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Self-Defence and the Principle of Non-Combatant Immunity

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Abstract

The reductivist view of war holds that the moral rules of killing in war can be reduced to the moral rules that govern killing between individuals. Noam Zohar objects to reductivism on the grounds that the account of individual self-defence that best supports the rules of war will inadvertently sanction terrorist killings of non-combatants. I argue that even an extended account of self-defence—that is, an account that permits killing at least some innocent people to save one's own life—can support a prohibition on terrorism, provided that it distinguishes between direct and indirect threats. What such an account cannot support is the blanket immunity of non-combatants to defensive killing. If a non-combatant is morally responsible for indirectly threatening in an unjust war, she can be liable to defensive killing. However, this gives us reason to revise our account of permissible killing in war, rather than to reject the reductivist account.

Keywords

self-defence, war, non-combatant immunity, terrorism

I. The Problem of Scope

Accounts of self-defence are often divided into two camps: extended accounts (sometimes called broad accounts) and restricted accounts (sometimes called narrow accounts). The biggest difference between these two camps is their stance on the permissibility of killing innocent people in self-defence. Extended accounts permit the killing of at least some innocent people in self-defence.¹ For example, they permit the killing of Falling Person, who is

¹ See Judith Jarvis Thomson (1991), 'Self-Defense', *Philosophy and Public Affairs* 20, pp. 283–310, F.M. Kamm (1992), *Creation and Abortion* (New York: Oxford University Press), Jonathan Quong (2009), 'Killing in Self-Defence', *Ethics* 119 No. 3, pp. 507–537,

hurting helplessly towards Victim as Victim stands trapped at the bottom of a well. If the only way that Victim can stop Falling Person from crushing him to death is by vapourising her with his ray gun, ESD accounts permit him to do so.² Restricted accounts permit the killing of fewer people, usually because they require something like moral responsibility for a threat to render a person a legitimate target.³

Zohar argues that their inclusion of innocent threats as legitimate targets has made Extended Self-Defence Doctrines (ESDs) look like good candidates for the rules of war because they can deal with the putative problem of a mutual permission to kill between combatants.⁴ Historically, all combatants obeying *jus in bello* have been deemed morally innocent, and yet the rules of war permit the killing of these apparently innocent people. ESDs seem able to explain this, because these accounts don't require culpability for liability to defensive killing. The combatants might be morally innocent, but they nonetheless pose a threat and are thus liable to be killed.

Despite this apparent advantage of ESDs, Zohar argues that such accounts cannot currently support a second key tenet of the war ethic, namely a permission to kill even non-attacking members of the armed forces. Zohar claims that in order to cover all the permissible war-time targets, an account of self-defence would need to be 'amplified':

If the ESD is to justify the war ethic, the concept of 'threat' cannot be restricted to those actually trying to shoot at me; rather, it must extend to soldiers generally. The enemy soldiers as a class, other than the actual shooters, can be said to be threats only in the sense that they contribute to the threats posed directly by the

Helen Frowe (2008), 'Equating Innocent Threats and Bystanders', *Journal of Applied Philosophy* 25 No. 3, pp. 277 - 290 and Helen Frowe, *Defensive Killing: An Essay on War and Self-Defence*, (manuscript in progress).

² As I discuss in Section III below, my account of self-defence holds that Falling Person is similarly permitted defend herself against Victim.

³ See, e.g. Jeff McMahan (2005), 'The Basis of Moral Liability to Defensive Killing', *Philosophical Issues* 15: Normativity, pp. 386—405, Michael Otsuka (1994), 'Killing the Innocent in Self-Defence', *Philosophy and Public Affairs* 23, No. 1, pp. 74—94.

⁴ Noam Zohar (2004), 'Innocence and Complex Threats: Upholding the War Ethic and the Condemnation of Terrorism', *Ethics* 114, pp. 734—751, p. 745. Zohar claims that Thomson, "explicitly adduces ESD to justify the killing of enemy soldiers" (p. 741). There is no reference for this claim and I have to say that I'm unclear about how Thomson's account would generate the moral equality between combatants that Zohar envisages. After all, Thomson is explicit that an innocent threat has no right of defence against an innocent victim (Falling Person may *not* defend herself against Victim on Thomson's view). It is therefore unclear how we would get the mutual permissions to kill that Zohar is after, even if he is correct that unjust combatants are morally innocent. However, we can set this aside for the purposes of this paper.

shooters. Some non-shooting soldiers contribute to specific threats and, in terms borrowed from the criminal law, can be described as ‘accomplices’ of the attackers... [B] Many of those who are encamped far back from the front, whether they [C] administrative roles or are even trained combat soldiers, are neither attackers nor accomplices—in an analogous, non-military setting they would not be described as threats at all.⁵

Zohar argues that these ‘non-attacking’ soldiers are best understood as *obstructors*.⁶ For example, a group of soldiers might not be attacking anyone, but still be positioned in such a way as to rule out an escape route or a manoeuvre that would otherwise be open to the enemy.

In a domestic context, obstructors are usually regarded as a special sort of bystander. People like Judith Thomson, who endorse an ESD, explicitly deny a permission to kill bystanders, including obstructors, to save one’s own life.⁷ But Zohar argues that it is only by extending the range of legitimate defensive targets to include obstructors that an ESD can hope to capture non-attacking soldiers in the scope of the right of defence.⁸ Moreover, he claims that not only do proponents of the ESD *need* to extend their range of targets in this way, but that they have no way to resist such an extension, since there is no principled difference between an obstructor and an innocent threat.

He illustrates this claim by thinking about variations on the well case that I just described. Imagine that you are trapped between a person’s body and a metal plate. In scenario 1, the plate is stationary, and the person is moving towards you to where she will crush you against the plate. In scenario 2, the person is stationary, and it is the plate that is moving towards you. In each case, says Zohar, the moving object is dangerous only because of the presence of the stationary object. The threat to your life consists in the conjunction of the two objects in their relative motion.⁹ Yet the stationary person is traditionally labelled a bystander whom it would be impermissible to kill, whereas the moving person is identified as an innocent threat whom ESDs grant a permission to kill. Zohar claims that there is no plausible way to distinguish between the stationary person and the moving person. They are both what Zohar calls ‘passive threats’.

⁵ Zohar, ‘Innocence and Complex Threats’, p. 742

⁶ Zohar, ‘Innocence and Complex Threats’, pp. 744 - 745

⁷ See e.g. Thomson ‘Self-Defense’, pp. 289 - 291

⁸ Of course, we could also deny that such people are legitimate targets. However, since I hold a strong inequality position, I don’t want to do this.

⁹ Zohar, ‘Innocence and Complex Threats’, p. 744

Using the model of the Israeli / Palestinian conflict, Zohar suggests that both combatants and non-combatants often pose these passive threats. Non-combatants form settlements that enable terrorists to hide in their midst. Children will grow up to be soldiers. Non-combatants form part of an expanding population in an area that doesn't have room for both the Israelis and the Palestinians. They provide a reason for the combatants to fight, perhaps by encouraging the soldiers, or simply by being something that the soldiers wish to protect. Zohar argues that:

[I]n terms of individual contribution, it seems hard to assert any essential difference between such civilian contributions and those of non-shooting soldiers. Under ESD, once killing in 'self-defence' has been permitted against the innocent and extended to enemy soldiers in general, a plausible case can be made for extending it to civilians as well... We require a moral argument [for the wrongness of terrorism], but if ESD is correct, applying to innocent obstructors and hence to non-attacking soldiers, it seems to follow that siege and terrorism can in principle be justified by the same token. Since ESD allows killing innocent people insofar as they passively contribute to the threat against us, it can often plausibly apply to noncombatants as well—perhaps to the entire enemy population. If, then, we are to justify the war ethic in such a way that precludes terrorism and preserves noncombatant immunity, it cannot be by means of endorsing ESD.¹⁰

I think that Zohar is right that the moral status of obstructors poses a problem for many accounts of self-defence, including Thomson's ESD.¹¹ Briefly, I suggest that thinking about obstructors forces us to widen our conception of what it is to pose a threat to a person. It is not only those people who are going to kill me, like Falling Person, who can be said to pose a threat to me. A person can also threaten by obstructing an escape route or by conspiring with a person who is going to kill me. A useful test for identifying whether a person is a bystander or a threat is to think about whether it is possible that she play her role in a given scenario culpably. Someone who deliberately blocks my only escape route as I flee some threat to my life is liable to be killed by me, and I think that any plausible account of self-defence will want to endorse such a permission. If, however, we also want to retain the claim that bystanders are not legitimate targets, we had better not call such a person a bystander. And, since being a bystander is about causal facts, and these facts remain constant

¹⁰ Zohar, 'Innocence and Complex Threats', p. 748

¹¹ See Helen Frowe, 'Equating Innocent Threats and Bystanders' and Helen Frowe (2008) 'Threats, Bystanders and Obstructors', *The Proceedings of the Aristotelian Society* 108 No. 3, pp. 365 - 372 for discussion of this argument and its implications for permissible defence.

irrespective of culpability, we shouldn't regard innocent obstructors as bystanders either.¹²

The problem is that more conventional ESDs of the sort Zohar has in mind cannot endorse a permission to kill culpable obstructors, since they insist that obstructors aren't appropriately causally involved in a threat, and are thus bystanders.¹³ If the causal role of an obstructor is such that she cannot be described as threatening, it shouldn't matter if she plays that role culpably. But I think it clear that this *does* matter, and it strongly suggests that obstructors are not bystanders, but threats.

Now, the point that Zohar will press (and it is a very good point) is as follows. If one can kill innocent threats, and a person who blocks an escape route is a threat, surely this person is a legitimate target even if she is innocent. In other words, Zohar seems to be right that an ESD cannot help but endorse a permission to kill innocent obstructors in the course of saving one's own life. I think Zohar is right that some ESD accounts will indeed be committed to this. For example, Thomson's account of permissible defence holds that I may use defensive force only if the target is going to violate some important right of mine. If I can kill a culpable obstructor, then, it must be because he is going to violate some right of mine. But Thomson famously argues that one can violate a right even if one is not acting (hence the permission to kill innocent Falling Person). Thus, a person who helplessly obstructs my escape can also violate my rights, and be a legitimate target.¹⁴ But it seems counter-intuitive that I could, for example, lethally trample over an innocent person as I flee something else, and Thomson herself explicitly rejects such a permission.¹⁵

¹² Some writers have tried to argue for a class of culpable bystanders whom, unlike innocent bystanders, it is permissible to kill. I develop several arguments against this idea in *Defensive Killing*. I will not pursue them here.

¹³ Thomson, 'Self-Defense', pp. 298 - 299

¹⁴ Gerald Lang has suggested to me that Thomson could respond by saying that the right the culpable obstructor violates is something like 'a right that people not block my escape when they could get out of the way'. We might think that this has something to do with people being where they shouldn't: the obstructor is entitled to be on the bridge when she can't help it, but not when she can help it. I think this reply fails for two reasons. The first is Thomson's explicit defence of the irrelevance of intention to permissibility. So, if it's impermissible for the obstructor to be there when she intends that Victim be trapped, it's impermissible even when she doesn't intend it. The second is that once Thomson lets intention into the content of a right, she will have trouble explaining why one can kill innocent threats. If she allowed that what makes it permissible to kill culpable obstructors is that they *intend* to occupy the space in a way that is detrimental to Victim, but not innocent obstructors who have no such intention, then she needs a new argument for why it's permissible to kill innocent threats who don't intend to occupy the space in a way detrimental to you.

¹⁵ Thomson, 'Self-Defense', p. 290

And, as Zohar points out, if we think self-defence underpins the war ethic, widening our range of targets in this way will raise difficulties on the national level for non-combatant immunity. We don't want combatants trampling over civilians simply because they are in the way.

Zohar concludes that ESDs fail as both a ground of the war ethic and as accounts of self-defence. He suggests that the correct account of self-defence is a restricted or narrow view that does not permit the killing of the innocent. Since Zohar takes a permission to kill the innocent to be integral to the war ethic, he argues that the rules of war cannot be reduced to the rules of self-defence.

II. Defending the Reductive Strategy

Zohar's argument presents two challenges for those who wish to defend a reductive strategy based upon an ESD account. The first is to show that what Zohar calls the 'amplification' of the range of defensive targets for the purposes of war is in fact mirrored on the domestic stage. In other words, I want to show that what Zohar takes to be an *extension* of the scope of self-defence is not an extension at all. The domestic equivalents of those he identifies as targets in war are legitimate targets of self-defence. The second challenge is showing that ESDs can resist the apparent progression from non-attacking soldiers to terrorism.

I suggest that whilst Zohar is correct that obstructors are threats, he is mistaken to assume that we cannot distinguish between different *sorts* of threats. I will argue that by invoking a distinction between direct and indirect threats, my account can meet both the challenges that Zohar's argument poses. However, whilst my view will not endorse terrorism, it will afford non-combatants blanket protection. In this respect Zohar is right that a plausible account of self-defence cannot support any wholesale Principle of Non-Combatant Immunity (PNI). However, this gives us grounds to be suspicious of any such principle, rather than to reject the reductive strategy.

(i) *Direct and Indirect Threats*

I am not going to attempt to devise any sophisticated metaphysical account of the difference between a direct and an indirect threat, or between a cause and a causal condition. Rather, I will define a direct lethal threat as a person who is going to kill you, using a pretty commonsensical notion of what it is to kill

someone. Direct threats are what we might call the ‘agent’ of harm, where the term ‘agent’ does not imply moral agency, but rather refers to ‘being the thing that harms you’. So, disease or starvation can be the agent of a person’s death. This will include as direct threats people like Falling Person, who is going to crush you to death, and also those who act through tools, like a person firing a gun, injecting a poison or driving a vehicle.¹⁶

An indirect lethal threat is a person who is not going to kill you, but whose movement or presence lessens your present chances of survival in some other way. A person who blocks your escape route counts as an indirect threat, as does a person driving the car for a drive-by shooting, and the mafia boss who hires an assassin to kill you.

On my account of self-defence, you can use force against even an innocent person if they will otherwise inflict upon you a comparable harm to which you are not liable. A person is not liable to bear a harm if she has not consented to bear it, nor is she party to some relevant wrongdoing. So, my account of self-defence is an extended account of the sort that Zohar objects to, because I permit an innocent person to kill an innocent direct threat like Falling Person to save her own life. However, I do not want to permit the killing of innocent indirect threats. I think that indirect threats can be killed only when they are morally responsible for posing an unjust threat.

I want to go at least some way to supporting a morally significant distinction between direct and indirect threats by suggesting that the fact that someone is on course to kill you, or to inflict serious harm upon you, is morally significant even in the absence of their having moral responsibility for that fact. It seems to me that an essential part of what it *means* to say that one is not liable to a harm is that one may use proportionate force against a thing that will otherwise inflict it, including those things that are themselves innocent. Since Victim is no more liable to a harm simply because it will be innocently, rather than intentionally, inflicted, he may defend himself against its infliction. The fact that Falling Person is going to kill Victim creates asymmetrical permissions between these two equally innocent characters. Victim may do to Falling Person things that Falling Person may not do to Victim. Thinking about this asymmetry undermines the idea, favoured by people like Michael Otsuka, that there is no moral difference between Falling Person and Victim, and that both have the moral status of bystanders.¹⁷

¹⁶ There might be some cases in which it is unclear whether a person counts as killing you, but I will not explore those here.

¹⁷ Michael Otsuka, ‘Killing the Innocent in Self-Defence’, p. 84–85, 87

The following two cases illustrate the asymmetry I have in mind:

Tractor Beam 1: Falling Person is heading towards Victim. She will lethally crush him, but his body will cushion her fall. Victim can use his tractor gun to alter Falling Person's trajectory. He can move her into the wall, which will paralyse her from the waist down. Given her altered trajectory, Falling Person will no longer hit Victim, but hitting the wall will break her fall so that she will not suffer any additional injury when she hits the ground.

Tractor Beam 2: Falling Person is heading towards the bottom of the well. She will be killed if she hits the well floor. She can use her tractor gun to pull Victim underneath her, where he will cushion her landing, but he will be paralysed from the waist down.

Now, it seems to me clearly permissible that Victim proceed in the first case, using his tractor beam to move Falling Person so that she doesn't kill him, even when doing so will cause her serious injury. But it seems equally clear that Falling Person may not pull Victim underneath her to cushion her fall when doing so will cause Victim serious injury. To do so would be for Falling Person to employ Victim—a bystander—as a human shield between herself and the ground. But if it is true both that (a) Falling Person and Victim are equally innocent, and (b) under such circumstances, the fact that one is about to kill the other is morally irrelevant, it is hard to explain the different permissions in the two cases. What could explain why Victim may harmfully move Falling Person to save his life, when Falling Person cannot harmfully move Victim to save her life?

Well, as I have just noted, Victim is a bystander. And it is wrong to intentionally inflict serious harm on bystanders, even in the course of saving one's own life. But of course, to say that Victim is a bystander really amounts to nothing more than the observation that Victim does not pose a threat to Falling Person. If *this* is the difference that makes the difference, we seem to be saying that it matters that Falling Person will inflict harm upon Victim even when she is not responsible for this infliction.

We might say, instead, that Falling Person acts wrongly in *Tractor Beam 2* because she is forcing Victim to save her, but there is no duty to save at very serious cost to oneself. But again, this says nothing more than that whilst Falling Person will be forcing Victim to save her, Victim will be forcing Falling Person not to kill him. Again, if we think *this* makes the difference, we are committed to saying that it matters that Falling Person is going to kill Victim.

Moreover, the *lack* of any duty on Victim's part to save Falling Person in *TB2* can be a relevant *difference* only if there *is* a duty on Falling Person's part not to kill Victim in *TB1*, such that Victim's harmful action is justified because he is forcing Falling Person to comply with this duty. But those who deny a permission to kill innocent threats will not want to endorse the idea that Falling Person fails in her duty if she kills Victim, and so this reply doesn't seem open to them.

The sole difference between *TB1* and *TB2* seems to be that in harming Falling Person, Victim is averting a greater harm to himself *that Falling Person will inflict*. This fact must have not insignificant moral force if it is indeed permissible for Victim to inflict very serious harm on Falling Person. Falling Person cannot invoke a similar justification for inflicting great harm upon Victim. It is not enough that she, like Victim, is aiming to prevent herself from being killed; it matters, morally, that Victim is not going to kill her. Hers is a paradigm 'use of a bystander' case: she aims to exploit Victim, making herself better off for his presence in a way that should strike us as impermissible. But if Falling Person, lacking responsibility for what threatens Victim, were really morally equivalent to a bystander, it would be similarly impermissible for Victim to inflict great harm upon her to save himself. I do not think that it is impermissible, and I think that this gives us pretty good grounds for thinking that being the agent of harm can be morally relevant even without moral responsibility. Thinking about this asymmetry undermines the idea that there is no moral difference between Falling Person and Victim, and that both have the moral status of bystanders.¹⁸

So, the fact that Falling Person is going to kill Victim grounds Victim's permission to kill Falling Person. But I do not think that the asymmetry between them rules out Falling Person's defending herself. Consider *Defensive Ray Gun 1*:

Defensive Ray Gun 1: Falling Person is falling towards Victim. She will kill him if she hits him. Victim powers up his ray gun in order to lethally defend himself. Falling Person has a revolver that she can use to stop Victim from killing her.

Falling Person is morally innocent, and thus on my account she is not liable to bear the harm that Victim will inflict. As I argue elsewhere, that Victim may inflict harm on Falling Person does not show that the harm *itself* is just—that

¹⁸ Michael Otsuka makes the opposing claim in, 'Killing the Innocent in Self-Defence', p. 84–85, 87

Falling Person will not be wronged by being harmed. I therefore hold that Falling Person is permitted to defend herself against Victim.¹⁹

It might be thought that this claim undermines the idea that Falling Person may not inflict harm upon Victim in *Tractor Beam 2*. Is it plausible to hold that Falling Person can kill Victim when she sees him power up his ray gun to kill her, if she can't force him to save her by using her tractor gun to move him underneath her? I think that it is, precisely *because* it makes a moral difference that when Victim is about to use his ray gun on Falling Person, he is about to inflict harm upon her. Now that he poses a direct threat of harm to her, and she is not liable to be killed, she may defend herself against him. I think this is also true when she realises that Victim is going to paralyse her in *TBI*. Again, it matters that now she will be preventing the infliction of a harm, not forcing Victim to save her (even if his body will save her if she manages to defend herself against him).

These cases suggest that inflicting harm is morally significant, even if it is innocent infliction. However, someone might object that the relevant feature here is that of posing a threat, rather than a *direct* threat. So, let's take a third case, *Comfy Well*:

Comfy Well: Falling Person is falling towards Victim, who will be killed if she lands on him. Since this well has a nice soft floor, Falling Person would survive even without Victim's body to cushion her. Victim could get out of the well, were it not for the fact that Obstructor is lying unconscious in the doorway. Victim powers up his ray gun, intending to kill Falling Person. Falling Person has her own ray gun. She can either (a) kill Victim before Victim kills her, or (b) kill Obstructor, enabling Victim to move out of the way.²⁰

In this case, both Victim and Obstructor threaten Falling Person. Victim poses a direct threat, since he is going to kill her. Obstructor poses an indirect threat, since in Obstructor's absence, Victim would have no need to lethally defend himself against Falling Person. She is thus worse off for Obstructor's presence.

¹⁹ I expand and defend this view in Helen Frowe (2009) 'The Justified Infliction of Unjust Harm', *Proceedings of the Aristotelian Society* 109 No. 3, pp. 345 - 351 and Helen Frowe (2000), 'A Practical Account of Self-Defence', *Law and Philosophy* 29 No. 3, pp. 245–271.

²⁰ The cushioned floor matters because this means that Obstructor indirectly threatens Falling Person and Victim. If the well had a hard floor, Falling Person would be *better off* for Obstructor's presence, because it is only Obstructor's presence that keeps Victim in the well where he will cushion her landing. She is worse off for his presence when the well is cushioned, because now Victim cannot move, and thus she threatens Victim's life.

But it seems very implausible to me to think that Falling Person may kill Obstructor rather than Victim. My view explains why this is. If Falling Person is not liable to bear the harm that Victim will inflict, it follows on my account that she may defend herself against its infliction. This means that she may take option (a), killing Victim before he kills her, but she may not take option (b), killing Obstructor to enable Victim to move. Such a killing would not be defensive, but preservative.

My position holds, then, that one can kill even an innocent direct threat, because inflicting unjust harm is morally significant even without agency. But when a person threatens only indirectly, Victim needs additional justification for killing her. The primary justification for this will, I suggest, be moral responsibility on the part of the indirect threat for unjustly endangering Victim's life.²¹

(ii) *Responsible Indirect Threats and Reasonable Opportunities*

I take a person to be morally responsible for endangering you if she intentionally fails to avail herself of a reasonable opportunity to avoid posing an unjust threat to you. I used to think that an opportunity was reasonable provided that it didn't require the agent to bear a harm comparable to that facing Victim.²² If, for example, a person who blocks your escape route from some lethal threat could get out of your way, but refuses to do so because this will mean getting her feet wet, she is a responsible indirect threat. She had a reasonable opportunity to avoid endangering you, and she intentionally failed to take it. But if she can avoid blocking your escape route only by throwing herself off a bridge into the ravine below, that would not count as a reasonable opportunity, and she would not count as a responsible threat if she decided not to take it.

But this seems to conflict with our intuitions about the role of duress in excusing wrongdoing. Take the *Lynch* case of 1975.²³ Lynch was forced under pain of death to drive some IRA members to the shooting of a policeman. Lynch was originally tried and convicted of murder along with the IRA members, because duress is not a legal defence to homicide. I think it plausible that Lynch ought not to have been punished (although we should be reluctant to say that he acted rightly).²⁴ But the question that I am interested in is not

²¹ The other obvious candidate is numbers.

²² See Helen Frowe, 'Equating Innocent Threats and Bystanders'.

²³ *DPP for Northern Ireland vs. Lynch*, 1975 AC 653

²⁴ In a similar case, *Abbot vs. R* (1977, AC 775), the defendant was the principal killer, and received a life sentence for murder.

whether Lynch should be punished or blamed, but whether the policeman whom the IRA went to kill would have been permitted to shoot Lynch if doing so was the only way in which he could have saved himself. Imagine that whilst he could have had no hope of defending himself against all three IRA shooters, he could have sent the whole car off the road if he had shot Lynch, thus saving his life. Would this have been permissible? I think it would. If I am right, things are more complicated than we might have thought. It looks like an indirect threat can render herself liable to be killed even if the alternative involves a comparable harm. Perhaps, then, an indirectly threatening person is not liable to be killed only if refusing to endanger someone else would require her to bear a *greater* harm than that to which she will expose them. Had the IRA been going to just beat the policeman up, for example, it would not have been permissible for the policeman to kill Lynch, given the comparatively large cost that Lynch would have faced had he refused to endanger the policeman.

We might go some way to drawing a distinction between Lynch and the person who must throw herself off the bridge into the ravine if we think that there is a morally relevant difference between requiring that a person refuse to endanger Victim even if someone else will then harm her, and requiring that a person harm herself in order to avoid endangering Victim. It seems to me psychologically harder, and therefore more demanding, to require that, for example, Lynch drive the car off a cliff himself than to say that he ought to refuse to drive the car even if the IRA will shoot him (although of course, this too is very demanding).²⁵ However, I'm not sure that this will greatly affect what I want to say about indirect threats in war, so we can perhaps set it aside for now.

There is a further question of whether or not Lynch acted impermissibly. I return to this in the discussion of civilian liability below.

III. Indirect Threats and Self-Defence

So how does this help me to resist Zohar's objections to a reductive strategy based on an ESD? Well, let's go back to the two problems that Zohar's challenge raises. The first is whether the range of legitimate targets in war, including those who threaten more abstractly, like administrators and other

²⁵ Kamm makes a related point in her discussion of killing innocent threats in *Creation and Abortion*, arguing that whereas Falling Person ought to redirect herself if doing so will cause her harm (a broken leg), she would not be required to fatally redirect herself: "it is not appropriate

non-attacking soldiers, can be plausibly mimicked on the domestic stage in a way that supports the reductive strategy. Is Zohar right that such people could not count as threats in a domestic context, much less as legitimate targets?

Imagine that a particularly well-organised branch of the mafia have set up offices, and employed various people to assist them in killing off people who stand in the way of their illegal and unjust activities. They track the movements of potential targets, establishing their routines, translating their phone calls and monitoring police radios to enable the shooters to make their getaway. All of these people seem like legitimate targets of defence to me. If, somehow, shooting one of them would enable the intended target of a hit to save his life, and there is no less harmful way in which he can do this, then the fact that a person works in an office rather than driving the getaway car does not grant her immunity. There is no principled difference between self-defence and national defence here.²⁶ There are contingent differences about the likelihood of being in this sort of situation. But thinking about this analogous, non-military setting undermines Zohar's claim that in such a scenario, these people would not be seen as threats at all.

The same seems true of those 'passive threats' whom Zohar describes as threatening 'simply by being there', perhaps by setting up camp in a way that forces the opposing army to travel across more dangerous territory. A person who intentionally lessens the survival chances of another person in this way would be a legitimate target of self-defence, and this explains why such 'non-attacking' soldiers on the unjust side of the war are legitimate targets of national defence. They are indirect threats whom, given their responsibility for the unjust threat that they pose, it is permissible to kill to save one's own life.²⁷ So, I think that my version of the ESD applies across both war and self-defence in a way that is compatible with, and supports, the reductive strategy.²⁸

to require an innocent threat to do this. Because she is morally innocent of threatening her victim, she does not owe it to him to give up her life to save him" (p. 48). But, Kamm also suggests that others would be permitted to lethally redirect Falling Person to save Victim from great harm: "Suppose that the innocent threat would paralyze her victim and could be stopped only by being killed. Although the threat would not need to press her button and fatally redirect herself... I believe that a third party may permissibly kill" (p.54).

²⁶ Remember, that I have in mind administrative staff working on the unjust side of a war, and thus we cannot appeal to the legality of the non-attacking soldier's actions compared to the illegality of the mafia office staff. Unjust wars of aggression are no more legal than mafia hits.

²⁷ I'm assuming here that all those who sign up for the armed forces are morally responsible for doing so.



²⁸ Of course, all of this takes place against the background assumption that the threatened person or group is not liable to be killed. Given this, my account will not support what Zohar identifies as a crucial tenet of the war ethic: the mutual permission to kill between opposing

IV. Culpability in War

As Zohar points out, however, getting the permission to kill in war to cover non-attacking soldiers is supposed to be only half the battle. The other half is making sure that it doesn't cover non-combatants as well. But if, as Zohar plausibly argues, lots of non-combatants make comparable contributions to the war effort, how can my account restrict the permission of defensive killing to only enemy soldiers?


The short, and probably unwelcome answer, is that it often won't. Zohar is right that once we recognise that many people indirectly threaten, the range of permissible targets becomes much wider. Lots of civilians will count as indirect threats: those manufacturing weapons, those working in code-breaking or as translators. Imagine that the political leader waging the war won his election campaign on the promise of waging this war. Aren't the people who voted for him, and gave him political power, responsible in no small part for the war? It seems to me that they are, and that therefore it matters enormously whether or not the war is just. If it is a just war of defence against aggression that these people support, they do not act wrongly and as innocent indirect threats they are not legitimate targets. Nor are their frontline combatants legitimate targets. Endangering a person or group that is liable to be killed does not render one a permissible defensive target.

But if a country is engaged in an unjust war of aggression, contributing to the war effort might well render a civilian a legitimate target if her support lessens the survival chances of innocent combatants and civilians in another country. A person's contribution may be indirect, but much like the person who gathers information for the mafia, this fact cannot grant her immunity when she is morally responsible for the threat that she poses. It is now that it starts to matter a lot what we think counts as being morally responsible for the fact that one poses a threat. Is a person who, for example, faces imprisonment if she does not join her country's war effort liable to be killed if she succumbs

combatants. A person may kill an innocent person if she will otherwise inflict a harm to which *he is not liable*. But he may not use force to avoid a harm if he is liable to bear it: as I suggested, this is the most important feature of liability to harm. But I don't think that this is problematic. A proponent of an ESD need not accept Zohar's claim that many or all unjust combatants are morally innocent, and that a battle is thus a bunch of innocent threats killing each other. As mentioned above, it is also hard to see how Thomson's account of self-defence could be thought to support the moral equivalence of combatants. She argues that one may kill an innocent person in self-defence if, *and only if*, they will otherwise violate your right not to be killed, or some other comparable right. If combatant A  kill combatant B, it must be because B will violate his rights. But if this is true, B has no  not to be killed by A that he can lethally defend.

to the duress and contributes (assuming that the harm that she will help inflict is greater than that she will suffer)?

I think that the answer to this question has to be yes, with two important caveats. Before I outline the caveats, let me explain two possible ways in which the ‘yes’ could be interpreted. We could take what I call the Hard Line, which is to say that one acts impermissibly when one intentionally exposes others to risk unless one would have to bear a greater harm oneself to avoid so exposing them. Since one has acted wrongly, one is liable to be killed. Or we could take what I call the Soft Line, which is to say that it is permissible for people to decide not to bear significant costs to avoid endangering someone else. However, when they decide to expose the person to this risk, they become liable to be killed if this is necessary for the other person to save their life.

I have in mind here something like what Jeff McMahan says about driving.²⁹ If a careful, conscientious driver decides to drive down the street, he knows that he exposes pedestrians to a small risk of great harm. His doing so is permissible: it is not always wrong to expose others to even lethal risks. But since he is responsible for creating the risk, it is fair that he bear the costs if the risk eventuates in harm. Should he lose control of the car and career towards a pedestrian, she may zap the car with her ray gun to save herself. We might say that in choosing to drive, the driver consents to bear a  firm if it becomes necessary that someone bear it.

I am sympathetic towards the Soft Line when the costs of refusing to indirectly threaten are sufficiently high. It seems pretty demanding to require that, for example, a person in Nazi Germany not join the Nazi party even when this is the only way that he can get a job and feed his family. But it also seems very demanding to insist that just combatants cannot kill such a person if it turns out that doing so is necessary to defend their lives, and the lives of others. We might want to say something like this about the *Lynch* case that I discussed earlier. Perhaps Lynch does not act impermissibly in acquiescing to the IRA’s demands when the cost to him of refusing is so high. This might explain our reluctance to blame or punish him. But, as in McMahan’s case, even permissible activity can render one liable to be killed. Again, it seems very demanding to insist that the policeman cannot shoot Lynch to save his own life.

²⁹ Jeff McMahan, ‘The Basis of Moral Liability to Defensive Killing’, *Philosophical Issues* 15, Normativity, (2005), p. 393 - 394

The first caveat that attaches to finding such civilians liable, then, is to remember that again, what we're interested in here is liability to defensive killing, and not blame or punishment. The second caveat is to remember that killings of this sort, like all defensive killings, will be permissible only if they are *necessary*. Part of a harm's being necessary is that it is the least harmful means available of averting the threat to oneself. There will probably be comparatively few instances in which killing an indirectly threatening civilian, at least one posing a relatively minor indirect threat, will be the least harmful way of defending oneself. A related point is that part of the justification for killing in war is that one gains a *military advantage* as a result of inflicting damage or harm.³⁰ This is particularly important when we think about civilian contributions. There might be many people who, on my account, have rendered themselves liable to be killed, but whom it would afford one no advantage to kill, perhaps because they will be easily replaced, or because their contribution is *very* small. Again, I suspect that actually, there will be comparatively few cases in which killing a person who poses a non-military, indirect threat will meet this condition.³¹

But when they do, such killings will not be terrorism. Zohar describes terrorism as the “purposeful slaying of the innocent”.³² But on my account, only those indirectly threatening people who are morally responsible for the fact that they pose a threat will be legitimate targets. As Michael Walzer points out, terrorism is about attacking people because of who they are, not what they have done.³³ What I am proposing is that a civilian can, *through her actions*, render herself liable to be killed. I am not suggesting that a civilian might be a legitimate target simply because, as Zohar claims, of ‘who and where she is’. Killing a person because she is morally responsible for contributing to an unjust threat is not an act of terrorism.

³⁰ Suzanne Uniacke has recently argued that the *ad bellum* requirement that one have a reasonable prospect of success is disanalogous to self-defence, where there is no such requirement ((2009), ‘Self-Defence, Necessary Force and a Reasonable Prospect of Success’, Unpublished Manuscript). We might think that the requirement of gaining military advantage is the *in bello* cousin of the reasonable prospect of success requirement. I think that there are interesting questions about how this informs our understanding of the relationship between war and self-defence, but I cannot address those here.

³¹ Note, then, that I reject McMahan's view that liability has an internal necessity condition, such that one can be liable to a harm only if that harm will be instrumental in averting a threat for which one bears moral responsibility (see, for example, Jeff McMahan (2009) *Killing in War*, (Oxford, OUP) p. 225). On my account, whether or not a person is liable to a harm depends on what they have done, not on the usefulness of killing them.

³² Zohar, ‘Innocence and Complex Threats’, p. 735

³³ Walzer (1997), *Just and Unjust Wars*, (New York: Basic Books), p. 200

Moreover, many of the sorts of threat that Zohar claims non-combatants might pose—being a reason why the army fights, or being a person who might grow up to be a soldier, being born in contested territory—are just not the sorts of threat that one can pose responsibly. So Zohar’s claim that using an extended account of self-defence to underpin the war ethic will end up labelling the ‘entire enemy population’ fair game seems unfounded. If we can recognise a distinction between direct and indirect threats, an extended account of self-defence will have the resources to cover the range of permissible wartime targets without endorsing terrorism. But, our understanding of permissible wartime targets might well have to change in light of our observations about permissible self-defence.

Conclusion

I have argued that accounts of self-defence that permit the killing of innocent threats can be used to underpin the rules of war. Zohar is correct that existing accounts of self-defence are mistaken to conceive of obstructors as bystanders. Obstructors are threats. However, he is mistaken to think that we cannot distinguish between different sorts of threat. I have argued that the fact that a person is going to kill me is morally significant even in the absence of their having moral responsibility for that fact. Recognising this gives us a way to morally differentiate direct and indirect threats. I then suggested that indirect threats become liable to be killed if they are morally responsible for the fact that they pose a threat, and that this applies both on an individual level and during war. Many non-combatants indirectly threaten, and some are morally responsible for doing so. My account does indeed undermine the idea of a universal Principle of Non-Combatant Immunity. But it does not undo our grounds for condemning terrorism, because the defensive killing of a person who is morally responsible for an unjust indirect threat is not terrorism.

