

Innocence, Self-Defense and Killing in War

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I. THE ORTHODOX VIEW

MOST of us believe that there are conditions in which war is justified and thus that there are conditions in which the individual soldier is morally permitted, and nearly as often morally required, intentionally to attack and even to kill other human beings. Many people, indeed, accept this quite uncritically, often assuming that war is a special condition in which morality, if it applies at all, is radically transformed. But consider the perspective of the morally scrupulous soldier who is ordered to kill. To what considerations may he appeal for justification?¹

What I will refer to as the *Orthodox View* among moral theorists is that, while it is normally or even always wrong intentionally to attack or kill the innocent, people may, because of what they do, render themselves relevantly noninnocent, thereby losing their moral immunity to intentional attack and instead becoming liable, or morally vulnerable, to attack. To be innocent, on this view, is to be harmless; correspondingly, one ceases to be innocent if one poses an imminent threat of harm to, or is engaged in harming, another person. To the modern mind this may seem a curious understanding of the notions of innocence and noninnocence. Yet there is etymological warrant for the use. To be “innocent” is not to be *nocentes*—a Latin term that refers to one who is harmful or who injures. To distinguish this sense of innocence from the more familiar notion of moral innocence, some writers have stipulated that a person who is harmless is “materially innocent,” while one who is threatening or causing harm is said to be “materially noninnocent.”

On the Orthodox View, it is assumed that all those who are, to use Michael Walzer’s phrase, “currently engaged in the business of war” are *ipso facto*

¹ Most combat soldiers have traditionally been, and still are, male. Doubtless this will change but until it does it seems justifiable to use male-gendered pronouns to refer to them.

engaged in causing harm and are therefore relevantly noninnocent.² It has therefore been assumed that there is a rough equivalence, in war, between the innocent and noncombatants and between the noninnocent and combatants.³ From there it has seemed a relatively short step to the conclusion that, while civilians in time of war remain relevantly innocent, all soldiers (except those who have surrendered or been incapacitated) are noninnocent. This, it is claimed, is why it is permissible for soldiers to kill other soldiers.

The presumed equivalence between the materially innocent, noncombatants, and civilians is only approximate, as is that between the materially noninnocent, combatants, and soldiers. In international law, for example, "combatant" is a technical term that refers to a person who wears a distinctive emblem, carries arms openly, and so on.⁴ Proponents of the Orthodox View, however, see themselves as articulating the morality of war and not the positive law of war (though they assume that there is a close congruence between the two) and hence use the term in a rather different way. They typically include among combatants certain types of civilian—for example, political leaders, persons who work in war industries, and so on—whose activities contribute directly to the war effort.⁵ But, because of the vagueness of such notions as making a contribution to the war effort, the task of drawing the relevant distinctions in a way that is intuitively plausible has been a persistent source of embarrassment to proponents of the View. For it is not obvious why a political leader who orders troops into battle is engaged in causing harm while voters in a democracy who demand that the leader should do so are not; or why drivers who transport arms to the troops count as combatants while the taxpayers who provide the arms by paying for them do not; or why a soldier who is asleep or sitting at a desk well behind the lines can be regarded as threatening or causing harm when a civilian editorialist who stirs support for the war is not; and so forth. I will not labor these objections since they have been well rehearsed elsewhere.⁶

² Michael Walzer, *Just and Unjust Wars* (Harmondsworth: Penguin, 1978), p. 43.

³ For representative statements of this view, see *ibid.*, pp. 43 and 145–6; Thomas Nagel, "War and Massacre," in Charles R. Beitz et al., eds, *International Ethics* (Princeton: Princeton University Press, 1985), p. 69; Jeffrie Murphy, "The Killing of the Innocent," *The Monist*, 57 (1973), pp. 532 and 536; Robert K. Fullinwider, "War and Innocence," in Beitz, *International Ethics*, p. 94; Philip Devine, *The Ethics of Homicide* (London: Cornell University Press, 1978), p. 152; Anthony Kenny, *The Logic of Deterrence* (London: Firethorn Press, 1985), p. 10; and John Finnis, Joseph M. Boyle, Jr, and Germain Grisez, *Nuclear Deterrence, Morality, and Realism* (Oxford: Oxford University Press, 1987), pp. 86–90.

⁴ See Ingrid Detter De Lupis, *The Law of War* (Cambridge: Cambridge University Press, 1987), pp. 106–20.

⁵ See, for example, Finnis, Boyle, and Grisez, *Nuclear Deterrence, Morality, and Realism*, pp. 89–90.

⁶ A related line of attack is pressed with considerable ingenuity in Noam J. Zohar, "Collective War and Individual Ethics: Against the Conscriptio of 'Self-Defense,'" sections III and IV, forthcoming in *Political Theory*.

In becoming a soldier, according to the Orthodox View, one gains the right to kill other soldiers but loses one's own immunity to being killed by soldiers of the opposing side. This distribution of rights and liabilities among soldiers is impartial in the sense that no special rights are granted to those who fight in a just cause and no special constraints are imposed on those whose cause is unjust. Thus judgements about the morality of resorting to war (*jus ad bellum*) and judgements about the morality of conduct in war (*jus in bello*) are, in Walzer's words, "logically independent. It is perfectly possible for a just war to be fought unjustly and for an unjust war to be fought in strict accordance with the rules."⁷

It is often supposed that the Orthodox View is grounded in a doctrine that contrasts the legitimacy of intentional killing in self-defense with the doubtful legitimacy of killing in self-preservation.⁸ When lethal violence is directed against someone whose action threatens one's own life, one's action counts as self-defensive and is legitimate. But to try to save one's life by directing lethal violence against someone who is not causing the threat to oneself is an act of self-preservation and is at least presumptively wrong. Grounding the Orthodox View in a doctrine of self-defense has various advantages. Among these is that, by discriminating among threats of various degrees of seriousness, the doctrine of self-defense explains why only combatants, and not all people who are engaged in causing harm, however trivial, are vulnerable to lethal attack. Also, if the Orthodox View is supported in this way, then there is no discontinuity between the morality of killing in ordinary life and the morality of killing in war. War is a morally special condition only in that the number of people that it causes to render themselves noninnocent vis-a-vis one another is abnormally large.

II. OBJECTIONS TO THE ORTHODOX VIEW

The Orthodox View is vulnerable to numerous objections. I will begin with one that I believe is answerable but will then advance several that I believe are not.

I. DEFENSE AGAINST INITIALLY NONLETHAL THREATS

Imagine that the forces of an invading army have crossed one's borders and are moving towards the capital with the avowed aim of annexing one's country to their own. Yet they have announced—and are known to be sincere—that they will not fire their weapons except in self-defense—that is, unless they meet with forcible resistance. It may seem that, since the invading soldiers do not threaten

⁷ Walzer, *Just and Unjust Wars*, p. 21.

⁸ See, for example, Fullinwider, "War and Innocence," pp. 92–4.

anyone's life, the soldiers of the invaded country have no justification under the Orthodox View for killing members of the invading force. Yet surely it is permissible to resist such an invasion with lethal force.

There are at least two responses to this objection. One is to argue that, even though the invading forces do not directly threaten anyone's life, the threat they pose to the invaded country's political independence is sufficiently serious to warrant a lethal defensive response. While there are, as any theory of self-defense will acknowledge, threats that are insufficiently grave to justify a lethal defensive response, there are also less-than-lethal threats, such as threats of rape, torture, or kidnapping, against which one may defend oneself by lethal means. It is arguable that the political independence of the state is, similarly, a value that the citizens may permissibly defend by lethal means.

The second response appeals to an analogy with private life. Suppose that one discovers a burglar in the process of stealing valuable possessions from one's home. Although this is perhaps controversial, most of us believe that it would not be permissible to kill the burglar to prevent him from taking the possessions; for that would be a disproportionate response to the threat. One is, however, entitled to take certain steps to resist the theft. Suppose, however, that the thief threatens to kill one if one resists. In that case one is permitted to create the conditions of one's own lethal defense. For the thief's threat does not nullify one's right to resist. Indeed, it seems that, as soon as the thief structures the situation in such a way that the attempt to defend one's possessions automatically creates a need for self-defensive killing, one's right to self-defense is immediately activated. One is permitted to kill the thief even without first provoking him to attack by attempting a non-lethal defense of one's possessions.

The logic of this situation seems to apply to the case of the nonviolent invasion. Even if the threat to the invaded country's political independence is not itself sufficiently grave to warrant a lethal defensive response, that threat is backed by a threat to kill in response to resistance and since resistance is justified, the soldiers in effect confront a lethal threat that they may meet with lethal defensive force.

2. INITIAL AGGRESSION

Let us refer to a soldier who fights in a just war as a *Just Combatant* and to one who fights in an unjust war as an *Unjust Combatant*.⁹ (The latter term should not be interpreted to imply culpability. It is possible for a person to fight

⁹ I say "unjust war" rather than "unjust cause" because it is possible to fight an unjust war to achieve a just cause—for example, when war is an unnecessary or disproportionate means of achieving the just cause.

in an unjust war and yet be morally innocent. I will return to this.) As I noted, the Orthodox View does not discriminate morally between Just and Unjust Combatants; both are permitted to kill enemy combatants, provided that the killing is proportionate to a legitimate military aim it is intended to achieve and inflicts the minimum amount of harm necessary to achieve that aim. Within these constraints, the Orthodox View licenses any killing of one active combatant by another. In war, such an act is never a crime, never an act of murder, never an act for which the agent is culpable or punishable, even if the agent's cause is unjust. Individual soldiers do wrong only when they violate the requirements of *jus in bello*; they are not accountable for violations of *jus ad bellum* (that is, merely for participating in an unjust war).

Yet it is not obvious that the considerations cited by the Orthodox View in support of this claim are in fact sufficient to justify it. As the previous case of the initially nonviolent invasion shows, it is possible to initiate a state of war without attacking anyone except in self-defense against violent acts of resistance. But many wars are initiated in another way: by a surprise attack on the unmobilized forces of the adversary (as occurred, for example, at Pearl Harbor). An act of war of this sort, while directed against military forces and personnel, is not directed against combatants in the sense specified by the Orthodox View. The quiescent, unmobilized forces who are the victims of the surprise attack are not threatening or causing harm. Though they wear uniforms, they are not yet combatants. So how can the Orthodox View simultaneously hold both that in war only combatants are legitimate targets of attack and that individual soldiers who participate in a surprise attack that initiates an unjust war are not guilty of a crime (since they can be held accountable only for violations of *jus in bello* and not simply for participation in an unjust war)?

Assuming that it is possible for a war of aggression (that is, a nondefensive war) to be just, it may be that a surprise attack can be justified even if the targets are not, or not yet, combatants. The Orthodox View makes combatant status a sufficient condition for the loss of immunity; it need not, it seems, make it a necessary condition. In other words, it need not exclude other possible justifications for the use of violence or killing. So it seems compatible with the Orthodox View that participation in a surprise attack that initiates a just war could be justified by reference to considerations other than that the targets of the attack are combatants. Suppose, however, that the war initiated by a surprise attack is unjust because its cause is unjust. In that case, it seems impossible that there could be other considerations that could justify the action of the attacking soldiers. Since it cannot appeal to the claim that the intended targets of the attack are combatants in the relevant sense, the Orthodox View appears to be unable to avoid the conclusion that the Unjust Combatants who participate in a surprise attack that initiates a war are guilty of wrongful, indeed criminal,

behavior. Because it denies this conclusion, it appears to be unable to support its own claims.

3. UNJUST WARS AND THE DOCTRINE OF SELF-DEFENSE

The foregoing objection is in fact part of a wider criticism of the Orthodox View that challenges its claim to derive from a doctrine of self-defense. Let us say that one who wrongfully and culpably threatens the life of a morally innocent person is a *Culpable Attacker*, while the victim of the Culpable Attacker who then engages in self-defense against the culpable attack is a *Just Attacker*. According to virtually all accounts of the right of individual self-defense, the Culpable Attacker is not morally permitted to use lethal violence even to defend himself against his initial victim's self-defensive response.¹⁰ Suppose, for example, that a burglar enters a person's home and, discovering that the homeowner is there, fires at her with a gun but misses. If she returns fire, does this activate the burglar's right to self-defense, making it permissible for him to kill her in self-defense? I think clearly not: self-defense against a Just Attacker is wrong.

The application of this conclusion to war should be straightforward. Consider an Unjust Combatant who knows his country's aggressive war is unjust but decides to participate nonetheless, perhaps because he prefers the risks of combat to the obloquy suffered by dissenters in his society. Is it really plausible to suppose that he does no wrong in attacking and killing morally innocent victims of his country's aggression? Is it plausible to suppose that, by justifiably taking up arms to defend themselves and their compatriots against this unjust aggression, these victims thereby lose their moral immunity, making it justifiable for the Unjust Combatant to kill them? I find it impossible to believe that the answer to either of these questions could be "yes," yet that is the answer that the Orthodox View gives. The important point, however, is that the only doctrines of self-defense that support this answer are those that make the right of self-defense absolute, implying, for example, that a murderer may justifiably kill a police officer who attempts to kill him in order to prevent him from committing a further murder. Since, with few exceptions, proponents of the Orthodox View do not accept any such account of the right of self-defense, but instead agree that the right of self-defense is incapable of justifying the killing of a Just Attacker by a Culpable Attacker, they cannot claim that the Orthodox View can be derived from our views about self-defense. If the Unjust Combatant is justified in killing Just

¹⁰ The exceptions are certain accounts in the Hobbesian tradition that regard the right of self-defense as absolute. See, for example, Jenny Teichman, *Pacifism and the Just War* (Oxford: Basil Blackwell, 1986), Chapter 8. Notice that there is a distinction between provoking an attack by attacking and other forms of provocation. Only those attacks provoked in the former way are self-defensive and only Culpable Attackers normally forfeit the right of self-defense. Other culpable provocateurs generally retain it.

Combatants on the opposing side, the justification cannot be simply that he has a right to defend himself against those who threaten him.

Certain theorists, perhaps aware of the doubtful consistency between the Orthodox View and our views about self-defense, have advanced an alternative justification for killing in war that does seem to be a consistent extension of common views about self-defense into the sphere of war. The most prominent of these theorists is G.E.M. Anscombe, who, beginning with the standard assumption that the noninnocent lose their immunity to intentional attack in war, claims that “what is required, for the people attacked to be non-innocent in the relevant sense, is that they should be engaged in an objectively unjust proceeding which the attacker has the right to make his concern; or—the commonest case—should be unjustly attacking him.”¹¹ According to this view, in order for it to be justifiable to attack someone who poses a threat, it must be the case that the one who poses the threat is “objectively” unjustified in doing so. This allows for the permissibility of killing a *morally* innocent person in self-defense provided that the person *would* be culpable for the threat he poses if, contrary to fact, the necessary conditions of moral responsibility obtained. (I will refer to such a person, who is morally innocent but poses a morally unjustifiable threat, as an *Innocent Attacker*.) It does not, however, permit the killing of a person, even in self-defense, if what that person is doing is not “objectively unjust,” which of course it will not be if it is morally permissible. Thus Anscombe’s view does not permit, and indeed prohibits, the self-defensive killing of a Just Attacker (for example, by a Culpable Attacker).

Despite its apparent success in organizing many of our intuitions about self-defense under a single simple principle, Anscombe’s view is vulnerable to objections, not least of which is that it seems to lack any foundation for the implication that it is permissible to kill an Innocent Attacker in self-defense.¹² The point that should be noted here, however, is that Anscombe’s view is radically at odds with the Orthodox View. For Unjust Combatants are engaged in an objectively unjust proceeding; therefore the Just Combatants who oppose them are justified in attacking them and, since these Just Combatants are justified in what they do, they retain their innocence; hence it is wrong for Unjust Combatants to attack Just Combatants even in self-defense.¹³

¹¹ G.E.M. Anscombe, *Collected Philosophical Papers, Volume III: Ethics, Religion, and Politics* (Minneapolis, MN: University of Minnesota Press, 1981), p. 53. Some commentators have mistakenly seen Anscombe as an exponent of the Orthodox View. See, for example, Nagel, “War and Massacre,” p. 69, n. 10. A recent theory of the foundations of the right of self-defense that has certain affinities with Anscombe’s view can be found in Judith Jarvis Thomson’s “Self-Defense,” *Philosophy and Public Affairs*, 20 (1991), 283–310.

¹² I advance certain objections to Anscombe’s view in “Self-Defense and the Problem of the Innocent Attacker,” *Ethics*, 104 (1994).

¹³ That Anscombe’s view has this implication is noted by Teichman (*Pacifism and the Just War*, p. 65), who, however, appears to find the implication so implausible that she wonders whether Anscombe could have been aware of it.

III. THE PRIMACY OF MORAL INNOCENCE AND NONINNOCENCE

Critics of the Orthodox View sometimes challenge the significance of the distinction between combatants and noncombatants in the following way. Suppose that one could advance the just cause of a war by one or the other of two equally effective means. Either one could intentionally attack a member of the adversary's civilian population who is clearly a noncombatant but who bears significant moral responsibility for the wrong the redress of which constitutes the just cause for war (for example, an editorialist and propagandist who is now an invalid in hospital) or one could intentionally attack a pure-hearted but simple-minded conscript who has been manipulated into fighting by means of coercion, deception, and indoctrination. Is it really plausible, the critics ask, to suppose that, while it is impermissible to attack the former because he retains his material innocence, the latter is fair game because he does not? Citing just such a comparison, George Mavrodes asks: "Is it not clear that 'innocence,' as used here, leaves out entirely all of the relevant moral considerations—that it has no moral content at all?"¹⁴ Mavrodes concludes that the requirement to distinguish between the innocent and the noninnocent so understood, or between noncombatants and combatants, is merely a convention, like driving on a certain side of the road, that is highly useful for people to agree to observe.

There is, of course, another possibility, which is that there is a deeper morality of war that is not convention-dependent but which does not coincide with the Orthodox View. I believe that there is such a morality and that one of its crucial features is suggested by the contrast between the guilty noncombatant and the morally innocent soldier. Let us consider more closely why that contrast seems to challenge the Orthodox View.

The guilty civilian is an example of what I call a *Culpable Cause*—that is, a person whose culpable action in the past is the cause of a threat that has materialized only now. There are cases—and we are imagining that that of the guilty civilian is one of these—in which, though the Culpable Cause of some present threat does not now himself pose a threat, so that self-defensive violence against him is not even a conceptual possibility, nevertheless attacking or killing him would, for one reason or another, eliminate the threat caused by his previous culpable action. It is, I believe, intuitively plausible to suppose that it is permissible (subject, perhaps, to some suitable proportionality restriction) intentionally to harm the Culpable Cause in order to prevent his own culpable action from now causing harm to the morally innocent. It is, for example, permissible to kill the Culpable Cause to prevent his culpable past action from now causing one's own death. This would be a case of permissible killing in self-preservation.

¹⁴ George I. Mavrodes, "Conventions and the Morality of War," in Beitz et al., *International Ethics*, p. 81.

What the case of the Culpable Cause shows is that moral noninnocence may weaken or nullify a person's immunity to attack even if the person is materially innocent. It is also clear, as is shown by the impermissibility of self-defense against a Just Attacker, that mere material noninnocence (that is, causing harm) is not sufficient for the loss, or even the weakening, of a person's moral immunity to intentional attack. If a person is morally innocent, his being materially noninnocent may have no effect on the moral barriers to harming him. This is why the case of the Unjust Combatant who is morally innocent is disturbing: his moral innocence causes us to doubt whether he has lost his moral immunity and therefore whether it is permissible to attack him, despite his material noninnocence.

The case of the Innocent Attacker is, however, merely disturbing; it does not show that one who is morally innocent but materially noninnocent retains his immunity. For, while some believe that it is wrong, and therefore at most excused, intentionally to harm an Innocent Attacker, even in self-defense, most people believe that self-defense against an Innocent Attacker is permissible.¹⁵ The reason why the case of the Innocent Attacker is nevertheless disturbing is that none of the justifications that have been offered for self-defense against an Innocent Attacker is wholly convincing.¹⁶ The problem, as I see it, is to find a difference between the Innocent Attacker and the Innocent Bystander (someone who bears neither causal nor moral responsibility for a certain threat) that is sufficiently morally important to justify killing the former given our belief that intentionally killing the latter, even in self-preservation, is a paradigm of wrongful action.

According to the Orthodox View, the justification for self-defense against an Innocent Attacker is exactly the same as the justification for self-defense against a Culpable Attacker—namely, that the attacker, by threatening harm, has lost his immunity. This is implausible; if it were true, then whatever restrictions there are on the defensive use of violence against an Innocent Attacker would also apply to self-defense against a Culpable Attacker. But intuitively the restrictions on self-defense against an Innocent Attacker are considerably more stringent. For example, if it is possible to retreat from a confrontation with an Innocent Attacker in safety, then one must retreat rather than engage in self-defense. This is true even if one is where one has a right to be—for example, in one's home. One need not, by contrast, flee from a confrontation with a Culpable Attacker. Particularly if one is where one has a right to be, one may stand one's ground, killing the attacker in self-defense even if one could flee in complete safety. Or, to take another example, the proportionality restriction governing self-defense

¹⁵ Those who reject the permissibility of self-defense against an Innocent Attacker include Laurence Alexander, "Justification and Innocent Aggressors," *Wayne Law Review*, 33 (1987), pp. 1184–9; and Zohar, "Collective War and Individual Ethics."

¹⁶ The various arguments for the permissibility of self-defense against an Innocent Attacker are critically assessed in McMahan, "Self-Defense and the Problem of the Innocent Attacker."

against an Innocent Attacker is in some respects stronger than that governing self-defense against a Culpable Attacker. If, for example, one could be certain of avoiding being killed by an Innocent Attacker by killing him but could alternatively reduce the risk of being killed to an almost negligible level by attempting to incapacitate him with lesser force, one might be required to accept the greater risk to oneself in order to reduce the harm to the attacker. No such requirement would apply if the attacker were a Culpable Attacker. It might, of course, be argued that these examples show only that the combination of moral noninnocence and material noninnocence has a greater effect in weakening a person's immunity than material noninnocence alone. But if—as I believe is true—the restrictions that apply to self-preservative violence against a Culpable Cause are exactly the same as those that apply to self-defense against a Culpable Attacker, then we are entitled to draw a stronger conclusion: namely, that moral noninnocence has a greater effect in weakening a person's immunity than material noninnocence, other things being equal.

We may summarize our results so far as follows. Material innocence does not guarantee moral immunity. Neither is it clear that moral innocence guarantees immunity. On reflection, however, it may seem that the case for self-preservative action against the Culpable Cause is stronger than that for self-defensive action against the Innocent Attacker (as evidenced by the fact that the restrictions that apply in the latter case seem stronger) and thus that moral noninnocence has a stronger effect in weakening a person's immunity than mere material noninnocence. This conclusion is reinforced by the fact that there are cases in which material noninnocence fails to weaken a person's immunity at all. Moral noninnocence, by contrast, always appears to be a ground for liability.

We can illustrate these rather abstract conclusions by means of an example. Suppose there is a group of your enemies who wish you to be killed, since they will profit from your death. They build a device that can be programmed to transmit irresistible commands to a person through a receiver implanted in his brain. Once programmed and activated, the device requires no further guidance or intervention. Your enemies then kidnap an innocent person, install the implant in his brain, program the controlling device with the command that this innocent person should kill you, and activate the device. You learn what has been done and realize that there are only two things that can be done to save yourself. One is to kill your implacable though morally innocent pursuer. The other is to find the controlling device and deactivate it. Since the police think your tale is pure fantasy, your only recourse, other than killing the innocent pursuer, is to coerce your enemies to deactivate or reveal the location of the device. You soon realize, however, that the only way to do this is to begin killing them, one by one, until one of them is sufficiently intimidated to tell you where the device is located.

Notice that the enemies do not constitute a threat to you. Like the guilty civilian in the earlier example, they may all be helpless invalids. They are Culp-

able Causes; thus you cannot, as a matter of conceptual necessity, engage in self-defense against them. According to the Orthodox View, therefore, the enemies are innocent and retain their immunity to attack, while the pursuer, who does threaten you, is relevantly noninnocent and has therefore lost his immunity. It is permissible to kill him in self-defense. This, however, is obviously implausible. Assuming that killing the enemies would be equally effective in averting the threat and other things are equal, it is clearly morally preferable to kill the enemies—and to kill as many of them as necessary—rather than to kill the innocent pursuer.

The parallels with war are obvious. Earlier, in Section I, I rehearsed the familiar point that certain types of civilian—more types than the proponent of the Orthodox View would care to admit—may seem to forfeit their immunity in war by causally contributing in various ways to the threat their country poses. The point here is different. It is that, like the enemies in the case of the innocent pursuer, many civilians are Culpable Causes of the unjust threat their country poses. While the Orthodox View declares them immune, it seems clearly morally preferable to attack them rather than to attack innocent soldiers if either option would be equally effective in contributing to the achievement of the just cause of the war.

It is worth noting that, just as the enemies are Culpable Causes of the threat to you, they are also Culpable Causes of the predicament of the innocent pursuer. There is thus an additional reason for attacking the enemies, which is that one would be rescuing the pursuer from the awful and dangerous situation in which they have unjustly placed him. (This assumes, plausibly, that third party intervention against a Culpable Cause is permissible.) This is worth mentioning because an analogous consideration applies in war—namely, that if attacking guilty civilians would be equally effective in promoting the just cause as attacking morally innocent soldiers would be, then one has as an additional reason for attacking the civilians that this would help to free the innocent soldiers from the dangerous and morally repugnant predicament in which they have been unjustly placed.

The case of the innocent pursuer provides vivid support for the central claim of this section: that whether a person is morally innocent or noninnocent has a clearer and stronger effect on that person's immunity to intentional attack than whether he is materially innocent or noninnocent. Depending on what one believes about the permissibility of self-defense against an Innocent Attacker, material noninnocence alone may function to weaken a person's immunity and may therefore have a subordinate role in defining the requirement of discrimination in war. But the principal distinction is between the morally innocent and the morally noninnocent.

The significance of moral innocence and noninnocence is connected with considerations of justice. In some instances a person may, as a matter of justice,

deserve to suffer a certain harm because of his moral noninnocence. In that case it may be permissible, or even obligatory, for the appropriately authorized person or persons to inflict that harm even if the alternative would be that no one would be harmed. In other cases a person may be *liable* to suffer harm if, through his own culpable action, he has made it inevitable that *someone* must suffer harm. In such a case, it is permissible, and sometimes even obligatory, to harm the morally guilty person rather than to allow his morally culpable action to cause harm to the morally innocent.¹⁷ The interests of the innocent have priority as a matter of justice.

Given a choice between causing or not causing a certain harm, or between causing or allowing one harm and causing or allowing another, a person is innocent relative to that choice if she has done no wrong that renders her deserving of or liable to being caused or allowed to suffer that harm. The notions of innocence and noninnocence must be relativized, as they are here, to particular choices, since moral guilt renders a person liable only to certain specific harms and not to others. My unjustifiably attacking you makes me liable only to the minimum amount of harm necessary to prevent my harming you, together, perhaps, with any further harm I may deserve as punishment. My immunity is compromised only to that extent; I do not become fair game for any sort of violence that anyone might want to inflict on me for any reason. Thus in war the noninnocent are those who are morally responsible for the offense or crime the prevention or rectification of which constitutes the just cause for war; and they may permissibly be harmed only to the minimum extent necessary to achieve the just cause. I will leave open what constitutes a just cause for war. Thus it is possible that people may be relevantly guilty for offenses other than aggression.

Considerations of moral guilt and innocence may interact in complex ways with other factors to determine the morality of action. Moral guilt is often, however, a morally decisive consideration that can nullify the relevance of factors that would otherwise be significant. It can, for example, nullify the relevance of the distinction between doing and allowing or that of the distinction between intending and merely foreseeing. If one is being attacked by a Culpable Attacker, there is no reason to save oneself by allowing him to tread on a landmine rather than by shooting him (for example, if there would be a slightly greater risk to oneself in the former case). Nor is there any reason to intend only to incapacitate him rather than to intend to kill him if one knows that what one must do will, either way, in fact kill him. These considerations may have important implications for the morality of war. Some have suggested, for example, that, if certain civilians are morally responsible for the grievance that provides the just cause for war, then this may justify acts of war that foreseeably but unintentionally

¹⁷ This claim is developed as an account of the right of individual self-defense in Phillip Montague, "Self-Defense and Choosing Among Lives," *Philosophical Studies*, 40 (1981), 207–19.

harm them¹⁸—or, more significantly, may weaken the stringency of the proportionality restriction on causing them unintended harm. If, however, moral guilt has the significance I have suggested, then a civilian's moral guilt may have the stronger effect of rendering him liable to intentional attack. I will return to this.

IV. IMPLICATIONS FOR THE CONDUCT OF WAR

I. CAN UNJUST COMBATANTS PERMISSIBLY FIGHT?

The fundamental distinction that determines who is and who is not a permissible target for attack in war is the distinction between the morally guilty and the morally innocent. We may, as an exercise in persuasive definition, refer to this view as the *Moral View*. Since a combatant's moral guilt or innocence may be determined in part by whether or not he is fighting in a just war, the Moral View denies the Orthodox View's claim that *jus in bello* and *jus ad bellum* are logically independent. For the rights and liabilities of Just Combatants may be different from those of Unjust Combatants.

The Orthodox View holds that Unjust Combatants do no wrong provided that they fight within the limits of the conventional rules of engagement. If, however, those against whom they fight are morally innocent, because they fight permissibly for a just cause, then, according to the Moral View, the use of violence by Unjust Combatants is problematic, since the objects of that violence presumably retain their immunity to intentional attack.

We may distinguish between two uses of violence by an Unjust Combatant: violence in the service of the unjust war and violence that is entirely self-defensive. There is, it seems, no justification for the Unjust Combatant's use of violence in the service of the unjust war. If the war lacks a just cause, it follows that the cause it serves is incapable of justifying belligerent action. (This is true whether the aims of the war are inherently unjust or whether they are good or worthy aims that, for whatever reason, are insufficient to justify the resort to war.) And even if there is a just cause, the fact that the war itself is unjust again implies that the cause may not, in the circumstances, be permissibly pursued by belligerent means.

Whether an Unjust Combatant may permissibly use violence in self-defense is a more complicated question, the answer to which may depend on whether he is a Culpable Attacker or an Innocent Attacker. An Unjust Combatant may be morally innocent if he is nonculpably or excusably ignorant of the fact that the war in which he fights is unjust or if, even if he knows or suspects that the war is unjust, he is subject to irresistible coercion that compels him, against his will,

¹⁸ See James Child, "Political Responsibility and Noncombatant Liability," in Kenneth Kipnis and Diana T. Meyers, eds, *Political Realism and International Morality* (Boulder: Westview Press, 1987), esp. p. 64.

to fight. If neither of these conditions applies, so that the Unjust Combatant's participation in an unjust war is not fully excused, then he is a Culpable Attacker whose use of force, even in self-defense, is wrong. If, however, his participation is fully excused, then he is an Innocent Attacker and a case can perhaps be made for the claim that Innocent Attackers, while merely excused for their initial attack, are nevertheless justified in engaging in self-defense against the defensive counterattack by the victims of their initial attack.¹⁹ If it is true that an Innocent Attacker retains the right of self-defense against the victim of his initial attack, then an innocent Unjust Combatant does no wrong if he uses violence purely for the purpose of self-defense. (This in turn implies that the mere material noninnocence of the Just Combatant does indeed weaken his immunity vis-a-vis the innocent Unjust Combatant.) Since it would be absurd to suppose that the innocent Unjust Combatant retains the right of self-defense while the Just Combatant does not, the struggle between the innocent Unjust Combatant and the Just Combatant becomes one in which each party is justified in attempting to kill the other. There are thus conditions in which the implications of the Moral View coincide with those of the Orthodox View (which of course regards all rule-governed struggles between Just and Unjust Combatants as ones in which both parties are justified).

1.1 Is Military Service an Honorable Profession?

Among the reasons for thinking that many of the soldiers who fight in unjust wars are Innocent Attackers are that the reasoning that leads the higher authorities to decide to go to war and to fight the war in a certain way is generally not made accessible to ordinary soldiers, that soldiers are often or even typically lied to about the real purposes of the wars in which they are required to participate, that they are indoctrinated to accept uncritically whatever their superiors in rank tell them, that they are intensively conditioned to obey orders without reflection, and so on. While at least some of these features of military life are in some degree necessary in order for a military force to be able to mobilize quickly and to function smoothly and cohesively, there is also no question that they tend to diminish the autonomy and moral responsibility of individual soldiers. They are therefore among the considerations that might be cited in making a case for the claim that many soldiers who fight in unjust wars are morally innocent.

Persons who join the military are typically aware that this abdication of moral autonomy is a condition of military life; indeed, some join the military in part in order to enjoy the freedom from responsibility. They know, in short, that they are allowing themselves to become instruments of the wills of others. There is, moreover, something else they could know with a little reflection, which is that most wars in which people fight are unjust. This follows from the assumption that a war can be just on at most one side, though it can be unjust on both.

¹⁹ See McMahan, "Self-Defense and the Problem of the Innocent Attacker."

Even if this formal assumption is unwarranted, it does seem true as a contingent fact that very few wars, if any, have been just on both sides, while, as Anscombe puts it, “human pride, malice and cruelty are so usual that . . . wars have mostly been mere wickedness on both sides.”²⁰

Putting these two points together, we arrive at the conclusion that, in joining the military, one allows oneself to become an instrument for the violent pursuit of purposes that are more than likely to be unjust. How can this possibly be a morally acceptable thing to do? Of course, in many cases, the pressure to join the military may be nearly as strong as the pressure, once one is in the military, to surrender the prerogative of determining for oneself whether or not the war in which one is asked to fight is just. It is only when this is true that there can be a convincing case for regarding an Unjust Combatant as morally innocent. For, otherwise, following one’s superiors into an unjust war is roughly analogous to committing a crime while drunk: one may not be responsible for one’s action given one’s condition at the time, but one’s conduct nevertheless remains culpable because of one’s responsibility for getting oneself into a condition of diminished responsibility.

This leaves the question how it can be permissible voluntarily to join the military given the knowledge that one is likely to be used as an instrument of injustice. I have no answer to this question, though I offer two observations. First, the problem is most acute in countries, like the US, with a history of extensive use of force abroad. The likelihood that a soldier will be called upon to fight unjustly is much lower in a country, such as Switzerland or Sweden, with a recent record free of external interventions and whose forces are manifestly configured for defensive operations only (though even in these countries there is a risk of being used for unjust purposes internally—or, perhaps, externally in what was once an internal area, as in the case of the Yugoslav army, which was configured for territorial defense but has since supported aggression against areas that were formerly within the territory of Yugoslavia). Second, the problem here is but one instance of the broader problem of reconciling individual moral autonomy with structures of authority, which in turn appear necessary for many valuable forms of collective action. An analogous question is raised, for example, by participation in democratic decision-making procedures. By participating, one acquires a moral commitment—one that is perhaps defeasible but nonetheless real—to abide by the result. If the issue is one of moral importance, one risks being bound to support and perhaps participate in an immoral activity. Non-pacifists may take some comfort in the fact that very few people have been prompted by this reflection to reject democracy in favor of anarchy. For whatever arguments can be marshalled in defense of democracy can presumably be applied, *mutatis mutandis*, to the defense of soldiering.

²⁰ Anscombe, *Collected Philosophical Papers, Volume III*, p. 52.

If, however, it is morally permissible voluntarily to join the military even in conditions in which there is a significant probability that one will then serve as an instrument of injustice, can soldiers who voluntarily join be regarded as Innocent Attackers if they do fight in an unjust war? If one is permitted to place oneself in a situation in which one is likely to act unjustly, does the permission then excuse one's later unjust action? I do not believe that it can; hence one is left with a profound tension between the presumption that voluntary participation in the military is permissible and the claim that participation in an unjust war is both wrong and culpable if the Unjust Combatant freely chose to risk being used in this way.

1.2 The Divergence Between the Morality of War and the Laws of War

The Orthodox View, as I noted, coincides rather closely with the international laws of war. In particular, the laws of war, like the Orthodox View, permit Unjust Combatants to attack and kill Just Combatants. According to the Moral View, however, Unjust Combatants are justified in killing Just Combatants only in self-defense and only if they (the Unjust Combatants) are morally innocent. If the Moral View is the correct account of the morality of war, then the laws of war permit forms of action that are immoral. Is this acceptable?

There are compelling reasons why the laws of war cannot treat the use of violence by Unjust Combatants as criminal. The main reason is that we cannot regard ordinary soldiers as liable to punishment simply for having participated in an unjust war. This is not because an Unjust Combatant cannot deserve punishment provided that he fights in accordance with the positive rules of engagement. Rather, some Unjust Combatants may indeed deserve punishment. Others—the morally innocent—do not. But even those who do will be guilty to differing degrees. And there are no impartial institutions competent to determine which soldiers do deserve punishment and how severe a punishment they deserve. In current conditions, for example, even if the victor in a war is the side that fought in a just cause, it could not possibly administer punishment to large numbers of soldiers in an informed and impartial manner. And matters are of course much worse if it is the unjust side that emerges victorious. For victors do not concede that they have been in the wrong, even if they are aware that they have been (which, given the propensity for self-deception, they often are not). Rather, they invariably declare their cause to have been just; thus, if the practice were sanctioned, they would doubtless be moved to seek vengeance, under the guise of punishment, against soldiers who had justifiably resisted their wrongful aggression. Finally, the expectation that ordinary soldiers would face punishment at the hands of their adversaries in the aftermath of war would deter either side from surrendering, thereby prolonging wars well beyond the point at which fighting might otherwise cease.²¹

²¹ For other arguments for the view that the laws governing the conduct of war must not discrim-

The laws of war, therefore, have to diverge from the morality of war.²² But this will be acceptable if their purpose is not necessarily to reflect and to aid in the enforcement of morality. Given a recognition that unjust wars and individual participation in unjust wars cannot, in current conditions, be eliminated by legislation, the function of the laws of war may have to be to make the best of a bad situation by seeking to minimize the human costs of inevitable wrongdoing. The laws of war, in effect, are conventions in Mavrodes's sense that are justified by their utility. Only by permitting what is immoral can they best fulfill their morally sanctioned purpose.

What, then, is the point of arguing about the morality of war if the rules by which international society must attempt to regulate and restrain the conduct of war are to be determined by their utility rather than by their conformity with the requirements of morality? There are many answers to this question. I will briefly note two relevant considerations. First, the morality of war, and not the rules of war, is what should govern the conscience of the individual soldier. In particular, if the individual soldier has reason to believe or suspect that his country's war is unjust, this is equivalent to believing or suspecting that his action as a belligerent in this war is or would be murderous. If he is convinced that the war is unjust, then he must not participate. (Complications arise in the case in which the adversary's war is also unjust. I will not pursue these matters here.) Second, insofar as domestic laws concerning the right of conscientious objection are influenced by the claim of international law (which of course is shared by the Orthodox View) that an individual soldier does no wrong in participating in an unjust war, those laws should be liberalized to take account of the recognition that participation in an unjust war may be an egregious moral crime that the state has no right to coerce an individual to commit.

2. UNJUST COMBATANTS AS INNOCENT ATTACKERS

2.1 *The Problem*

Earlier, in Section IV.1.1, I noted various reasons for thinking that some Unjust Combatants may be Innocent Attackers. It is worth elaborating on those reasons. For our purposes, it is useful to divide unjust wars into two categories: those for which there is a just cause and those for which there is not. In the first category are, *inter alia*, wars that are unnecessary, wars that are disproportionate, and perhaps wars that are intended to achieve both the just cause and other aims

inate between lawful and unlawful belligerents, see H. Lauterpacht, "Rules of Warfare in an Unlawful War," in George Arthur Lipsky, ed., *Law and Politics in the World Community* (Berkeley: University of California Press, 1953), pp. 91-9.

²² The same conclusion is reached by Nicholas Denyer in his "Just Wars," unpublished MS, though he believes that the divergence between morality and the law is greater than I believe it to be. He accepts a view of the morality of war that is quite similar to the Moral View but thinks that, because it is generally impossible for acts of war to discriminate between the innocent and the guilty, the correct view of the morality of war is pacifism.

that are unjust. Soldiers who fight in such a war have a strong claim to be considered morally innocent. For example, in the Gulf War (which I believe was an unjust war with a just cause²³) it is hard to regard allied soldiers as culpable for their participation given the evident justice of the cause of expelling Iraqi forces from Kuwait and the endorsement of the war by the UN.

Even in a war fought for an unjust cause, there may be reasons for refusing to hold the Unjust Combatants responsible for recognizing that the cause is unjust. First, there is considerable uncertainty, and therefore controversy, about the criteria for distinguishing between just and unjust causes. (This is presumably what led the US Catholic bishops, in their pastoral letter on war and peace, to introduce the notion of “comparative justice” and to assert that “no state should act on the basis that it has ‘absolute justice’ on its side.”²⁴) It may seem harsh to hold an individual soldier morally culpable for the position he takes on an issue about which moral theorists are deeply divided. Second, as I noted earlier, there are often significant obstacles to obtaining the information about the nature of a country’s policies that is necessary to determine whether its aims are just. Third, one must make allowance for the individual’s limited capacity for independent moral reflection. It is, for example, difficult to blame soldiers for accepting false views about the morality of war—for example, the view that moral requirements are suspended in time of war—if those views are widely shared in their society. Soldiers may also find it difficult to doubt the moral authority of the state that commands them to fight, since the officials who command them to fight are the very same persons who create and enforce the domestic legal order, which is assumed by most to mirror the moral order.

These considerations suggest that nonculpable ignorance may be a powerful excuse available to Unjust Combatants. And there is, as I also noted earlier, the additional excuse of duress. Either singly or in combination, these considerations may be sufficient to excuse an Unjust Combatant’s participation in an unjust war, thereby giving him the status of an Innocent Attacker. If, however, we assume that at least some Unjust Combatants are Innocent Attackers, then the basis for the Just Combatant’s right to engage in combat is called into question. For, despite the intuitive consensus that defense against an Innocent Attacker is justified, it is not obvious how it is justified or, therefore, that it really *is* justified. If it turns out not to be justified, then it is unclear how the Just Combatant can be justified in fighting against Unjust Combatants, since many among the latter may be Innocent Attackers and the Just Combatant cannot discriminate between those who are and those who are instead Culpable Attackers.

If what the Moral View implies is that Unjust Combatants are not permitted to fight at all (except perhaps in individual self-defense, after they have already

²³ See Jeff McMahan and Robert McKim, “The Just War and the Gulf War,” *The Canadian Journal of Philosophy*, 23 (1993).

²⁴ *The Challenge of Peace* (London: CTS/SPCK, 1983), p.27.

wrongfully attacked their adversaries), while Just Combatants are not permitted to attack Unjust Combatants who are morally innocent, then the result seems to be a contingent (that is, nonabsolute) form of pacifism. This seems an extreme response. What are the alternatives? The obvious response is to seek a robust justification for defense against an Innocent Attacker. The justification must be robust in the sense that it must permit third party intervention against an Innocent Attacker, since the Just Combatant's justification for fighting extends beyond his right of individual self-defense to the defense of others and of their political association.

If the justification for fighting in a just war depends in part on the permissibility of defense against Innocent Attackers, then this may require some adjustments in our understanding of the morality of combat. For, even if it is permissible to attack Innocent Attackers in self- or other-defense, the restrictions that apply to defense against Innocent Attackers are, as I noted earlier, more stringent than those that apply to defense against Culpable Attackers. In some respects, however, the recognition that some Unjust Combatants are Innocent Attackers may bring the implications of the Moral View closer to those of the Orthodox View—for example, if an Innocent Attacker is justified in engaging in self-defense against the defensive attack by his initial victim, then there will be circumstances in which both Just and Unjust Combatants will be justified in attacking one another.

Since there is uncertainty about the prospect of discovering a robust justification for defense against an Innocent Attacker, it will be well to explore other options for avoiding pacifism. One suggestion might be that, while defense against an Innocent Attacker is unjustified, it is nevertheless excused.²⁵ This view, however, seems ultimately self-defeating, since the recognition that virtually all participation in war is wrong tends over time to diminish the availability of the excuses of ignorance and duress.²⁶ Moreover, this view is not really an alternative to pacifism, since it concedes that all participation in war is wrong. Let us turn to a more promising proposal.

2.2 *The Combatant as a Partial Embodiment of the State*

Noam Zohar believes that only moral guilt can compromise a person's moral immunity to intentional attack and therefore that violent defense against an Innocent Attacker is impermissible. Yet, even recognizing that Unjust Combatants may be Innocent Attackers, he rejects pacifism. He does so by maintaining that we are simultaneously subject to two, often conflicting moralities: one (individual morality) governing relations among individuals and the other (collective morality) governing relations among collectives such as states. The morality of war is a compromise between the two moralities. "It guides us," Zohar

²⁵ See Alexander, "Justification and Innocent Aggressors," pp. 1184–8.

²⁶ I advance other objections in "Self-Defense and the Problem of the Innocent Attacker."

writes, "to regard some members of the enemy society solely as individuals, while subsuming others under their collective identity as 'the enemy people.' The key factor is participation: combatants are those marked as participating in the collective war effort, while the rest of the enemy society retain their exclusive status as individuals."²⁷ In short, Unjust Combatants, even if they are morally innocent *qua* individuals, nevertheless lack immunity *qua* partial embodiments of their state, for their state is morally guilty. They may therefore be permissibly attacked by Just Combatants, who also act as partial embodiments of their state. Just Combatants may not, however, intentionally attack enemy noncombatants, since treatment of the latter is governed entirely by the norms of individual morality.

This is an attractive view. It seems true that it is the state that is guilty of aggression. But since the state does not exist independently of the individuals of which it is composed, it is not possible to respond to the state's unjust aggression except by attacking those individuals who act as the agents of its aggression. Notice, moreover, that this view, though it treats the distinction between combatants and noncombatants as fundamental for the morality of combat, does not coincide in its implications with the Orthodox View. For the state that is guilty of aggression has no right to use violence, even in self-defense, against the state (or its individual agents) that is the innocent victim of its aggression; hence Unjust Combatants, as agents and partial instantiations of the guilty state, have no right to use violence, even in self-defense.

But, despite its attractions, this view, which we may call the Collective View, is vulnerable to several serious objections. First, it is unclear why, in the context of war, the treatment of combatants should be governed exclusively by collective morality while the treatment of noncombatants should be governed exclusively by individual morality. That is a neat and convenient division but seems a rather *ad hoc* way of allowing scope to both moralities. The combatant is not more a part of the collective than the noncombatant; nor is he less an individual. His role as an agent of the state does not, in short, negate his standing as an individual. Thus a more natural way of giving scope to both moralities would be to claim that, since the combatant is both an agent or partial instantiation of the collective and also an individual, his moral status must be determined by a synthesis of the claims of both moralities. By itself, however, this claim fails to distinguish between the combatant and the noncombatant in the desired way, since both are parts of the collective and both are also individuals.

The problem here is a familiar problem in the theory of collective responsibility. When the collective acts wrongly, or is guilty of some specific offense (so that there is a real sense in which it is the collective that is responsible), how is liability to be apportioned among its constituent individuals for purposes of self-

²⁷ Zohar, "Collective War and Individual Ethics."

defense, self-preservation, punishment, or procurement of compensation? Consideration of the question of punishment highlights the implausibility of the neat division whereby in war the collective morality applies only to combatants while the individual morality applies only to noncombatants. For it suggests that, since individual Unjust Combatants are to be treated strictly as instantiations of the state rather than as individuals, they are fit objects of punishment for the crimes of the state. The fact that we resist this conclusion shows that we regard combatants as remaining within the sphere of individual morality even in war, for we find it unjust to punish them except for conduct for which they as individuals are guilty. For them to be liable to punishment, it matters what they as individuals have done, not just what their state has done.

It seems, therefore, that in responding to action taken by a collective, we have to assign liability to individual members of the collective by reference to their individual contributions to the collective action, taking into account not just their causal contributions but also their moral responsibility. If correct, this claim challenges the idea that there are two distinct moralities, one for individuals and one for collectives. Instead, individual morality has principles that govern the conduct of individuals in their roles as members of collectives and it is a person's guilt or innocence relative to these principles that is largely determinative of his or her liability for actions taken by the collective. If this is right, then it cannot simply be irrelevant to how an Unjust Combatant may be treated whether he is morally innocent or guilty for his individual action, even if he acts as an agent of the collective.

Similarly, civilian noncombatants may also contribute to the war-related acts of the collective and may not be absolved of all liability for those acts simply by virtue of their noncombatant status. Indeed, it is important to note that, despite Zohar's assumption that it prohibits the intentional killing of noncombatants, the Collective View itself seems implicitly to sanction intentionally attacking noncombatants. For individual morality—which, according to the Collective View, governs the treatment of noncombatants—does not exclude the possibility that a civilian noncombatant may be morally guilty, as an individual, for his or her role in initiating or provoking an unjust war. There is, as far as I can tell, no reason why this guilt may not compromise the noncombatant's immunity, rendering him or her liable to intentional attack. This fact may be even more disturbing than it initially seems, for reasons I will discuss in the next section.

2.3 The Presumption of Guilt and the Problem of Civilian Populations

One temptingly simple solution to our problem would be to deny that Unjust Combatants are ever really Innocent Attackers. For, in this context, while guilt is a matter of degree, innocence is not. To count as an Innocent Attacker, an Unjust Combatant must be wholly morally innocent with respect to his participation in the unjust war. For guilt and innocence are potent moral factors; we

have seen, for example, how the presence of guilt can nullify the normal significance of the difference between doing and allowing. Thus even a slight degree of guilt can be morally decisive, giving substantial priority to the interests of a wholly innocent person (for example, a Just Combatant) vis-a-vis those of the minimally guilty person.

The claim, then, is that no Unjust Combatant is ever fully innocent; there is always some element of negligence or fault that functions to weaken his immunity sufficiently to make it permissible for a wholly innocent Just Combatant to attack him. While it is true that soldiers are typically manipulated, indoctrinated, and lied to in order to get them both to join and to fight, it is also true that war is a monstrous evil when it is unjust and that it is consequently not unreasonable to expect a person to exercise considerable care in deliberating about whether or not to participate in it. The fact that the human race has always taken its wars rather casually merely reveals how readily we follow the multitude to do evil; it does not excuse any particular individual for complacently assuming that his participation in some war must be all right. Similarly, uncertainty about the justness of one's country's cause does not excuse one's participation if the cause is in fact unjust; rather, if one chooses to participate in the face of uncertainty, one risks one's rights and immunities and indeed forfeits them if one loses the gamble.

One could continue in this way to challenge the standard excuses but it seems to me that the task is hopeless. While it is true that most of the excuses offered tend only to mitigate an Unjust Combatant's liability rather than to exculpate him fully, one cannot rule out in advance the possibility that an Unjust Combatant could be wholly morally innocent. And surely the permissibility of fighting in a just cause does not depend on whether or not that possibility is entirely ruled out.

This line of argument does, however, suggest a more promising alternative strategy. This is to claim that, because the excuses available to Unjust Combatants are seldom fully exculpatory, there is a strong presumption that any Unjust Combatant is a Culpable Attacker. It is therefore because the Just Attacker is entitled to presume that his opponent is indeed a Culpable Attacker that he is permitted intentionally to attack him. This view is supported by the fact that a parallel justification appears to apply at the level of individual self-defense. For, if one is unjustifiably attacked by an unknown assailant, one can seldom know that the assailant is not morally innocent; but certainly one is entitled to presume that he meets the conditions of moral culpability.²⁸

²⁸ Recall that Denyer ("Just Wars") claims that pacifism follows from our inability to discriminate between the innocent and the guilty in war. He therefore assumes that pacifism is compatible with the permissibility of individual self-defense, since at the individual level one can make the relevant discriminations. Pacifism would certainly be more plausible if this were indeed true. But the point

This may ultimately prove to be a sufficient defense of fighting in a just war, even granting the assumption that defense against an Innocent Attacker is wrong. But there are further complications that are worth considering. Suppose that it is statistically certain that some members of an army prosecuting an unjust war are Innocent Attackers. Assuming that each Just Combatant on the opposing side will kill only a relatively small number of Unjust Attackers, the probability of his killing an innocent person may be low—as low, for example, as the probability that an individual who, in ordinary life, kills in order to defend herself against an unjustified attack will turn out to have killed an Innocent Attacker. Suppose, however, that it is possible for an individual Just Combatant to kill a very large number of Unjust Combatants—for example, by exploding a tactical nuclear weapon over a large formation of troops that have massed for an attack. In that case it is statistically certain that the Just Combatant will kill some Unjust Combatants who are morally innocent. Assuming that it would be permissible to kill all of the Unjust Combatants in the more usual way, with each Just Combatant killing at most a few Unjust Combatants, can it be permissible for the one Just Combatant to kill them all?

The question this case poses is whether it can be permissible to kill everyone in a group knowing that the group contains both guilty and innocent people.²⁹ The standard response is to claim that it is permissible provided that killing the guilty alone would be justified and that the killing of the innocent is both unintended and not disproportionate to the good that is to be achieved by killing the guilty. But can one drop a nuclear weapon on a massed army intending to kill only those soldiers who are guilty, so that the inevitable killing of the innocent is merely a foreseen side-effect?

This is a case in which the innocent Unjust Combatants may be regarded as Innocent Shields of the guilty; and it is often held that, in attacking someone who is screened by an Innocent Shield, one need not intend anything for the shield.³⁰ Yet in standard cases involving shields, one can distinguish the guilty who are being shielded from the Innocent Shields themselves. In the case of the massed army, by contrast, one cannot determine who are the shields and who are the shielded. It seems that, in this case, one must intend to kill each and

in the text is that it is not always possible, even at the individual level, to discriminate between Culpable and Innocent Attackers. The logic of Denyer's case for pacifism therefore suggests that individual self-defense is permissible only in cases in which one is certain of one's attacker's guilt. If this conclusion is implausible, this casts doubt on the case for pacifism.

²⁹ An alternative way of posing this question might have been to take up the perspective of the collective. For example, can we (the state with the just cause) attempt to kill a large number of Unjust Combatants knowing that some of them are innocent?

³⁰ See Warren S. Quinn, "Actions, Intentions, and Consequences: The Doctrine of Double Effect," *Philosophy and Public Affairs*, 18 (1989), p. 345.

every Unjust Combatant. Killing them all is one's means of killing the guilty. Hence killing the innocent is intended as part of the means of killing the guilty.³¹

It is the knowledge that some of those that one intends to kill are innocent that distinguishes this case from that in which an individual kills in self-defense without knowing for certain that her assailant is culpable. In the latter case one may intend to kill without intending to kill the innocent, even if the person one kills is in fact innocent. Hence, as we have seen, it is possible for an army of Just Combatants intentionally to kill all the members of an army of Unjust Combatants without anyone intending to kill the innocent, even if it is known that some of those killed are innocent, provided that each Just Combatant kills only a limited proportion of the army of Unjust Combatants. Yet it does not seem possible for a single Just Combatant intentionally to kill all the members of that army, knowing that some are innocent, without intentionally killing the innocent. If intention has the significance normally attributed to it, then we should conclude that the first of these two ways of killing the Unjust Combatants is more acceptable than the second (and perhaps even that, while the first is permissible, the second is impermissible). Yet intuitively there seems to be no relevant difference between the two.

One response to this problem would be to claim that, while it is true that a single Just Combatant could not bomb a concentration of Unjust Combatants without intending to kill the innocent as well as the guilty, it could nevertheless be permissible for him to bomb them since the constraint against intentionally killing the innocent is not absolute but may instead be overridden in conditions of extremity. And war, of course, is often a condition of extremity. In the case of the massed army, the alternative to killing a certain number of Innocent Attackers is to permit the aggressors to achieve their unjust aims, perhaps by means that would involve killing large numbers of wholly innocent people. The prevention of such disastrous consequences might be sufficiently important to override the constraint against intentionally killing the innocent.

This response allows us to avoid the extremely implausible conclusion that, while it is permissible for an army of Just Combatants to kill a large number of Unjust Combatants, provided that each Just Combatant kills only a small proportion of the many Unjust Combatants, it is *not* permissible for a single Just Combatant to kill all of the Unjust Combatants by means of a single act. But, since it concedes that the latter mode of killing involves the intentional killing of the innocent whereas the former does not, this response still discriminates morally between the two modes of killing, given the common assumption that intention makes a difference. And that is still rather implausible.

³¹ Compare Nagel ("War and Massacre," p.61), who grapples inconclusively with much the same problem. Note, however, that the counterargument Nagel attributes to Rogers Albritton has no parallel in the case of the massed army.

A second response is to deny that, in killing all of the Unjust Combatants by a single act of bombing, the lone Just Combatant would necessarily be intentionally killing the innocent. It might be argued that the Just Combatant would intend to kill the innocent only if the relevant description of his intention is to kill *all* the soldiers as a means of ensuring that he kills the guilty among them. But his intention might alternatively be described as an intention to kill *each* of the Unjust Combatants in the reasonable belief that each, considered singly, is very likely to be morally noninnocent. In that case, there would be no person whom he intentionally kills whom he has reason to believe to be innocent. He need not, therefore, intend to kill the innocent.

This response raises difficult questions about the individuation of intentions that I do not know how to answer. But, if it is correct, it not only establishes that a single Just Combatant could bomb a concentration of Unjust Combatants without intentionally killing anyone he knows or believes to be innocent but also, more generally, it offers a moral defense of intentionally killing entire groups that one knows to contain both the innocent and the noninnocent when one cannot discriminate among them. This poses a problem. The source of the problem is that since, according to the Moral View, civilians may be in various degrees morally responsible for the war-related conduct of their state, they may be relevantly guilty and thus liable to attack. In itself this seems quite plausible, as the earlier case of the enemies and the innocent pursuer suggests. An account of the grounds of civilian liability requires an account of the ways in which citizens authorize the state to act as their agent. Thus the theory of civilian liability will be a corollary of one's theory of the authority of the state. I will not pursue these issues here; suffice it to say that civilians can share moral responsibility for the acts of their state and can thus acquire liability for those acts. Their responsibility may be slight but, as I noted earlier, even a slight degree of culpability can be a potent moral factor. The civilian population of a country engaged in an unjust war may therefore exhibit the same profile as the country's military: it may consist of a mix of the guilty and the innocent. And, just as it is normally impossible to discriminate between the guilty and the innocent among Unjust Combatants, so it is likewise normally impossible to discriminate between the guilty and the innocent among civilians. Given, therefore, that military and civilian populations are so similar with respect to the factors that the Moral View identifies as relevant, it seems that any justification (other than one that asserts that material noninnocence, even in conjunction with moral innocence, entails forfeiture of immunity) for attacking an army of Unjust Combatants, despite the presence of innocents among its members, will also provide a justification for attacking certain civilian populations, other things being equal.

The license this view offers for attacking civilians is, however, narrowly limited. For the justification for attacking civilians presupposes the absence of an intention to kill the innocent and this is held to be possible in indiscriminately

attacking an entire group only when one reasonably believes of each member of the group that he or she is relevantly noninnocent. This belief will be reasonable only if the proportion of the guilty to the innocent is greater than 50 per cent. Since it will very rarely, if ever, be reasonable to believe of a civilian population that more than half of its members are relevantly morally guilty, there will in practice be virtually no instances in which one could indiscriminately attack a civilian population with the intention of killing only the guilty.

Civilian populations are therefore relevantly different from armies of Unjust Combatants. A Just Combatant, confronted by an Unjust Combatant, would be entitled to presume him guilty; but the same presumption would clearly be unwarranted in the case of an unknown enemy civilian. Hence, while there is a presumption that Unjust Combatants are guilty, there is likewise a presumption that civilians are innocent. This alone may be sufficient to ground a general distinction between armies of Unjust Combatants and civilian populations, making it generally possible to attack all the members of the former but not the latter without intending to kill the innocent. But there is yet another important difference between the two types of group: since armies are typically far more threatening than civilian populations, the ratio of good achieved to harm caused will typically be far greater from an attack on an army than from an attack on a civilian population. Thus an attack on an army of Unjust Combatants that will foreseeably but unintentionally kill some who are morally innocent is more likely to satisfy the requirement of proportionality than an attack on a civilian population containing both the guilty and the innocent.

There are, however, at least two objections to the view that, if one can reasonably believe of each member of a group that he or she is relevantly guilty, then one can intentionally attack the entire group without intending to kill the innocent, even if one knows that it is statistically certain that the group contains persons who are innocent. One objection is that, if the permissibility of attacking the group as a whole depends on the absence of an intention to kill the innocent, then the view may fail to permit certain acts of war that most of us regard as clearly permissible—namely, acts of war that intentionally attack concentrations of Unjust Combatants when it is *not* reasonable to believe of each Unjust Combatant that he is relevantly guilty. Acts of this sort are not uncommon. Whenever an army of Unjust Combatants is known to consist largely of conscripts who were coerced to fight by terror and intimidation, it may be unreasonable to believe of any single individual among them that he is more likely than not to be noninnocent. Each may instead be more likely to be morally innocent. The presumption may therefore be that each is indeed innocent. To cite but one example, most of the Iraqi forces stationed in the desert during the Gulf War were known to have been forcibly conscripted. Their reluctance to fight was demonstrated by their readiness, indeed eagerness, to surrender *en masse*. The US cannot, therefore, plausibly repudiate the charge that, in attacking

them from the air, it was engaged in the intentional killing of the morally innocent.³²

A second objection to the view we are considering is that it makes presence or absence of an intention to kill the innocent depend on the proportion of guilty to innocent in a given population. But, while the proportion of guilty to innocent may be morally relevant, it is not obviously crucial to intention. On the view we are considering, if 51 per cent of the population are known to be guilty while 49 per cent are known to be innocent, then it may seem reasonable to assume that each is guilty, thereby making it possible to intend to kill each without intending to kill anyone of whom it is reasonable to believe that he is innocent. But if the percentages were reversed, with 49 per cent guilty and 51 per cent innocent, then this would presumably not be possible. Yet it seems doubtful that whether or not one must intend to kill the innocent could depend on so tiny a difference in the proportion of the guilty to the innocent.

I will conclude by summarizing the problems that I believe the Moral View faces but that I have been unable to solve. The problems concern the permissibility of intentionally attacking certain groups that consist of a mix of morally innocent and morally guilty people. Let us distinguish three such types of group. There are [1] groups of Unjust Combatants, some of whom are statistically certain to be morally innocent, [2] groups containing both Unjust Combatants and civilians, and [3] civilian populations containing some who are relevantly morally guilty. Most of us believe that it is permissible intentionally to kill entire groups of the first type. This is not, I think, because we believe that it is possible in these cases intentionally to kill the guilty without intending to kill the morally innocent. Rather, we believe that it is permissible intentionally to kill each Unjust Combatant even if we believe him to be morally innocent because we believe that it is permissible intentionally to kill Innocent Attackers when this is necessary for self-defense. But, as I have indicated, the Moral View does not obviously have the resources to justify self-defense against Innocent Attackers. Nor is it obvious that any other theory offers a persuasive justification.

The common view of the second type of group is that it is permissible to attack it provided that the harm to the civilians is both unintended and proportionate to the good achieved. This judgement is also problematic for the same reason that our belief about cases of the first type is—namely, that some of the Unjust Combatants are likely to be morally innocent in the same way that many of the civilians are. Again, this problem would be surmounted by the discovery of a persuasive justification for self-defense against Innocent Attackers.

³² While it is important to be able in principle to justify defensive action against an unjust attack by terrorized, morally innocent conscripts, I do not believe that the bombing of Iraqi conscripts is an example of justified defensive action. This is mainly because the bombings, and indeed the war itself, were unnecessary for the achievement of the justified aims that were among the reasons for which the war was fought. See McMahan and McKim, "The Just War and the Gulf War."

Finally, the common view of cases of the third sort is that it is in general not permissible intentionally to attack a group of civilians, even if it is reasonable to believe that the majority are relevantly noninnocent. This view is, however, in tension with the common view about the second type of case. For, if it can be permissible intentionally to kill Unjust Combatants knowing that one will also thereby kill some innocent civilians, and if it can be permissible intentionally to kill relevantly noninnocent civilians, then why can it not be permissible intentionally to kill guilty civilians knowing that one will also thereby kill some innocent civilians, provided that the killings of the innocent are not disproportionate?

It is tempting to try to distinguish between the second and third types of case by appealing to a difference in intention. Since, in the second type of case, one can distinguish between the Unjust Combatants and the civilians, one may be able to claim of each civilian that one does not intend to kill him. But, in the third type of case, one cannot distinguish between those civilians who are guilty and those who are innocent. Thus it is true of each civilian that one must intend to kill him. As we have seen, however, there are various problems with this response. First, it is unclear whether the inability to discriminate between guilty and innocent civilians entails that, in intentionally attacking the entire group, one must intend to kill the innocent. For example, in cases in which each civilian is more likely to be guilty than innocent, it may be possible to intend to kill each civilian without intending to kill any individual that one has reason to believe to be innocent. Second, it is hard to believe that the relevant difference between cases of the second and third types (if indeed there is such a difference) is one of intention. For any difference in intention would be traceable to a purely contingent difference in the agent's ability to distinguish between the guilty and the innocent—for example, Unjust Combatants are distinguishable by their uniforms but guilty civilians look just like innocent ones. It is hard to believe that this could make a significant difference morally.

We would, it seems, be able to defend our intuitions about the first and second types of case if we could find a plausible justification for self-defense against an Innocent Attacker. Other efforts to defend these intuitions are likely to fail. For, since civilian populations are like armies of Unjust Combatants in having both the guilty and the innocent among their members, any justification for intentionally attacking the latter that does not appeal to their combatant status is likely to have excessively permissive implications for intentionally attacking the former. Moreover, the problem of prohibiting intentional attacks on civilian populations known to include the guilty among their members will remain even if a persuasive justification for defense against Innocent Attackers is found. This problem may not be severe in cases in which it is reasonable to believe that the majority of the civilians are morally innocent. But, in cases in which it is reasonable to believe that the majority of a group of civilians are relevantly noninnocent and in which

intentionally killing the entire group would satisfy the requirement of proportionality, the Moral View seems to lack the resources to judge the intentional killing of the entire group to be wrong. Thus, while the Moral View may seem excessively restrictive in the constraints it imposes on the killing of combatants, it may also be more permissive in its implications for the killing of civilians than many of its partisans would wish.³³

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