harm.² He gives several reasons for why this might be, including that killing non-combatants is usually disproportionate to the contributions they make and

¹ Jeff McMahan is the most influential proponent of this approach. See, in particular, *Killing in War* (Oxford: OUP, 2009)

² *Killing in War*, p. 225

that they are generally only weakly morally responsible for making those contributions. I have addressed these claims elsewhere.³ I will focus here on McMahan's claim that non-combatants generally evade liability to lethal attack because killing them can typically be a means of averting threats only if the non-combatants are killed in ways that make use of them, by using their deaths to influence the wills of other people. Essentially, this sort of terroristic killing of non-combatants relies on the hope that other people in the unjustly warring state will be frightened by the attacks on the non-combatants and, as a result, pressure their government into stopping the unjust war. McMahan's explanation of why non-combatants are not liable to these killings invokes both the uncertain effectiveness of these killings, and the fact that the killings usefully harm the non-combatants, rather than straightforwardly eliminate the threats for which they are responsible.⁴

In this paper, I consider the purposes for which a person who is morally responsible for an unjust threat may be liable to be killed. I defend what I call the narrow account of liability, which holds that a person can be liable only to harms that avert the particular threat for which she is responsible. But, I argue, even on this more restrictive account of the harms to which one can be liable, many non-combatants will still be liable to defensive harm. I also argue that it's a mistake to think that the wrongness that attaches to usefully killing an innocent person to avert a threat extends to the useful killing of a person who is morally responsible for that threat. Finally, I

³ See Helen Frowe, 'Non-combatant Liability in War', Helen Frowe and Gerald Lang (eds.) *How We Fight: Ethics in War* (Oxford: OUP, 2014)

⁴ It's not entirely clear in *Killing in War* how much weight McMahan is placing on the fact that such killings make use of the non-combatants. He certainly includes this feature of the killings in his account of why non-combatants are not liable, but he might think that the uncertain effectiveness of such killings does the moral work. I include it here anyway because several theorists (including myself, but also Victor Tadros, Jon Quong and Michael Otsuka) generally take killings that make use of a person to be harder to justify. As I argue here, though, this higher burden of justification applies only to the killing of a non-liable person.

suggest that the uncertain effectiveness of killing a person who is morally responsible for an unjust threat does not, absent collateral harm, undermine her liability to being killed. A non-combatant can be liable to harm if there is only a low prospect that the harm will avert a threat to a just combatant for which she is responsible.

1. Liability to defensive harm

The notion of liability has played an increasingly important role in the literature on defensive killing, thanks in no small part to the work of Jeff McMahan. Some people find the concept ‘liability’ rather opaque, but, at least as I understand it, it’s not an especially mysterious term. If I say that Attacker is liable to a defensive harm, this is a concise way of expressing the following claim: ‘Attacker lacks a right against having the defensive harm inflicted upon him, because he has forfeited his usual rights against such harm as a result of behaving in a particular way’. Liability, then, captures both the ‘moral status’ of a person with respect to a certain harm – that she lacks a right against suffering that harm – and how that moral status came about – that the right was forfeited because the person behaved in a particular way. On most accounts of liability to defensive harm, ‘behaving in a particular way’ is going to be cashed out in terms of being morally responsible or culpable for a threat of unjust harm (usually abbreviated to ‘an unjust threat’). A threat of harm is unjust if it is aimed at someone who possesses a right not to suffer the harm.

Some theorists add what they take to be an essential caveat to this account of liability, namely that Attacker has forfeited his right not to be harmed in *the pursuit of a particular goal*. This goal might be, for example, fending off the threat that Attacker poses. This caveat can be interpreted in two ways. The first, McMahanian,

interpretation holds that Attacker is liable only to harm that is necessary for achieving that goal – that is, to the *least harmful means* of achieving that goal.⁵ I call this the internalist view, because it amounts to the claim that liability has an internal necessity condition. One can be liable only to necessary harms.

The second interpretation, which I think is the correct view, holds that Attacker is liable only to harms that are a *proportionate means* of achieving the goal. This view denies that aggressors can be liable only to necessary harms – that is, only to the least harmful means of averting a threat. But it recognises that one can be liable on grounds of defence only to harms that can be defensive – that is, only to harms that can be a means of averting a threat.

We can see the different implications of these two views in a case like *Lucky Escape*:

Lucky Escape: Attacker is shooting at Victim to try to kill him because he dislikes Victim. He chases Victim to the edge of a cliff. Unbeknown to Attacker, Victim has both a gun and a parachute. He can thus save his own life by either (a) jumping to safety, using no force against Attacker, or (b) shooting and killing Attacker.

According to the internalist, Attacker is not liable to defensive harm in *Lucky Escape*, even though he is morally responsible for an unjust threat. Harming him is not necessary for avoiding the threat that he poses, and harming him will therefore wrong

⁵ McMahan, *Killing in War*, p. 10

him. This suggests that if Victim uses force against Attacker, this constitutes an unjust threat to Attacker (since Attacker has not forfeited his right not to be harmed). On most accounts of liability, this will, at least *prima facie*, give Attacker a right of counter-defence against Victim, which is somewhat counter-intuitive.⁶

In contrast, according to the proportionate means account, Attacker is liable to be harmed – to be killed – in *Lucky Escape*, because killing him is proportionate to the threat he poses to Victim, and killing him is a means of averting the threat he poses.

We should notice at this point that whether a person is liable to a harm does not determine whether harming her is all-things-considered permissible. There can be cases in which a person is liable to be harmed and yet harming her is impermissible – if, for example, harming her will cause disproportionate collateral damage to other people. And, there can be cases in which a person is not liable to be harmed, and yet harming her is permissible. Anyone who thinks that we may divert the trolley away from the five to where it will kill the one in the trolley problem thinks that it can be permissible to kill a person who is not liable to be killed. Liability is a factor in our judgments about permissible harming, but it is not the whole story.

Some theorists deny that there is this kind of goal-orientated caveat attached to liability. On purely ‘backwards-looking’ accounts of liability, Attacker’s behaviour renders his rights forfeit irrespective of whether harming him is necessary for, or

⁶ For a detailed discussion of competing accounts of the relationship between necessity and liability to defensive harm, see Frowe, ‘Liability and Necessity’, (forthcoming) in Michael Weber (ed.) *The Ethics of Self-Defence* (New York: OUP)

instrumental in, averting a threat. He lacks a right not to be killed by Victim even if killing him can do nothing to avert the threat to Victim's life. So, consider *Poison*:

Poison: Murderer has poisoned Victim's wine, and Victim has drunk a lethal dose. There is no antidote, and Victim is certain to die.

In this case, both the internalist and the proportionate means account hold that since there is no harm that can be inflicted on Murderer that can avert the harm to Victim, Murderer is not liable to any defensive harm. But on a purely backwards-looking account, Murderer has forfeited his right not to be killed by Victim, even though killing him can serve no defensive purpose. Killing him would not wrong him.

I have argued elsewhere that this sort of account – a version of which was recently adopted in a paper by Jon Quong and Jo Firth – cannot succeed as an account of liability to defensive harm for a variety of reasons.⁷ One reason to reject these purely backwards-looking accounts that is relevant to our discussion here is that such accounts struggle to distinguish liability from desert. Those holding this sort of account distinguish liability from desert by saying that liability does not give us a positive reason to harm someone. It merely conveys the absence of a usual reason against harming her – that she lacks a right against the harm. But the natural way to more fully explain this idea of the lack of a positive reason to harm is to invoke the means / ends distinction. Harms to which we are merely liable are instrumental harms: there's no positive reason to inflict them because they are not ends in themselves. But

⁷ See Helen Frowe, (forthcoming), 'Liability and Necessity', and (in press) *Defensive Killing: An Essay on War and Self-Defence* (Oxford: OUP). For Quong and Firth's account of liability, see Jonathan Quong and Joanna Firth, 'Necessity, Moral Liability and Defensive Harm', *Law and Philosophy*, (2012), 31, pp. 673 – 701

by divorcing liability to defensive harm from averting a threat, backwards-looking accounts struggle to gain purchase on the distinction between liability and desert, because they cannot distinguish between harming for a further purpose and harming as an end in itself. On a purely backwards-looking account, one can be liable to ‘defensive’ harms that serve no purpose at all, as Murderer is in *Poison*. In contrast, both the proportionate means account and the internalist agree that deserved harms are ends in themselves, whereas harms to which we are merely liable are valuable only as a means of achieving a goal. What I want to explore in the rest of this paper is the range of legitimate goals for which a liable person may be permissibly harmed.

2. Narrow Liability and Broad Liability

To establish the range of legitimate purposes for which a liable person may be harmed, I will explore two related debates in the self-defence literature. The first is the debate between narrow liability and broad liability. The second concerns the ways in which people can be harmed – specifically, whether a person who renders herself liable to eliminative killing thereby renders herself liable to be killed in a way that makes use of her.

A person is *narrowly* liable to be harmed if she is liable to be harmed only to avert the particular unjust threat for which she is responsible. A person is *broadly* liable to be harmed if, once she is morally responsible for posing an unjust threat, she is liable to harm to avert any unjust threat, provided the harm we inflict upon her is proportionate to the threat for which she is responsible.

We can illustrate the implications of this distinction using the following case, which I've adapted from a case by McMahan:

Alley: Roof Shooter is shooting at Victim from the roof, maliciously trying to kill him. In an independent (but simultaneous) attack, Basement Shooter is shooting through a basement window at innocent Victim. Victim can hide from Roof Shooter's bullets, but not from Basement Shooter's bullets. However, he can shoot Roof Shooter, whose body will then fall from the roof and block Basement Shooter's line of fire, saving Victim's life.⁸

The narrow view of liability holds that Roof Shooter is liable only to harm that averts the particular threat for which she is responsible. Since she's not responsible for Basement Shooter's attack, she is not liable to be killed to avert Basement Shooter's (even if killing her is necessary to avert it). But the broad view of liability, in contrast, holds that Roof Shooter *is* liable to be killed so that she blocks Basement Shooter's line of fire. Once she is liable to be defensively killed by Victim, Victim can kill her in defence against another threat to his life.

In my version of *Alley*, Roof Shooter poses a genuine threat to Victim. But in McMahan's original version, Roof Shooter is a merely apparent threat because Victim has had an opportunity to replace her bullets with blanks. Call my version of the case *Genuine Alley* and McMahan's version *Apparent Alley*. Whilst Apparent Roof Shooter believes that she is threatening Victim's life, Victim knows that she poses no

⁸ I've adapted this from a set of cases in McMahan, 'Self-Defense and Culpability', *Law and Philosophy*, 24, (2005): 751 – 774, p. 757

threat at all because her gun is not loaded. McMahan wonders whether, in this case, Apparent Roof Shooter's culpable attempt to kill Victim would be sufficient to ground liability to defensive harm, such that Victim may kill Apparent Roof Shooter to avert the genuine threat posed by Basement Shooter. And, despite sharing the intuition that killing Apparent Roof Shooter could be permissible, McMahan ultimately thinks that it is a mistake to sanction such a killing, since doing so will cast the net of liability implausibly wide.

If [Victim's] choice is between killing Apparent [Roof Shooter] and allowing himself to be killed by [Basement Shooter], it does not strike me as wrong to think that he would be justified in sacrificing Apparent [Roof Shooter] to save himself. It would be another matter, of course, for [Victim] to shield himself from [Basement Shooter's] fire by killing a passerby who was telling outrageous lies to his wife on the cell phone. A principled line must be drawn between Apparent [Roof Shooter's] culpability and that of the mendacious husband. But I do not know where to draw it. (McMahan, 'Self-Defense and Culpability', p. 765)

The focus of McMahan's concern is thus somewhat different to our focus here. McMahan is wondering whether a mere attempt, absent the posing of an actual threat, could render a person liable to be killed by Victim. McMahan's reason for rejecting liability in such a case is that once we jettison the requirement that a person be morally responsible for an actual threat, we have no principled way of demarcating the relevant sources of responsibility. Any sort of responsible wrongdoing – such as lying to one's wife – could be a ground of liability to harm. Of course, killing a

person because he is lying to a wife would be disproportionate. But McMahan is surely correct that this isn't the right sort of answer: the problem isn't that killing the husband is disproportionate to his wrongdoing, but that his wrongdoing is irrelevant to the threat to Victim's life.

In contrast, McMahan thinks that we do have principled grounds for identifying responsibility for posing a genuine threat as the ground of liability to defensive harm because "if a person has culpably made it the case that either she or someone else must be harmed, then other things being equal (and subject to relevant restrictions such as proportionality) it is permissible as a matter of justice to ensure that she rather than anyone else is harmed."⁹

But if this is the explanation of why posing a threat is an appropriate ground of liability, then it looks like McMahan must also think that killing Roof Shooter is impermissible in *Genuine Alley*, when she poses a genuine threat. Roof Shooter has not made it the case that either she or Victim must be harmed, because Victim has a way to evade Roof Shooter's attack without harming her. It is *Basement* Shooter who has made it the case that someone must be harmed – Roof Shooter merely provides by her presence a way for Victim to ensure that it is not Victim who is harmed.

McMahan's reluctance to endorse killing Apparent Roof Shooter comes, as I have described, from a kind of slippery slope concern. Once we grant that people who make no causal contribution to a threat can be liable to defensive harm, we have no way to restrict the relevant sources of responsibility that could ground such liability.

⁹ McMahan, 'Self-Defense and Culpability', p. 764

The principled justification of fairly distributing an unavoidable harm to those who are responsible for it no longer applies. If it is to avoid the charge of arbitrariness, the expansion to mere attempters (but not to the lying husband) must be captured by some other moral consideration.

The only plausible candidates for that role seem to be Apparent Roof Shooter's willingness to harm Victim or her intending to harm Victim. But McMahan is unpersuaded: "what if Apparent [Roof Shooter] had made her attempt yesterday and now just happens to be passing through the alley at the right moment to be used as [Victim's] shield? Or what if the basis of her culpability is a similar attempt she made a year ago against a wholly different person? And so on."¹⁰ In such cases, it would still be true that Apparent Roof Shooter had been willing, or intending, to kill an innocent person. But there's something worrying about the idea that a person might be liable to defensive killing on the basis that she was willing or intending to perform an unjust killing at some point in the past.

I agree with McMahan that in *Apparent Alley*, Apparent Roof Shooter is not liable to be killed. Apparent Roof Shooter gets lucky in this case, since Victim knows that he does not pose a threat. The case is thus different to the following *Apparent Murderer* case:

Apparent Murderer: Enemy hates Victim and wants to kill him. He points what he mistakenly believes to be a loaded gun at

¹⁰ McMahan, 'Self-Defense and Culpability' p. 764

Victim. Victim, thinking that the gun is loaded, believes that only by killing Enemy can he save his life.

In *Apparent Murderer*, Enemy culpably causes Victim to believe that killing Enemy is necessary to avert a threat that Enemy poses. I think that Enemy's responsibility for this kind of belief grounds liability to harm that Victim inflicts in the course of trying to defend himself (although, on my view, harm directed at Enemy would not properly be described as defensive, because there is in fact no threat for Victim to avert).

However, I suspect that responsibility for this sort of belief can ground only narrow liability – that is, Victim may harm Enemy only in ways that he thinks necessary to avert the particular threat he believes Enemy poses. This is because Enemy's liability comes from his moral responsibility for Victim's belief that he must kill Enemy to avert a threat to himself. But it's hard to see how Enemy could be morally responsible for making Victim think that he must kill Enemy to avert a threat posed by *somebody else*. In *Apparent Alley*, for example, Apparent Roof Shooter is not morally responsible for Victim's belief he can kill her to avert a threat from Basement Shooter in any way that could ground liability to harm. Victim's belief is triggered simply by Apparent Roof Shooter's presence, not by the fact that she's trying to kill him. This is also true in *Genuine Alley*, where Roof Shooter poses a genuine threat.

In *Genuine Alley*, Victim knows that he can avoid any threat from Roof Shooter without harming her. Even though Roof Shooter poses a genuine threat, she will manage only an attempt on Victim's life, just as Apparent Roof Shooter will manage only an attempt in McMahan's case. Nonetheless, I think Victim may treat Roof

Shooter and Apparent Roof Shooter differently, and I suspect that my proportionate means account of liability does a better job than McMahan's internalism of explaining why this is so.

An illuminating way of approaching this case is to ask whether it would be permissible for Victim to defend himself against Basement Shooter in a way that unavoidably kills Roof Shooter as a side-effect. Would Victim be permitted to, say, throw a grenade at Basement Shooter even if the ensuing explosion would also kill Roof Shooter? I think that the answer to this question is clearly 'yes'. Victim cannot be required to refrain from defending his life because his defence will harm someone else who is culpably trying to kill him. But one may not, ordinarily, kill a non-labile person as a side-effect of saving one's own life. If so, the fact that Victim may kill Roof Shooter as a side-effect of saving his own life suggests that Roof Shooter is indeed liable to be killed.¹¹

The proportionate means account of liability can explain this. Roof Shooter is liable to harms that are a proportionate means of averting the threat that she poses. Killing her, even as a side-effect of throwing a grenade at someone else, is a proportionate means of stopping Roof Shooter from posing a threat to Victim. She is thus liable to such harms, since they avert the threat that she poses to Victim.

¹¹ McMahan has suggested that non-combatants might sometimes render themselves liable to measures short of lethal attack, including being harmed as a side-effect. I don't think that this is true when they contribute to lethal threats because, as I have argued, I think that those who contribute to lethal threats are liable to lethal defence. But even if it were true with respect to non-combatants, it wouldn't work here because there are no relevant circumstances that could make Roof Shooter liable to be incidentally, but not intentionally, killed. If she's liable to be incidentally killed, it's because she's morally responsible for an unjust lethal threat. The only thing preventing McMahan from saying that she's liable to be intentionally, eliminatively killed is that such a killing isn't necessary, not any sort of mitigating factors about Roof Shooter's responsibility.

In order to know whether Roof Shooter is also liable to be harmed in the case where Victim uses her body in order to block Basement Shooter's bullet, we need to know whether her liability to proportionate defensive means includes liability to be usefully harmed. Usually, when a person poses a threat, it is eliminative killing that is required to avert that threat: it is the killing of the attacker that defends the victim, because the attacker herself is the source of the danger. Most theorists think that eliminative killing is easier to justify than killing a person in the course of making use of them. Killings that make harmful use of a person – such as shoving the fat man off the bridge into the path of a runaway trolley, or, in our case, shoving a person off a roof to block some bullets – are thought to be particularly hard to justify.¹²

Usually, killings that make use of a person do so in the course of averting a threat for which someone else is responsible. It is not the fat man, we assume, who has sent the trolley down the track towards the five. But, as I will argue, it can sometimes be possible and permissible to usefully kill a person to avert a threat for which she is responsible. Whilst it is especially bad to kill an innocent person in a way that exploits her or makes use of her, this badness does not obtain in the case of a person who has rendered herself liable to defensive harm.

When one uses a bystander to avert a threat, one is purely profiting from their presence, treating them as apparatus from which one can benefit. This is why these killings are objectionable and nearly always wrong. But in a case where one harmfully uses a person to avert a threat for which she is morally responsible, one is not using

¹² See Otsuka (1994) 'Self-defence against the innocent', *Philosophy and Public Affairs*; Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford: OUP, 2010); Frowe, (2008) 'Equating innocent threats and bystanders', *Journal of Applied Philosophy*; Quong, (2009) 'Killing in Self-Defence', *Ethics*

her purely to profit from her presence, but rather to prevent her past actions from making one worse off. If the fat man *did* set the runaway trolley down the tracks towards the five, shoving him under the trolley to save the five does not enable the five to derive a benefit from the fat man that they could not have enjoyed in his absence. Rather, making use of the fat man enables the five to maintain the *status quo* that they would have enjoyed had the fat man not acted as he did. They use him only to avert the impending harm of his threatening action.

We might call such killings ‘merely opportunistic’ to distinguish them from the objectionable, exploitative killing of a bystander. Merely opportunistic harming lacks the moral repugnance that attaches to the exploitative harming of bystanders to make oneself better off than one would have been in their absence. If this analysis is correct, there is no higher burden of justification to be met when one is killing a person merely opportunistically. A person who is liable to eliminative defensive harm – as the fat man surely would be, if this could avert the threat for which he is responsible – is also, on this account, liable to be usefully killed to avert threats for which she is responsible.

But if Victim kills Roof Shooter in *Genuine Alley* in order to have her body block Basement Shooter’s bullets, he is not using her to avert a threat for which she is responsible. Rather, he is using her to prevent *Basement Shooter’s* actions from making Victim worse off. Victim is, therefore, using Roof Shooter to make himself better off than he would have been in Roof Shooter’s absence. Such use of Roof Shooter is exploitative by my lights, and Roof Shooter is not liable to exploitative harm. If this is correct, we must reject the broad account of liability, since holding a

person liable to harm to avert threats for which other people are responsible is to hold them liable to exploitative harms.

So, I do not think that Roof Shooter is liable to be exploitatively killed by Victim as a means of blocking Basement Shooter's bullets. Does this mean that Roof Shooter is not liable to be killed at all in this case? No. If Victim kills her, it's still a proportionate means of averting a threat that Roof Shooter poses, and she's liable to be defensively killed to avert *that* threat on even a narrow account of liability. What is at issue is whether the fact that Victim would be killing her in order to make use of her, not to avert the threat that she poses, makes the killing all-things-considered impermissible. And I don't think it does. Victim faces a situation in which either a wholly non-liable person (Victim) will be non-defensively killed, or a person who is liable to merely opportunistic, eliminative or incidental killing, but not to exploitative killing, will be killed. If Basement Shooter succeeds in killing Victim, he very seriously wrongs him, since Victim is liable to no harm at all. But when a person is liable to eliminative killing, exploitatively killing her does not greatly wrong her. It wrongs her somewhat, but not enough to make it impermissible for Victim to kill her to avoid a much greater wrong to himself. The disparity between the morally weighted harm that Victim faces (that is, harm that exceeds his liability) and the morally weighted harm that Roof Shooter faces is sufficiently great that killing Roof Shooter can meet a lesser-evil justification.

Note, then, that this argument will permit usefully harming a person only when she is *already* liable to harm that is a proportionate means of averting a threat, which is true only while she poses a threat. Imagine that Roof Shooter poses a genuine threat to

Victim a *t*, but fails in her attempt to kill him and ceases to pose a threat. Then, twelve months later, Basement Shooter tries to kill Victim, and Victim can use Roof Shooter's body to avert this threat, even though she is no longer trying to kill him. Killing Roof Shooter in this case will not be permitted by my account because, unlike in *Genuine Alley*, the killing of Roof Shooter will not in itself also be a means of averting a threat she poses. Roof Shooter herself now poses no threat, and so *killing* her can't be a means of averting a threat – only Roof Shooter *herself* can be the means. Thus, if he kills her in this exploitative way, Victim will not be only mildly wronging Roof Shooter, inflicting a somewhat worse harm than that to which she is liable. Rather, since she is not liable to any harm, he will be violating her right not to be killed along with her right not to be used. Here, what Victim will do to Roof Shooter will be *worse* than what Basement Shooter will do to Victim. Thus, there's no justification for doing it and it's impermissible.

(ii) Non-combatants and the threats of war

This debate has implications for liability in war, if, as I believe, we should adopt a reductivist view of war, according to which the moral rules that govern harming in war are reducible to the moral rules that govern harming in ordinary life. (That's another assumption I'm going to make here.) Since many non-combatants responsibly contribute to the threats posed by their country's combatants in unjust wars, it looks like many non-combatants on the unjust side are candidates for liability to defensive harm. But whereas the broad account of liability would permit one to kill an otherwise liable non-combatant to avert *any* proportionate threat, the narrow account will limit this to the averting of the particular threats for which the non-combatant is responsible. Since non-combatants don't typically pose direct threats – they're not the

ones doing the killing and the maiming – it seems, *prima facie*, that it will be very difficult for a just combatant to tie killing a non-combatant to averting a particular threat for which she is responsible.

However, as I will argue, these implications are not as significant as we might think. One of the characteristics of a war is that the specific micro-threats posed in combat are simply a means of bringing about the larger ends of the war. So, when unjust combatants fight, their offensives promote the macro-threat that justified the waging of a defensive war in the first place. A munitions worker who makes guns does not simply enable unjust combatants to endanger the lives of particular just combatants during a number of specific offensives. She also, in doing so, helps the unjust combatants further the unjust macro-threats that are the ends of their country's aggressive war.

Once we take the broader threats of an unjust war into account, even a narrow account of liability is going to find people liable to be harmed for a wider range of purposes than we might expect. Consider the following case:

Munitions: At the beginning of the war, Worker worked in a factory making guns for the unjust side. Two years later, she has retired and no longer works in the factory. Just Combatant is trapped behind enemy lines. Whilst being pursued by enemy combatants, he grabs Worker to use as a human shield to save his own life.

Even if Worker did not make the particular guns that the enemy combatants are using to threaten Just Combatant, the fact that she has made some guns that have been used to further the unjust war means that she has previously contributed to the on-going macro-threat of aggression. Even though killing her can't eliminate those previous contributions, this doesn't show that she's not liable to harms that frustrate the pursuit of the unjust war. Moreover, given the discussion above, McMahan's observation that often only the useful killing of non-combatants can be effective in averting threats for which they are responsible won't undermine their liability to harm.

McMahan thinks that it's problematic that killing non-combatants opportunistically – for example, to frighten other people in their state into pressuring their government to end the war – relies upon a causal chain that will have variable effectiveness. This argument speaks to both the internalist and proportionate means accounts of liability, since it relies upon uncertainty about whether killing a person will be a means of averting a threat or not. If killing some non-combatants will not cause other people to bring about the end of the war, then such killings won't avert threats and will not, on my account, be defensive.

However, it seems plausible that a person who responsibly poses a threat renders herself liable to harms that her victim inflicts in the course of trying to defend himself against unjust threats, even if those harms ultimately fail to be defensive. In the *Apparent Murderer* case, where Victim merely believes that Enemy is going to kill him, Enemy is still liable to harm that Victim inflicts in trying to defend himself even though Enemy poses no threat at all. If such harms fail, it doesn't follow that one was not liable to them. I doubt that McMahan wants to endorse a general position that

harms that fail to avert unjust threats are impermissible or wrong those who are morally responsible for the threats. This would mean that all unsuccessful attempts at defence somehow wrong the perpetrators of the attack. If so, the fact that the opportunistic harming of non-combatants is not certain or even likely to succeed cannot show that the non-combatants are not liable to such harm.

Again, we should remember that liability is not the whole story when it comes to permissible harming. I think that many non-combatants are liable to defensive harm, such that they lack rights against being harmed and harming them would not wrong them. But, nonetheless, non-combatants typically enjoy moral immunity from attack, which means that attacking them would be all-things-considered impermissible.

I think there are two main sources of this immunity. The first is what I call the identification problem – the difficulty of knowing which non-combatants have responsibly contributed to their country's unjust war. The second is the restriction on collateral damage to non-liable people. I think this is likely to be the source of non-combatants' most significant moral protection from attack, making it impermissible to attack even those people whom one knows to be liable to defensive harm. The reasons for this are two-fold. First, unlike many combatants, non-combatants are going to be living amongst other people, including people who are innocent with respect to the unjust war being waged by their country (all children, for example, will be so innocent on my view, since even those who contribute to the war effort will lack moral responsibility for doing so). It will often – perhaps usually – be very hard to target a non-combatant without causing collateral harm.

Second, the permissibility of collateral harm is determined by weighing the good that an attack achieves against the collateral harm caused. And, in order to be permissible, collateral harms must not only be proportionate to the good achieved, but also meet a lesser-evil standard. Lesser-evil standards are sensitive to the prospect of success. This sets the bar for permissibility very high. Even if a particular non-combatant is liable to be killed in virtue of responsibly contributing to unjust lethal threats, it does not follow that killing her is likely achieve a sufficiently significant good to make it permissible to inflict the collateral harm that killing her will entail. Indeed, even when killing a responsible non-combatant is *certain* to achieve some good, it will normally be only a very small amount of good, and therefore it's still unlikely to be sufficient to meet a lesser evil standard. Whilst this does not undermine the claim that the responsible non-combatant is liable to be killed, it will render it impermissible to attack her when doing so will cause even moderate harm to innocent people.

Conclusion

So, I have argued that the broad account of liability, according to which a liable person may be harmed to avert threats for which other people are responsible, would sanction the exploitative harming of individuals and is therefore incorrect. But even the narrow account of liability will not generate a particularly restrictive result concerning the liability of non-combatants in war. Once we consider the macro-threats of an unjust war, which consists in the sum of the micro-threats to which non-combatants contribute, the narrow account will deem non-combatants liable to be harmed in ways that help to avert those threats.

I have also argued that a person who is liable to eliminative, defensive harming can be liable to be usefully harmed to avert a threat for which she is responsible. Such merely opportunistic harming does not exploit a person, but merely restores or maintains the *status quo*. Moreover, harming a person to avert a threat for which someone else is responsible can be permissible if that person is herself liable to eliminative, defensive killing. Roof Shooter is not liable to be exploitatively killed. But she is liable to eliminative killing, and so killing her in a way that exploits her only wrongs her somewhat. Such killings can be justified on lesser-evil grounds.

The upshot is that the sort of considerations that we might think limit or preclude non-combatant liability – the purposes for which they may be killed, the fact that killing them makes use of them, or that killing them is unlikely to be effective – do not, in fact, undermine non-combatant liability. If it's impermissible to attack non-combatants who are responsible for unjust threats, this is most likely to result from contingent features about identification and collateral harm, not because of the rights of the non-combatants themselves.

This conclusion is at odds with how we normally think of the restrictions on intentionally harming non-combatants (it stands in opposition to, for example, the Walzerian view that non-combatants may not be attacked because they have done nothing to forfeit their usual rights). The deeply entrenched norm that non-combatants should not suffer the harms of war means that we rarely weigh the lives of combatants against the lives of non-combatants as I have done here, according no special weight to the non-combatants' lives, nor any special duty to incur risk on the part of combatants. When we permit the collateral harming of non-combatants, we usually do

so only because we grant the importance of the mission – of the military objective that helps to win a war. We don't often do so because we grant the importance of the combatants themselves, thinking that they might be allowed to prefer their own survival to that of non-combatants, and, moreover, kill non-combatants in defence of their own lives. But it seems to me that the reductivist project requires us to reject the very ingrained notion that the killing of a combatant is in some important way less wrong than the killing of a non-combatant. When one is weighing the lives of those who are acting in legitimate self-defence against those who are, at least in part, morally responsible for the threats against which those people are defending themselves, it is deeply plausible to think that the defenders should be permitted to avoid harm to themselves by harming those who have helped to put their lives at risk.