

# GRADUATE PAPERS FROM THE 2008 JOINT SESSION

## THE JUSTIFIED INFLICTION OF UNJUST HARM

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I develop a distinction between the justness of *inflicting* a harm and the justness of *the harm itself*. I use this distinction to argue that Victim is permitted to inflict lethal harm upon Mistaken Threats: characters whom Victim justifiably, but mistakenly, believes pose a threat to his life. Since Victim cannot distinguish Mistaken Threats from Genuine Threats, whom Victim is permitted to kill, a theory of permissible defence can be action-guiding only if it grants identical permissions in both cases.

### I

*Genuine Threats and Mistaken Threats.* Consider *Culpable Genuine Threat*:

*Culpable Genuine Threat:* Victim is being pursued by Murderer, who has a gun. Only by killing Murderer can Victim save his own life.

I believe that Victim is permitted to kill Murderer to save his own life. We might explain this permission by citing Murderer's moral responsibility for a threat to Victim's life. But I believe that Victim is also permitted to use lethal force in *Innocent Genuine Threat*:

*Innocent Genuine Threat:* Falling Person is blown down a well in which Victim is trapped. Victim will be crushed to death unless he vaporizes Falling Person with his ray gun. If Victim does not use the ray gun, he will cushion Falling Person's landing, saving her life.

Falling Person lacks moral responsibility for the threat he poses to Victim. If we think that Victim can nonetheless kill Falling Person, it looks as if mere *causal* responsibility for a threat to innocent Victim suffices to render Victim's defence permissible. Being the object that will kill Victim is enough to make Falling Person a permissible target.

Let's assume that I am correct in thinking that morality permits Victim to kill both Murderer and Falling Person in self-defence. But what about *Culpable Mistaken Threat*:

*Culpable Mistaken Threat*: Victim is being pursued by Incompetent Murderer. Both Victim and Incompetent Murderer mistakenly believe Incompetent Murderer's gun to be loaded.

Our intuitions might well dictate that Victim would be permitted to kill Incompetent Murderer. These intuitions become unstable, however, in light of *Innocent Mistaken Threat*:

*Innocent Mistaken Threat*: Victim unknowingly stumbles across Actor, who is rehearsing for his gangster play. Not noticing Victim, Actor points a fake gun in Victim's direction whilst saying the line, 'I'm going to kill you'.

When the Mistaken Threat in question is innocent, we are reluctant to endorse the view that Victim may nonetheless employ lethal force. Actor bears neither moral nor causal responsibility for a threat to Victim's life, since there *is* no threat to Victim's life. But, of course, the same is true of Incompetent Murderer. Incompetent Murderer poses no more of a threat than Actor, and thus cannot be responsible for a threat to Victim's life.

If it is (moral or causal) responsibility for a threat that renders a person liable to be killed in self-defence, neither Incompetent Murderer nor Actor are liable to be killed. And yet from Victim's perspective, Mistaken Threats are epistemically indistinguishable from Genuine Threats.

I argue that an account of permissible defence must be practical, or *action-guiding*. By action-guiding, I mean that an account must be able to tell Victim what he is permitted to *do*. And accounts that yield Victim different permissions in subjectively identical situations cannot be action-guiding in this way. If, *ex hypothesi*, Victim cannot tell which situation he is in, he cannot know how he is permitted to act. An account of defence that does not generate identical permissions in these cases must be rejected.

## II

*Excuses and Justifications.* It might be argued that an objectivist account of defence—one that holds that Victim is permitted to use force only when there is a genuine threat to his life—can meet the criterion of action-guidingness that I have suggested by invoking *excuses*.<sup>1</sup> Roughly, such accounts hold that Victim is justified in using force against a Genuine Threat. But since any force Victim uses against a Mistaken Threat will be objectively unnecessary, Victim will not be justified if he uses force in these cases. But, given his reasonable ignorance, Victim will be fully *excused* if he kills a Mistaken Threat. If what we care about is how we are to treat Victim—for example, do we blame him, or punish him?—then surely, for these purposes, an excuse is as good as a justification.

I cannot give a full reply to this objection here. But I will suggest that this kind of objectivist account still fails to meet the condition of guiding action, because excuses cannot function other than retrospectively. Excuses ought not to form part of one's deliberation about what one is permitted to do.<sup>2</sup> Thinking about excuses can guide punishment or blame, but it cannot guide Victim's deliberation about the use of defensive force.

The claim I want to defend is that Victim is *justified* in inflicting harm in all four of the above cases: he may use force against Actor and Incompetent Murderer as well as against Murderer and Falling Person. Victim is not excused for wrongdoing as a result of his ignorance. Rather, Victim does not act wrongly when he uses force in these cases. I think it has to be this stronger claim that we defend if we accept that theories of defence should be action-guiding in the way I have described.

## III

*Inflicting Harm and the Harm Itself.* In order to resolve the problem of Mistaken Threat cases, we must distinguish between the *justness of inflicting a harm*, and *justness of the harm itself*. Victim's subjective perspective determines the justness of inflicting harm: of per-

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<sup>1</sup> Jimmy Lenman and Gerald Lang have both suggested this to me.

<sup>2</sup> David Rodin makes a similar point in Rodin (2002, p. 37).

forming a defensive act. The justness of the harm itself is determined by whether or not the target is liable to bear the harm, in a sense of 'liable' to be defined.

Genuine Threat cases stipulate that Victim will definitely be killed unless he uses defensive force. Yet such objective knowledge is so rarely (if ever) available to prospective Victims that it cannot form a necessary part of our theories of permissible defence. If we require that Victim kills in self-defence only when in possession of objective knowledge, we effectively prohibit self-defence.

Since all defensive killings rest upon subjective beliefs, then, a reasonable belief that one's life is threatened must suffice to justify the inflicting of harm. Only in this way can a theory of defence be action-guiding. Since Victim has a reasonable belief that his life is threatened in all four of our hypothesized cases, Victim is justified in inflicting harm in each.

However, it does not follow from the justness of Victim's inflicting harm that the target is liable to bear that harm.<sup>3</sup> Mere reasonable belief on Victim's part cannot render someone else liable to bear lethal harm, especially when that belief might be mistaken. By distinguishing between the inflicting of harm, and the harm itself, we can hold that a harm is unjust even if it was justly inflicted. I suggest it is sufficient to render a person liable to bear a harm, such that their bearing the harm is not unjust, if they culpably intend to harm Victim.<sup>4</sup>

On this account of liability to defensive harms, neither Innocent Genuine Threats nor Innocent Mistaken Threats are liable to bear the harm that Victim will inflict upon them. If Victim is successful, both Falling Person and Actor will have suffered unjust harms. My account thus holds that it is possible for a person to be wronged by justified action.

Murderer and Incompetent Murderer, however, will not bear unjust harms. Victim does not wrong Incompetent Murderer in killing him, despite the fact that Incompetent Murderer poses no threat.

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<sup>3</sup> Jeff McMahan (2005, p. 399) relies on a similar separation in his discussion of a tactical bomber who has objective justification for bombing a factory, despite the lack of liability on the part on the civilians who will be killed by the blast. The bomber is justified in killing the civilians, but the civilians are not liable to be killed.

<sup>4</sup> I also think that it is sufficient that one culpably intends to make Victim *think* that one intends to harm him (one is bluffing, in other words), although this raises more questions than I can answer here.

Both Murderer and Incompetent Murderer culpably intend to harm Victim. Given this, they are liable to bear the harm that Victim will inflict.

On my account, then, the difference between the culpable and the innocent emerges not in what Victim is permitted to do to each of *them*, but on what each of them is permitted to do to *Victim*.

#### IV

'*Counter-Defence*'. The question of counter-defence is somewhat neglected in the literature on Mistaken Threats. But considering what a Mistaken Threat is permitted to do to Victim illuminates the moral status of Mistaken Threats. Consider *Defensive Murderer*:

*Defensive Murderer*: Incompetent Murderer realizes that his gun is unloaded just as Victim opens fire. However, another gun is lying on the ground. Only using this loaded gun to kill Victim can Incompetent Murderer save himself.

Incompetent Murderer realizes that, actually, he never posed any threat to Victim. Is Incompetent Murderer now the victim of an unjust attack, justified in using defensive force against Victim? I think we must say that he is not. It would be an unwelcome state of affairs if merely pretending to kill a person might afford one the right to *actually* kill that person on grounds of self-defence. If Incompetent Murderer is not permitted to defend himself, this must be because he will not suffer an unjust harm if Victim succeeds. And if his being killed will not be unjust, Incompetent Murderer must be liable to be killed. Yet, since Incompetent Murderer did not pose a threat to Victim, it cannot be either moral or causal responsibility for a threat that has rendered him so liable. Rather, what has rendered Incompetent Murderer liable is his culpable intention to harm Victim. If Incompetent Murderer is not permitted to fight back, this intention must be sufficient to render him liable to be killed.

But, as noted above, neither Innocent Mistaken Threats nor Innocent Genuine Threats culpably intend to harm Victim. Thus, my account holds that neither is liable to be killed by Victim, and that any harm they suffer will be unjust. This is true even though Victim is justified in inflicting such harms. Imagine that Actor suddenly notices Victim, who is about to open fire upon him. Actor has time to

grab a real gun in order to defend himself. I think our intuitions strongly suggest that, faced with such a threat, Actor is justified in trying to kill Victim. This, I suggest, is because Actor will be wronged if Victim succeeds in killing him: Actor is not liable to bear harm, and any harm he bears will thus be unjust.

It is the unjustness of the harm that generates mutual permissions of defence in the case of Innocent Genuine Threats as well.<sup>5</sup> If Falling Person realizes that Victim is going to kill her, I think she is permitted to try to use her own ray gun to kill Victim in self-defence. If I am right, mere causal responsibility for a threat cannot be sufficient to render one liable to bear lethal harm. If this were the case, Falling Person would not be facing an unjust harm, and would not be permitted to kill Victim to avoid bearing that harm. But if I am also right that Victim may try to kill Falling Person, we must distinguish the justness of the harm to be inflicted from the justness of Victim's inflicting the harm.

## V

*Conclusion.* Accounts of self-defence must be action-guiding. Only accounts that permit Victim to kill both Genuine and Mistaken Threats can meet this requirement. By distinguishing between the justified inflicting of harm, and the justness of the harm itself, we can allow that Victim can be justified in acting defensively against even Mistaken Threats. Since a culpable Mistaken Threat intends to harm Victim, the harm that Victim will inflict upon a culpable Mistaken Threat is not unjust. But since neither an Innocent Genuine Threat nor an Innocent Mistaken Threat culpably intends to harm Victim, they will suffer an unjust harm should Victim kill them. Thus, both may defend themselves against Victim's justified infliction of this unjust harm.

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<sup>5</sup> I also think that the unjustness of the harm might well constitute grounds for compensation should Victim kill an Innocent Mistaken Threat or Innocent Genuine Threat, although I will not explore this here.

## REFERENCES

- McMahan, Jeff 2005: 'The Basis of Moral Liability to Defensive Killing'.  
*Philosophical Issues*, 15: *Normativity*, pp. 386–405.
- Rodin, David 2002: *War and Self-Defense*. New York: Oxford University Press.

