A Defense of the Traditional War Convention*

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The language of self-defense is used both in justifying wars and in articulating what is right and wrong within wars. In particular, the traditional war ethic, especially as Michael Walzer formulates it in his *Just and Unjust Wars,* strongly suggests that a just war is a large-scale exercise of the right of self-defense.[1] Yet, critics of this traditional doctrine insist that, in fact, the war convention reflects a particularly repugnant conception of the right of self-defense: "The just war theory, as manifested in the war convention, seems much more like an adaptation to the circumstances of war of a Hobbesian vision of the right of self-defense combined with various elements of chivalric morality."[2]

In order to understand the basis of this critique, let me sketch the Hobbesian ethics of self-defense. Somewhat metaphorically, its bottom line can be put as follows: if a person's life is at stake, "the notions of Right and Wrong, Justice and Injustice have . . . no place."[3] The argument contains two stages. First, in the state of nature, a person has

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1. Michael Walzer, *Just and Unjust Wars* (New York: Basic, 1977), 61, 145. See also his *Arguing about War* (New Haven, CT: Yale University Press, 2004). Following Jeff McMahan, whose work is my main focus in this article, I treat the theory developed in *Just and Unjust Wars* as the traditional just war doctrine or the traditional war convention.

2. Jeff McMahan, "Killing in War: A Reply to Walzer," *Philosophia* 34 (2006): 47–51, 51.

3. Thomas Hobbes, *Leviathan* (London: Crooke, 1651), 79.

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a right—Hohfeldian liberty[4]—to do whatever he thinks is necessary for his survival; that is, individuals possess no natural precontractual right claim to their own life. Second, in no contractual context can a person waive his right liberty to harm others—or even to kill them—if this is necessary for his survival. "A covenant not to defend myself from force by force is always void,"[5] as, for Hobbes, surrender of rights can be validated by considerations of self-interest (reason) only. And, it can be known a priori that if it is determined that either a victim or a bystander would survive, but not both, no mutually beneficial contract between them is possible. So, according to the Hobbesian ethics of self-defense, you violate no duty if you shield yourself from the bullets that are about to hit you by using a bystander who just happened to be around (in case this is necessary for your survival).

Hobbes's ethics of self-defense (in general) and his denial of a natural right claim to life (in particular) are widely dismissed. Indeed, following Locke, most ethicists take the existence of a natural right claim to life to be a self-evident moral fact. Specifically, X has a natural right claim against Y that Y won't kill him, even if the killing of X is necessary for Y's survival. X might lose this claim against Y's defensive attack in one case: if he poses a threat to Y's life while having no right to do so. But, by definition, innocent bystanders have done nothing that could have caused them to lose their natural right to life.

To repeat, then, Walzer's critics argue that the war convention, as it is explicated, systemized, and defended in *Just and Unjust Wars*, embraces a Hobbesian conception of the right of self-defense. I shall focus on two targets of Jeff McMahan's accurate and powerful articulation of this critique.[6] The first is the traditional doctrine of the moral equality of soldiers, according to which, within a war, just combatants (those who participate in a defensive war) and unjust combatants (those who participate in a war of aggression) have an equal right to kill each other in self-defense. Second, in the traditional view, although war does not eliminate morality, it "collectivizes" it: "materially" innocent people—those who do not pose any threat (i.e., a substantial risk of causing serious harm) to others—become liable to defensive killing, merely by virtue of their membership in the military forces.

4. I follow Judith Thomson, *The Realm of Rights* (Cambridge, MA: Harvard University Press, 1990), 49–50.

5. Hobbes, *Leviathan*, 86.

6. See Jeff McMahan, "The Ethics of Killing in War," *Ethics* 114 (2004): 693–733; cf. his "War and Self-Defense," *Ethics and International Affairs* 18 (2004): 75–80. For an earlier statement, see his "Innocence, Self-Defense, and Killing in War," *Journal of Political Philosophy* 2 (1994): 193–221. For related criticism, see David Rodin, *War and Self-Defense* (Oxford: Clarendon, 2002), and David Mapel, "Coerced Moral Agents? Individual Responsibility for Military Service," *Journal of Political Philosophy* 6 (1998): 171–89.

Both doctrines—McMahan argues—allow violating the right to life of innocent people. After all, just combatants use force in order to eliminate the unjust threats posed to their country by an aggressive state; just combatants exercise their right to self- and other defense. Additionally, nonthreatening soldiers pose no threat to others. That is, just combatants and nonthreatening soldiers have done nothing that could have caused them to lose their right to life.

This article offers a defense of the moral equality of soldiers and the collectivized morality of the war convention. I shall show that, despite McMahan's claim to the contrary, rather than constituted by the Hobbesian (and thus excessively permissive) conception of self-defense, the traditional war convention reflects a Lockean (i.e., extremely constrained) conception of the scope of this right. My aim here is limited in one central respect. I do not argue for the controversial (Lockean) conception of self-defense that I shall use in elucidating the traditional war convention. I take it for granted. Also, I shall not try to refute (the no less controversial) conception of self-defense that underlies McMahan's unorthodox war ethic. (I undertook both tasks elsewhere.)[7] Rather, by dissolving the deeply disturbing worries raised by his critique, I show that the traditional war convention does not collapse to the Hobbesian conception of self-defense, despite its commitments to the moral equality of soldiers and to collectivizing their moral status.

I. THE TRADITIONAL WAR CONVENTION AND ITS CRITIQUE

A. Thomson's Theory of Self-Defense and the Traditional War Convention

As noted, any theory of self-defense should explain why it is typically permissible to kill an attacker in self-defense, while it is impermissible to kill a bystander in self-preservation. The moral requirement to discriminate attackers from bystanders is basic and uncontroversial. Notwithstanding this broad agreement, theorists formulate and explain this requirement in radically different ways.

Judith Thomson's theory of self-defense provides a simple and attractive formulation of the basic requirement.[8] Self-defensive killing is morally justified, she argues, on the basis of facts about rights violation: the potential victim has a claim against the attacker that the attacker will not kill him or pose an imminent threat to his life. Since these

7. In Yitzhak Benbaji, "Culpable Bystanders, Innocent Threats, and the Ethics of Self-Defense," *Canadian Journal of Philosophy* 35 (2005): 623–40, I developed the theory of self-defense that I shall employ here. In Yitzhak Benbaji, "The Responsibility of Soldiers and the Ethics of Killing in War," *Philosophical Quarterly* 57 (2007): 558–73, I show that McMahan's justice-based conception of self-defense yields a nearly pacifistic ethics of killing in war.

8. Judith J. Thomson, "Self-Defense," *Philosophy & Public Affairs* 20 (1991): 283–310.

claims are Hohfeldian, the attacker is subject to the correlative duties. In a case in which the attacker violated these duties, the victim might acquire a right to kill the attacker in self-defense. As opposed to the typical attacker, a bystander violates no right—hence, he is not liable to killing.

Famously, Thomson believes that rights violation is possible without culpability, responsibility, or even agency. Thus, consider her "Innocent Threat" case:

> *Innocent Threat*: A victim is sitting on a bench when he realizes that a man is falling on him. The falling man was pushed by a villainous aggressor, so he constitutes a threat without doing anything. Unless the victim blows the falling man to pieces, the falling man would crush the victim to death.[9]

The falling man, Thomson argues, unintentionally violated a claim the victim holds against him: he is under a duty to the victim not to kill him. In and of itself, this fact entails that the falling man is liable to defensive killing (as this is the only way to eliminate the lethal threat he poses).

As we shall see in Section II.C, there is an important difference between the way the right of self-defense is understood within Thomson's theory and the way it is understood within the traditional war convention. To anticipate, the former theory does not allow for "moral equality": in Innocent Threat, for example, the fact that the victim has a right to kill the falling man entails that the falling man has no right to kill the victim. In contrast, the conception of self-defense embedded in the traditional war convention resists this entailment; it does allow for moral equality. Before discussing this difference in more detail, I should like to point to the close relations between the Thomsonian and the traditional visions of the right of self-defense.

For Walzer, the rules of conduct in war should "reflect as closely as possible the same principles of justice and liability that govern conduct outside of war."[10] He believes that the traditional war convention satisfies this constraint: soldiers in war are required to discriminate between, on the one hand, men and women in uniform, who are—in wartime—combatants (whatever their specific job in the military), and, on the other, civilians or noncombatants. This requirement reflects the deeper moral obligation to discriminate attackers from bystanders. Now, within a war, a soldier counts as posing a threat, by virtue of the pre-

9. Ibid., 287.

10. This is Jeff McMahan's formulation of his own position in his "Liability and Collective Identity: A Response to Walzer," *Philosophia* 34 (2006): 13–17, 13; Walzer makes clear that the war convention is "morally plausible" (see, e.g., *Just and Unjust Wars*, 133).

sumption that he will participate in the warfare.[11] Soldiers' status as threat-posing individuals does not follow from the threatening acts they do or from their culpability for the material threat the army to which they belong poses. Thus, moral innocence and lack of agency do not secure immunity from defensive killing. Indeed, innocent, not quite innocent, and guilty enemy soldiers are all present in the battlefield. Notwithstanding these differences between them, soldiers are equally liable to killing in wars. Thomson's theory of self-defense provides an attractive explanation of the insensitivity the traditional convention manifests to such differences; individuals might become liable to defensive killing, even if the threat they pose involves neither intentionality nor agency.

B. Against the Moral Equality of Soldiers: McMahan's First Argument

The traditional convention attributes to unjust combatants the right to kill just combatants in self-defense. This ruling, McMahan claims, has no moral basis within Thomson's framework (as it is sketched in the previous subsection). After all, in this framework, liability to defensive killing follows from violation of rights. And, normally, just combatants violate no right possessed by unjust combatants. McMahan's argument for this claim is simple and effective: in the paradigmatic case, an unjust war is initiated by a surprise attack against "the members of [a] standing army that is based in its home-territory. . . . [This army] is not mobilized and has no plans for war."[12] The attacked soldiers do not pose a threat to others. Hence, the initial attack on them is a violation of their right not to be attacked. This is inconsistent with the traditional just war doctrine, according to which, insofar as he follows the *jus in bello* rules of fighting, a combatant has a right to participate in a war, however unjust it is.

In fact, McMahan contends that unjust combatants never acquire a right to kill just combatants in self-defense (unless the just combatants violate their own duties, e.g., they attack materially innocent civilians). Unjust combatants do not differ from the thief in "Robbery":

> *Robbery*: During a robbery, the guard of the bank had tried to get a gun in order to neutralize an armed thief. The guard's preventive actions were not disproportionate. Realizing that this was the guard's intention, the thief shot the guard and killed him. Initially, the thief had no murderous intentions. His killing was purely defensive: had he not killed the guard, the guard would have killed him.

11. This is one of main theses in Michael Walzer, "Terrorism: A Critique of Excuses," in his *Arguing about War*, 51–67, and "Terrorism and Just War," *Philosophia* 34 (2006): 1–12.

12. McMahan, "Ethics of Killing in War," 697.

Needless to say, the thief had no right to kill the guard. This is as true in the Thomsonian framework as it is in every other (non-Hobbesian) framework; by taking advantage of his right to stop the robbery, the guard does not lose his right not to be attacked by the thief. This is why the thief's killing counts as murder. "Most find it impossible to believe that, by unjustifiably attacking you and thereby making it justifiable for you to engage in self-defense, your attacker can create the conditions in which it becomes permissible for him to attack you. Most of us believe that, in these circumstances, your attacker has no right not to be attacked by you, that your attack would not wrong him in any way, and that he therefore has no right of self-defense against your justified, defensive attack."[13] I shall refer to the argument in this passage as McMahan's First Argument.

McMahan's First Argument concludes with a "purist" war ethic. Purists contend that the killings committed by unjust combatants are wrongful homicides (which might be excused to some degree), whereas, if necessary and proportionate, the killings committed by just combatants are morally permissible or even morally justified.

C. Against Collectivized Morality: McMahan's Second Argument

The collectivized morality of the war convention is claimed to be a further Hobbesian aspect of the traditional just war doctrine. As McMahan reads him, Walzer views the common beliefs about individual morality outside the context of war as largely irrelevant to the conduct of war: "[Walzer] embraces the accepted view that 'it is entirely legitimate to kill soldiers at random, as they come within range, so to speak, and it is legitimate to try to terrorize the ones who never come within range.'"[14] McMahan then asks, "What is it about soldiers, once war has begun, that makes them 'rightly subject to attack, all of them, all the time' (unless they have surrendered or been taken prisoner)?"[15] "According to Walzer's view—and here he speaks for the dominant tradition within just war theory—it is because they are 'materially engaged in the war effort.'"[16] The difficulty McMahan brings out is deeply disturbing: many soldiers are not engaged in fighting the war. Why are these soldiers liable to being killed? Walzer answers that they are all the members of an army and "contribute to the achievement of its ends. . . . In time of war they pose a unified threat."[17] This has to do with the fact that

13. Ibid., 699.
14. Walzer, "Terrorism and Just War," 1.
15. Ibid.
16. McMahan, "Liability and Collective Identity," 13.
17. Walzer, "Terrorism and Just War," 1.

soldiers are collectively organized and disciplined, trained in the use of weapons, and isolated on bases provided for them by the state.

McMahan understandably complains that even if all of these characteristics are correctly attributed to the individual soldier, none of them entail that, in time of war, he makes a material contribution to the threat the army poses. A military organization has many goals: "Some . . . are entirely unrelated to the war. Some [soldiers] may even obstruct the prosecution of the war: for example, a military lawyer who, acting in fidelity to her understanding of the military's own guiding principles, seeks to revise the rules of engagement in a way that would hamper the effectiveness of military action in this instance." Hence, a Thomson-style theory of self-defense does not support the convention in which totally innocent soldiers are liable to defensive killing. However, "some people who are uncontroversially civilians do contribute, sometimes more significantly than most soldiers—for example, a scientist employed by a university whose research is financially supported by the Department of Defense because among its many possible applications are certain improvements in weapons technologies that can be used to great advantage in an ongoing war."[18] I shall refer to this argument as McMahan's Second Argument.

II. THE MORAL EQUALITY OF SOLDIERS AND A LOCKEAN CONCEPTION OF SELF-DEFENSE

The case for the moral equality of soldiers I shall advance will be two staged. In this section I show that the theory that best explains the permission to kill unjust combatants is based on Lockean convictions and that this theory of self-defense entails that in many typical cases soldiers of both sides have an equal right of self-defense. The very possibility of such a theory counters the purist accusation that the war convention embeds a Hobbesian vision of this right. In Section III, I show that "contractual considerations" (that do not follow from the ethics of self-defense but are strongly suggested by my rights-based conception of it) imply that soldiers are morally equal in all other cases.

A. Robbery, Sleeping Soldiers, and Sleeping Untrained Soldiers

Robbery is a misleading analogy, and the purist critique of the traditional convention inspired by this analogy is therefore mistaken.[19] In order to show that, I shall describe two cases—"Sleeping Soldiers" and "Sleeping Untrained Soldiers"—through which the problematic consequences of purism become more visible. Consider first,

18. McMahan, "Liability and Collective Identity," 14.
19. This section draws on my "Responsibility of Soldiers."

> *Sleeping Soldiers*: A war has been initiated by an unjust aggression carried out by an elite (and very small) unit of unjust combatants. The preparations for the military campaign were highly confidential. Very few unjust combatants were aware of them. Now, immediately after the surprise attack had been launched, just combatants responded by attacking sleeping enemy soldiers. At the time the sleeping soldiers joined the army, it was permissible to do so. Additionally, they contributed nothing to the unjust attack, knew nothing about it in advance, and are not responsible for the aggression initiated by their country in any other way. Even so, presumably, they will participate in the war. So, their killing is preventive and, as such, a means for achieving a legitimate military goal.

Purists face a dilemma. According to the purist ethics of self-defense, liability is intrinsically related to agency. And, on the face of it, the sleeping soldiers did not do anything that makes them liable to killing. Hence, purism seems to entail that the sleeping soldiers are not liable to killing and just combatants ought to avoid targeting them. So it seems that in order to sustain their core conviction with respect to the impermissibility of the killing of unjust combatants, purists have to advance a radical reform of the rules of conduct to which just combatants ought to subject themselves.

But suppose that the purist ethics of self-defense is more permissive; the fact that the sleeping soldiers will participate in the unjust war makes them liable to defensive killing. Or, alternatively, these soldiers lost their immunity due to the fact that they would have been ready to join the fighting forces. Or perhaps the sleeping soldiers are responsible for the unjust threat they now pose because when they joined the army they knew that they might participate in unjust wars.[20] This move is quite costly as well; it commits purism to deny the sleeping soldiers a right of self-defense. For, the purists' other core conviction is quite clear: like all other cases, Sleeping Soldiers involves no moral equality; if the just combatants' preventive attack is permissible, the unjust combatants have no right to eliminate the threat just combatants pose by killing them. That is, the sleeping soldiers are denied a right to self-defense, despite the fact that their membership in the military forces is permissible, they are not yet the agents of any threat, and they have had no chance to opt out from the unjust war. The dilemma is straightforward: purism denies either that the preventive killing in Sleeping Soldiers is permissible or that the sleeping soldiers retain their right of self-defense. Both claims are counterintuitive.

20. A close analysis of Jeff McMahan's writings suggests that this would be the line of argument to which he would adhere. Compare his "Self-Defense and the Problem of the Innocent Attacker," *Ethics* 104 (1994): 252–90, 260, to his "Ethics of Killing in War," 723.

In Sleeping Untrained Soldiers, purists confront a harder dilemma:

> *Sleeping Untrained Soldiers*: Like Sleeping Soldiers, except that the unjust combatants have just been drafted and there is no way to train them before the current war ends, they are attacked in order to terrorize and deter other unjust combatants. Thanks to this (counter-) attack, the army—whose soldiers were demoralized by the first strike—is back on its feet again. In addition, the attack is proportionate; there is no "cheaper way" to achieve the legitimate aims listed above.

Purists are more likely to bite the bullet in this case: given the total innocence of the targeted soldiers in Sleeping Untrained Soldiers, killing them is as wrong as killing totally innocent civilians. But then, purism would require obtaining specific knowledge about how threatening unjust combatants are, as a precondition for attacking them. Again, under this reading of purism, the reforms it advances are far reaching, unrealistic, and excessively high minded.

Purists might come up with a conception of self-defense that somehow permits targeting the soldiers in Sleeping Untrained Soldiers. Presumably, these soldiers would have been ready to participate in the unjust war—had they been trained and ordered to do so. Purists might allude to this fact as the basis of the liability of these soldiers. True, the sleeping soldiers won't be part of any further attack. But this, purists might argue, is accidental and hence morally irrelevant. So understood, the purist ethics of self-defense seems unreasonably permissive; it allows targeting nonthreatening soldiers on the basis of the counterfactual that had they been trained, they would have joined the fighting troops. Could counterfactuals of this type be a basis for the liability to defensive killing? This seems unlikely: many civilians would have been ready to fight an unjust war, had they been trained and asked to do so. Worse, this permissive version of purism implies that the sleeping soldiers have no right of self-defense in spite of their total innocence. The dilemma is again clear: purism denies either that the preventive killing in Sleeping Untrained Soldiers is permissible or that the sleeping soldiers retain their right of self-defense. With respect to this case, both claims seem even more counterintuitive.

I won't discuss the purist approach to these cases any further. For now, I also put aside Sleeping Untrained Soldiers (a case I shall discuss at length in Sec. III.D). The very dilemma purism faces in Sleeping Soldiers conveys what is important for my purpose in this part. In attributing the right of self-defense to the sleeping soldiers, we seem to be guided by Lockean convictions as to whether these soldiers have done anything that could have caused them to lose this right. Our Lockean intuition is clear: the fact that the sleeping unjust combatants

are not responsible or minimally culpable for the threat the army (to which they belong) poses guarantees their right to self-defense. These convictions have nothing to do with the Hobbesian view, according to which one is allowed to do everything one takes to be necessary for one's survival.

Note, however, that I do not deny another clear intuition: the surprise counterattack against the sleeping soldiers is justified; I merely assume that, notwithstanding the justification of the counterattack, the sleeping soldiers retain a right to defend themselves. I shall put this commonsensical assumption in the language of rights: in Sleeping Soldiers, soldiers are morally equal because both sides lost the right not to be attacked by each other but retain their right to defend themselves from these attacks. In the following subsections I systemize these convictions and argue for them; I develop a Lockean, rights-based theory of self-defense that yields the above (appealing) description of the normative reality in Sleeping Soldiers and in a wide range of other cases. I shall also argue that Sleeping Soldiers is not exceptional and that wars should be analogized to this case rather than to Robbery. That is, the ethics of self-defense that yields the correct result in Sleeping Soldiers entails that, within many circumstances that wars are likely to generate, just and unjust combatants are morally equal.

The argument unfolds in the following way. Section II.C sketches a crucial modification of Judith Thomson's original theory of the right to self-defense. In Sections II.D–E, I shall use the modified conception in order to elucidate our moral intuitions in cases that involve moral equality. In Section II.F, I show that wars are likely to generate circumstances in which, according to the rights-based ethics developed in Sections II.C–E, soldiers are morally equal. I begin with constructing the conceptual framework that underlies the theory of self-defense that I shall develop.

B. Preliminaries

The normative framework that best describes the distribution of rights and duties in Sleeping Soldiers is a modification of Thomson's conception of self-defense.[21] I shall call it SD. The moral facts to which SD appeals are expressed by sentences of four types:

1. X has a right to A (usually, A = kill Y in self-defense).
2. X is justified in A-ing (usually, A-ing = killing Y in self-defense).
3. The distribution of harm is un/just. The threat posed by X is un/just, and

21. For a further defense of this conceptual framework, see my "Culpable Bystanders, Innocent Threats, and the Ethics of Self-Defense," 615–21.

4. X ought, all things considered, (not) to A. X is morally obliged to A/avoid A-ing.

SD employs other moral notions, which are definable by the notions of (1) right, (2) justification, (3) just distribution, and (4) moral obligation. But, unfortunately, these basic notions are terribly vague. In this subsection I clarify what I mean by saying that X has a right to A, is justified in A-ing, ought (not) to A, or poses an un/just threat. I do not pretend that my use is the most prevalent one, nor do I argue that this is how the concepts that appear in 1–4 should be used in all contexts. What follows is mainly a series of meaning stipulations. The framework that emerges paves the way for SD, which is, I argue, the theory that best captures our intuitions with respect to the right of self-defense.

Consider then the proposition expressed by "X has a right to A." Formally, the right to A is constructed as a moral privilege: X has a right to kill in self-defense if for all Y, X violates no claim Y has against him. (Hohfeldian right claims and duties will be referred to as 'claims' and 'duties', respectively.) I additionally assume substantive intrinsic relations between a person's legitimate interests and the rights this person possesses. In particular, the right to self-defense is a right to be partial. A victim who exercises this right avoids the harm the attacker is about to inflict on him by shifting it to the attacker. Yet, rather than enforcing justice in the distribution of harm, or bringing about an outcome that involves less evil, the agent merely protects his own self-interest.

Thus, facts about rights of self-defense can be put in terms of "weak moral permissibility": A is (weakly) permissible if and only if, by A-ing, the agent violates no claim held against him. The weakness of this notion of permissibility is revealed by the fact that (as a matter of conceptual possibility), even if by A-ing the agent would act permissibly, it is not impermissible to prevent him from A-ing. Hence, conceptually, both the victim and the attacker in Innocent Threat (say) might have a right to kill each other in self-defense. Weak permissibility is quite prevalent: defeating your rival in chess is morally permissible. Clearly, it is also permissible for your rival to prevent you from defeating him. Another crucial feature of weak permissibility is that it is a middle-ground category; the fact that X's A-ing is weakly permissible does not imply that X's A-ing is justified, yet it does imply that it is more than merely excusable. And the fact that X's A-ing is more than merely excusable has important consequences. As a middle ground between excuse and justification, permissibility generates moral immunity from interference by certain people and institutions; for example, if A-ing is weakly permissible, an impartial institution has no moral power to criminalize it.

As for 2, I define the notion of justification very narrowly, in a way that relates it to impartiality. I do so by first adopting the formal features

that characterize justification on most views. It is extendable to a third party: if X is justified in killing Y in self-defense, anyone else is justified in doing so, in X's defense. And, if X's killing in self-defense is justified, it is unjustified to prevent X from doing it. More important, I shall stipulate that a person is prima facie justified in A-ing, if A-ing is recommended by the principle of the lesser evil. That is, X is prima facie justified in A-ing, if by doing so he brings about outcome 1 (O1) instead of outcome 2 (O2), and O1 contains less evil than O2. Outcomes 2 and 1 meet this requirement if the number of harmed people in O1 is smaller than the number of people harmed in O2, or the magnitude of the harm people suffer in O1 is smaller than in O2, and all other things are equal. A final stipulation with respect to impartial justification: a person is prima facie justified in bringing about O1 rather than O2, if the harm in O1 is more justly distributed than the harm in O2, and all other things are equal. As I use the notion, justification is sensitive to these considerations only. Hence, I should admit that the notion as it is defined here is unusual.

I won't provide a full account of justice in the distribution of harm or of the truth conditions of the schemata in 3. But some self-evident truths can be safely assumed. By definition, a threat is "unjust" if it is unjust that the victim of the threat—rather than the person who poses it—will be harmed because of it. Usually, shifting unjust harms enforces justice in the distribution of harm. For example, the thief in Robbery poses an unjust threat to the guard—and it would have been just to eliminate this threat by inflicting harm on the thief. But, there is a crucial complication here which Innocent Threat makes vivid: the falling man poses an unjust threat to a victim. As the falling man is not the agent of the threat, he is not even minimally culpable for this threat. Therefore, the defensive threat created by shifting the harm to the falling man is unjust as well. Put more generally, if an attacker is not even minimally culpable for the unjust threat he poses, shifting the harm to him would be unjust as well.[22]

A final remark regarding justice in the distribution of harm and its relation to culpability: let us suppose that there are cases in which an attacker ought, all things considered, to pose an unjust threat (we shall shortly see that there are such cases). If so, he is not minimally

22. As an *Ethics*' editor remarked, one might readily agree that shifting harm onto someone who poses an innocent threat is no improvement in justice. We still might ask, however, why does that make it "unjust" to do that? After all, the shift might be neither just nor unjust. My answer: the harm inflicted on the attacker is unjust because it is a matter of brute bad luck. The inequality generated by this shift is, thus, unfair. This, of course, calls for elaboration, which is beyond the scope of this article.

culpable for the threat he poses because he had no morally preferred alternatives. Hence, shifting the harm to him is unjust.

This final remark on distributive justice leads us to 4. My comments on the truth conditions of "X ought, all things considered, (not) to A" and on the notion of moral obligation are negative. Most important, X might have a right to A, even if X ought to waive it. Consider an enriched version of Innocent Threat where, in order to survive, the victim has to kill five people who fall on him. Conceptually, it is possible that the victim have a right to kill the five in self-defense, while being obliged to waive this right; he has a right to be partial, even if morality requires impartiality.

Furthermore, there is an important gap between the narrow concept of justification defined above and the inclusive notion of moral obligation characterized now. Suppose that by A-ing, X brings about an outcome that involves less evil (such that in the narrow sense defined above, he is justified in A-ing). Still, it might be the case that X ought not to A. This phenomenon manifests the complexity of the moral landscape: X is subject to morally valid contractual and special obligations. In some circumstances, these obligations imply that X ought to bring about an outcome that involves more evil. For example, it is widely believed that firefighters ought to save those who pay for their service. They ought to do so, even in circumstances in which they can save a larger group of people to whom they bear no contractual duty. Similarly, it is widely believed that X ought to save his children from the fire, even if he could save many others, who are unrelated to him.

The notion of moral obligation is inclusive; it is sensitive to rights (to be partial), to impartial justifications, to contractual and special duties, and so on. As such, it commands a notion of strong moral permissibility. "A-ing is morally permissible" means that it is not the case that the agent ought, all things considered, not to A. Unless explicitly stated otherwise, in what follows 'permissible' means 'weakly permissible'.

C. SD and the Moral Equality in Innocent Threat

As noted, I call the rights-based theory I develop 'SD'. It is a conjunction of two propositions, SD-1 and SD-2. SD-1 follows from Thomson's theory of self-defense, while SD-2 does not and instead modifies it. Both combine to form the view endorsed here.

> SD-1: Suppose that Y constitutes an unjust threat to X's life and that Y has no right to do so. Then, X has a right to kill Y in self-defense. That is, by killing Y, X violates no claim X holds against him (if the killing is necessary and proportionate).

According to Thomson, having a right to kill in self-defense entails

being justified in doing so. And vice versa: for Thomson, any instance of injustice necessarily involves a right violation. She thus believes of Innocent Threat that, from the fact that a victim has a right to kill the falling man in self-defense, it follows that he is justified in doing so. And this implies, on Thomson's notion of rights, that the falling man has no right to eliminate the defensive threat imposed on him. But these results are implausible. It seems obvious that the falling man does have a right to eliminate the defensive threat posed by the potential victim.

Within the conceptual framework that underlies SD, the right the victim has does not entail that his killing is justified. Moreover, the falling man is not an agent of the threat he constitutes, so he is not culpable for it; so shifting the harm to him does not implement justice in the distribution of harm. The defensive threat posed to him by the victim is, therefore, unjust. In fact, then, the conceptual framework developed in the previous section strongly suggests that SD-2 is true. I take it to be a crucial correction of Thomson's theory:

> SD-2: Suppose that at time $t + 1$, Y poses a threat to X's life, aiming to eliminate an unjust threat posed by X at t. Then,
>
> *a*) If X is not even minimally culpable for the threat he posed at t, the defensive threat Y poses is unjust. Hence, subject to constraints of proportionality and necessity, X has a right to eliminate the defensive threat that Y poses, by killing Y.
> *b*) If X has no right to pose the threat he actually poses and he is culpable for posing it, then the defensive threat posed to him is just. X, therefore, has no right to eliminate the defensive threat imposed on him by killing Y.

In the Thomsonian view I adopt, the falling man in Innocent Threat poses an unjust threat to the victim and has no right do so. By SD-1, the victim has a right to kill the falling man in self-defense (i.e., it is weakly permissible for the victim to do so). But, by SD-2, if the victim takes advantage of the right he holds, the falling man has a right to eliminate the defensive threat imposed on him by killing the potential victim. (Hence, eliminating the defensive threat the victim poses is also weakly permissible.) The reason is simple: the falling man is not even minimally culpable for the threat he poses, so the defensive threat imposed on him is unjust. The victim, I suggest, has a right to prevent one injustice by doing another. In this sense, the victim and the falling man in Innocent Threat resemble chess players—they both have the right to defeat each other. In sum, Innocent Threat is a case of moral equality; both, the falling man and the victim, lost their right not to be attacked but retained their right to self-defense.

D. Further Motivating SD: Moral Equality in "Symmetrical Case"

Interestingly, Innocent Threat resembles a simpler and clearer case of moral equality.

> *Symmetrical Case*: X and Y are driving two trains toward each other on the same track. Following the instructions of a negligent inspector, they started driving at the same time. A total-loss crash where both drivers are killed is bound to happen, unless one driver stops the other by using deadly force. They cannot avoid the crash by stopping the trains. For, upon realizing the danger, the drivers are too close to each other.

The "optimal" result of Symmetrical Case is an outcome in which either X or Y is killed but not both, whereas "the suboptimal result" would be the outcome in which both are killed. What is each driver permitted to do? One possibility is that X and Y should let the coin decide who will survive the tragedy. The procedure is fair, and if X and Y can communicate, cooperate, and trust each other, randomization secures an optimal result. Alas, in Symmetrical Case, X and Y cannot communicate. And, a noncooperative randomization increases the chance that both drivers will avoid action. Free competition seems a safer way to reach one of the optimal outcomes.

It might be thought that rather than optimal, randomizing is fair by virtue of the *ex ante* equality it secures. If X and Y let a coin decide who will survive, their expected utilities are equalized. Does the *ex ante* equality make the *ex post* unequal distribution in one of the optimal outcomes just? There is no reason to think so; it would be unfair to X if he is killed just because of the brute bad luck that he was slower than Y. It would be as unfair to him if the coin decides against him. Indeed, there is no fair optimal outcome in Symmetrical Case—and the fairness of the *ex ante* equal distribution of chances to survive won't change this fact.

I thus suggest that X and Y each have a right to kill the other in self-defense and believe that most of us would accept this suggestion. Both, X and Y, have a right to act in their own (conflicting) interests, despite the fact that neither's interest is weightier than the other's; hence, neither is (impartially) justified in doing so. It follows that no action could enforce just distribution in Symmetrical Case. Let me reemphasize that the killings both agents have a right to commit are not merely excused. A killer is excused because he is not to be blamed or punished for this right violation. But the excuse/justification dichotomy is too crude: having a right implies more than having a valid excuse but

less than having justification.[23] Like Innocent Threat, Symmetrical Case exemplifies a very complicated cluster of normative facts:

1. By imposing an unjust threat on Y while having no right to do so, X lost the claim he had against Y that Y won't attack him in self-defense. Still,
2. X is not even minimally culpable for the threat he poses; hence, X retains the right to defend himself against Y's defensive attack, even if it means killing Y.

Mutatis mutandis, the same is true of Y.

E. SD and the Moral Equality in Asymmetrical Cases

Might a typical war generate circumstances in which both sides lose the right not to be attacked but retain the right of self-defense? The purists' answer is negative. They probably believe that, as a matter of conceptual necessity, cases in which both parties enjoy a right of self-defense are, if not strictly symmetrical (like Symmetrical Case), morally symmetrical (like Innocent Threat). I now want to show that—contrary to purism—moral equality in asymmetrical cases like Sleeping Soldiers is possible.

Consider the commonsense view regarding "Trolley."

> *Trolley*: A runaway trolley is careering down the mainline track. If it continues along this track, it will crash into the station, killing hundreds of people. It can be diverted onto a branchline track on which stands an innocent person, the victim. You stand on the bridge just above the branchline track. And you have access to the switch that can divert the trolley. You do so. The trolley is now on the branchline track, so you already saved the hundreds. It is too late for the innocent bystander to run away. Yet, he can defend himself by shooting you. For, as a result of the shooting, you will fall on the branchline track and stop the trolley before it hits him. In other words, it is too late for the victim to run away but not to kill you in self-defense.

Most people believe that you ought to divert it (in the inclusive sense defined in Sec. II.B). In such a context, the principle of lesser evil seems to them most weighty. I will grant this common view but assume—again, in accordance with commonsense morality—that the harm inflicted on the bystander is unjust. It seems clear that the bystander retains his right of self-defense.

SD has a simple explanation for this conviction. In diverting the trolley you impose an unjust threat on the victim, and you had no right

23. Compare Russell Christopher, "Self-Defense and Defense of Others," *Philosophy & Public Affairs* 27 (1998): 123–41, and "Self-Defense and Objectivity: A Reply to Judith Jarvis Thomson," *Buffalo Criminal Law Review* 1 (1998): 537ff.

(against him) to do so. By SD-1, the victim acquires a right to kill you in self-defense. However, you ought to divert the trolley; that is, diverting the trolley is the morally preferable alternative you face. So, in an important sense, you are not even minimally culpable for the unjust threat you impose on the bystander; you had no morally preferred alternative. Under this interpretation of "minimal culpability," SD-2 entails that (subject to the constraints of proportionality and necessity) you have a right to eliminate the threat posed by the bystander, by killing him.

Trolley involves moral asymmetry: in the narrow sense articulated by the principle of lesser evil, you justifiably impose an unjust threat on the victim, while the victim has no parallel justification for imposing an unjust threat on you. This moral asymmetry notwithstanding, both of you have an equal right of self-defense: both of you lost your right not to be attacked but retained your right to defend yourselves from these attacks.

Consider another famous case, in which the moral asymmetry is even sharper:

> *Tactical Bomber*: A pilot fighting a just war has been ordered to bomb a munitions factory located on the border of the enemy country. He knows that if he bombs the factory, the explosion will kill the group of innocent civilians just across the border in a neutral country. But this would be a side effect, and the harm to the civilians would be proportionate to the good of the destruction of the factory—in the long run, the bombing would save the lives of thousands.

In the narrow sense of justification used here, the bomber is justified in posing an unjust threat to the innocent civilians. If he is successful, he would bring about an outcome that contains less evil. Moreover, I shall grant the received view that, given the numbers of the lives saved by the bombing, the role of the bomber in the army, and the bomber's intention and efforts to save lives rather than to kill innocent neutrals, he ought, all things considered, to undertake the mission. Therefore, if the civilians kill the bomber and cause the failure of the bomber's mission, they bring about an outcome that contains more evil.

Still, as in Trolley, there is no real intuitive doubt that, despite being justified in undertaking the mission, the bomber had no right (against the civilians) to threaten their life and that the threat he poses is unjust. It follows from SD-1 that the civilians have a right of self-defense; that is, in killing the bomber in self-defense, they violate no claim he holds against them. They possess this right, even if it is further assumed that they are perfectly aware of the facts that justify the bombing of the factory. In other words, they hold a right to attack the bomber, despite the fact that in doing so they bring about an outcome that involves more evil. That the bomber retains a right of self-defense seems evident

as well. That is, if the civilians attack him, he has a right to directly kill the civilians—even if, as a result, he cannot complete the mission. In light of my above interpretation of minimal culpability, SD-2 is a ready explanation for this: as the bombing of the factory is something the pilot ought to do, it is the best alternative he had at the time. Hence, he is not minimally culpable for the unjust threat that he poses.

No doubt, the thief in Robbery is very different; he has no right of self-defense while being engaged in the armed robbery. Why? Why is he so different from the unjustified civilians in Tactical Bomber? How did he lose his right of self-defense? The plausible answer follows from SD-2: unlike the agents in Innocent Threat, Trolley, and Tactical Bomber, the thief is culpable for the unjust threat he poses.

F. SD and the Moral Equality of Soldiers

So understood, SD suggestively articulates and explains the moral equality in Sleeping Soldiers. Consider a core Thomsonian conviction: a person might lose his title to life, even if he is not the agent of the lethal threat he constitutes. In accordance with that conviction, I suggest that the sleeping soldiers in Sleeping Soldiers constitute a threat by virtue of the true presumption that they will participate in the war. If so, SD-1 entails that just combatants have a right to kill them in self-defense. It is, however, the corrupt political leader who pushed unjust combatants into the battlefield. They are not the agents of the threat they pose, so they are not culpable for it. Therefore, it follows from SD-2 that they retain a right to defend themselves. In other words, Sleeping Soldiers share with Tactical Bomber a crucial feature: they are both morally asymmetrical cases that involve moral equality. Like the bomber (in the latter case), just combatants (in the former case) fight for an (impartially) justified aim; they try to bring about an outcome which contains less evil and in which harm is distributed more justly. Still, like the bomber, the threat they pose is unjust, hence, the resemblance between the sleeping soldiers and the civilians in these cases; both have a right to eliminate the unjust (defensive) threat posed to them.

I shall argue now that typical wars generate circumstances that resemble Sleeping Soldiers. The basic reason was offered in passages in *Just and Unjust Wars* that McMahan quotes but, to my mind, misinterprets. Walzer concedes that unjust war is a crime; it is, however, the crime of the political leader. As for the soldiers, "their war is not their crime"; "for the war itself . . . soldiers are not responsible."[24] McMahan agrees but claims that, at best, these facts form an excuse for the criminal violence unjust combatants exercise. I read Walzer's remarks differently. Unjust combatants' lack of minimal culpability for the war they fight

24. Walzer, *Just and Unjust Wars*, 37–38.

explains why their killings within the war are defensive and why they have a right (of self-defense) to commit them.

How can an act of killing within a war of aggression be defensive? Observe, first, that before a war starts, there is a time at which it is epistemically determined that it is about to start. At that time, most combatants cannot know about the future war. Still, at that point, it is presumably true of just and unjust combatants alike that they will fight each other. So the analysis of Sleeping Soldiers I have just offered implies that they threaten each other at that time. Hence, a preemptive attack, whose aim is eliminating the unjust threat posed by unjust combatants, is permissible, even if the attack targets combatants that haven't yet done anything wrong. Soldiers are morally equal (partly) because of a further complex fact: at the time in which it is determined that a war is about to start, it is also true of just combatants that they threaten unjust combatants. And, since at least some unjust combatants are not even minimally culpable for the initial threat they pose, the defensive threat posed to them is also unjust. By SD-2, these unjust combatants have a right to eliminate this threat. They retain, in other words, a right of self-defense, despite the fact that they lost the right not to be attacked. Hence, the moral equality of soldiers in such asymmetrical circumstances: both sides lost their right not to be attacked by each other but retained their right of self-defense.

I shall develop these claims by looking closely at McMahan's story about the surprise attack launched against a "standing army that is based in its home-territory. . . . [The army] is not mobilized and has no plans for war."[25] From SD's standpoint, McMahan's story is radically underspecified. There are circumstances that satisfy his description of which SD says that the unjust combatants involved have a right (of self-defense) to participate in the surprise attack.

Suppose, for example, that at the time combatants joined the army it was morally permissible to do so and that, unexpectedly, they find themselves in the unfortunate situation in which it is (epistemically) determined that an unjust war will take place. No individual soldier or individual act of refusal can prevent the unjust war. Sooner or later, unjust combatants will be counterattacked by just combatants, and nothing that the unjust combatants can do might stop this (justified) attack. Hence, if unjust combatants are not minimally culpable for the threat they initially posed, they have a right to eliminate the threat posed to them. Furthermore, if auxiliary conditions (which I shortly spell out) are met, they have a right do so by participating in the surprise attack. I shall argue, in other words, that typical wars generate complex asymmetrical cases, which nevertheless involve moral equality.

25. McMahan, "Ethics of Killing in War," 697.

Before presenting the argument in more detail, let me try to prevent a basic misunderstanding. SD does not imply the repugnant conclusion that a murderer (the unjust combatant) has a right to kill his victim (the just combatant) on the grounds that the victim's acting in self-defense would pose a threat to the murderer. Remember that SD-2 says that an attacker has a right to eliminate the defensive threat the victim poses only if he is not even minimally culpable for the threat he initially poses. Thus, in Innocent Threat, the attacker (the falling man) became a threat unintentionally; in Trolley and Tactical Bomber, the attacker poses a threat only because he did not have any morally preferred alternative to doing so. The example I shall build up combines these two types of cases. Rather than the unjust combatants themselves, it is the corrupt leader who created the initial threat they pose. Hence, unjust combatants have a right to eliminate the defensive threat posed to them by just combatants. And, in the circumstances I shall describe, they have a right to eliminate this initial threat by participating in a surprise attack.

Consider, then, a surprise attack, which satisfies the following conditions:

1. The surprise attack is unjust.
2. Still (despite appearances to the contrary), from the standpoint of an individual unjust combatant, the surprise attack is defensive: the standing army poses a threat to him.
3. The threat that the standing army poses is unjust.
4. The unjust combatant is not minimally culpable for the unjust threat he poses by mounting a surprise attack against the standing army because he has no morally preferable alternative to doing so.

There are circumstances that satisfy 2–4, which I shall exemplify by a short story. You are the hero of this story: you joined the army because you believed that you would contribute to the security of your country. At the time, your belief was perfectly reasonable. While serving, you were required to participate in a surprise attack, which you knew would be the first event of an unjust war. Due to the state's intensive propaganda, your fellows disagree with your judgment as to the morality of the attack. (These soldiers are indirectly responsible for the future war; the corrupt political leadership could not have counted on them if they were more sensitive and critical.) You, however, are not one of the mass. You know that your leader is corrupt and that the war he initiates is unjust.

Alas, your objection to the war does not change a simple fact: a preemptive attack by the enemy soldiers is now permissible. For, it is now (epistemically) determined that a future war is about to be waged; you and your fellows became a threat by virtue of the fact that you will

presumably attack in the near future. Now, you—as opposed to those who believe the war they are about to fight is just—are not really different from the unjust combatants in Sleeping Soldiers. You became a threat by doing nothing. The same is true of the just combatants: the war is inevitable; nothing they are able to do would prevent it, so presumably, just combatants will eventually attack. And, 3 is true: the initial threat posed to you by just combatants is unjust. We shall assume that the surprise attack preemptively eliminates this threat.

There is, though, a crucial difference between the cases I am trying to analogize: unlike the unjust combatants in Sleeping Soldiers, you can eliminate the threat posed to you by fleeing from the battlefield or by refusing to participate in the war. Hence, it might be thought that, as an exercise of the right of self-defense, the surprise attack is neither necessary nor proportionate. You can eliminate the initial defensive threat by refusing to participate in the surprise attack. It might be thought, in other words, that 4 cannot be true of any instance of McMahan's story.

Admittedly, in some versions of McMahan's story, refusal and surrender are possible and morally preferable. Of such cases, 4 is false. Yet, these circumstances are quite circumscribed; usually, your personal surrender is not the morally preferable alternative you face. For, the war unjustly put innocent people at risk, and these people count on your defense. As coordinated refusal cannot be arranged, some of your friends in the army are as innocent as you are. Further, the just side imposes a dire risk on innocent civilians, even if, unlike the Allies in World War II, it fights in strict accordance with the war convention. The convention outlaws targeting innocent civilians. But, in some cases, it does permit killing civilians as a foreseeable side effect of bombing military bases or munitions factories. We can assume that, thanks to your participation in the war (in general) and in the surprise attack (in particular), the risk to these people diminishes. Given your contractual and special duties to these innocent civilians, refusal is not the morally preferable alternative you have.

In this context, it is especially important to distinguish between the narrow notion of justification and the inclusive notion of moral obligation that were defined in the preliminaries (Sec. II.B). Your participation in the surprise attack does not bring about an outcome that involves less evil or in which the harm is distributed more justly. In the narrow sense defined in the preliminaries, your participation in the surprise attack is unjustified. Still, in the situation in which you are trapped, valid impartial considerations are not more important than your contractual and special duties. Hence, it is not the case that you ought not to participate in the surprise attack. Therefore, you are not

culpable for the threat you pose by doing so. Indeed, these circumstances seem very common in wars.

McMahan anticipates and rejects a similar rejoinder to his critique of the moral equality of soldiers. "It might be argued," he says, "that the unmobilized military personnel have combatant status because they do pose a threat by virtue of being prepared to use force if their country is attacked."[26] He responds as follows, "If the fact that they would fight if attacked is sufficient to make them count as threats to others, then anyone, military or nonmilitary, who is prepared to fight if his or her country is attacked, must count as a threat to others and, therefore, a combatant."[27] Note, however, that the SD-based argument is better than the one McMahan anticipates (and rejects). The soldiers of the standing army do not pose a threat merely by virtue of the fact that they are ready to fight if attacked. Rather, they pose a threat by virtue of the fact that they will attack. Hence, rather than merely conditional combatants, the members of the standing army are future combatants.

Unfortunately, the basic idea from which the SD-based argument takes off—the idea that X has a right to kill Y by virtue of the fact that Y will kill him in the future—is problematic. By its logic—the objector would claim—killing babies on the grounds that they will grow up to be soldiers would be permissible. But this objection misses an essential characteristic of our ethical reasoning: as moral agents, we reason and act on the assumption that the occurrence of some future events is presently undetermined. To see this, suppose that a person voluntarily engages in a permissible but risk-imposing activity, such as driving a car, and suppose, further, that contrary to reasonable expectations and through no fault on his part, he became a lethal threat. Saying of the driver that he ought to have avoided the driving altogether because of its tragic consequences sounds bizarre. It sounds as weird to say that the fact that he could not have known the tragic consequences of his driving is merely a valid excuse. In the epistemic sense, when he started the driving, the consequences were not in existence—there was nothing to know. It turns out, I suggest, that epistemic indeterminacy matters for morality. From a moral standpoint, the threat you and your enemies pose to each other exists only at the time in which it was epistemically determined that war is about to take place.[28]

Let me conclude by describing the normative reality created by the circumstances that satisfy 1–4 in terms of moral permissibility. In such circumstances, the killings committed by unjust but inculpable com-

26. Ibid.

27. Ibid.

28. Compare ibid., 724, and my discussion of the risk imposing driver case in "Responsibility of Soldiers," 564.

batants are permissible in the two different senses that were defined in the preliminaries. First, the killings are weakly permissible because soldiers in such circumstances have a right (liberty) to kill each other in self-defense. Yet, second, in participating in the war, the soldiers we imagine contribute to the defense of the innocent people that count on their protection; they fulfill a contractual duty they undertook. Hence, given the fact that they hold a right of self-defense, it is not the case that they ought not to participate in the war—even if they are able to eliminate the unjust threat imposed on them by fleeing or refusing.

I should warn against an overstated misreading of the theory advanced here: it does not imply that in circumstances described by 1–4, moral but unjust combatants ought to participate in the unjust war (in the inclusive sense defined in Sec. II.B). There is another possibility. By fighting the war, unjust combatants further an unjust outcome, so they face two mutually exclusive courses of action—participating in the war or fleeing from it (say)—where no alternative is morally preferable to the other.

G. Summary

As a Lockean theory, SD presents a radically constrained conception of self-defense. And it is by virtue of its Lockean underpinning that it allows for cases in which an attacker loses his right not to be killed while retaining his right to eliminate a lethal defensive threat the victim poses. Furthermore, we saw that typical wars, in which only one of the parties is just, are likely to generate cases that involve moral equality. The purist accusation—which reads the moral equality of soldiers as an expression of the unconstrained Hobbesian conception of self-defense—was proved to be baseless. The traditional just war doctrine should be understood in light of a perfectly sensible Lockean conception of self-defense.

Note, however, that, as a defense of the traditional war convention, the argument is not yet complete. The SD-based argument shows that the purist critique does not establish a complete inequality between just and unjust combatants. But, by itself, it does not establish the full doctrine of the moral equality of combatants. For, first, the permissibility of the killing of the nonthreatening combatants in, for example, Sleeping Untrained Soldiers is not yet explained. After all, SD does not permit killing nonthreatening soldiers. Second, for traditionalists, unjust combatants that do not satisfy 4—and thus are minimally culpable for the unjust threat they pose—have a right to kill in self-defense. Indeed, the convention takes the culpability of unjust combatants for the threat they pose to be irrelevant. Isn't the indifference of the traditional doctrine to facts about innocence and responsibility an expression of a Hobbesian vision of self-defense? In the next section I shall give a negative answer to this question.

III. BEYOND SELF-DEFENSE: THE WAR CONVENTION AS A TACITLY ACCEPTED SOCIAL NORM

The basic idea is simple: rights can be lost if their holders freely subject themselves to a procedurally fair and mutually beneficial norm (convention) that commands it.[29] Just combatants lose their right not to be attacked by unjust combatants because they subject themselves to a rule that disregards the distinction between just and unjust combatants. They do so because they know that it is in their interest that this rule would be commonly followed. In other words, they lose their title to life (in war) by virtue of their (very indirect) consent, just like boxers who, by agreeing on certain fair rules, lose their right not to be attacked by each other. Indeed, a boxer who crippled another boxer in order to win a contest violated no duty, even if what he did was unjustified. War is even a less friendly activity than boxing, but the moral basis of fighting and boxing is very similar.

As noted, the contractual argument developed in this section explains the moral equality of soldiers in cases that cannot be explained by SD, like Sleeping Untrained Soldiers. But it also explains the equality of soldiers in cases that SD already covered. Notwithstanding this, rather than obviating the SD-based argument, the contractual argument heavily depends on it. For, absent the support of SD, the convention would be morally invalid: if self-defense in war was totally asymmetrical, the "contract" between soldiers would have been invalid. Combatants are treated by the convention as if they are not minimally culpable for the threat they pose. In effect, the convention applies SD-2 to all soldiers, irrespective of the cause for which they fight. Furthermore, the nearly universal acceptance of the *in bello* code frees soldiers from the duty to obtain knowledge that could have made them culpable for the threat they pose. And, in light of this exemption, SD says that they are morally equal.

I shall start by explaining the mechanism that causes persons to lose moral rights as a result of subjecting themselves to commonly fol-

29. The debt of the argument in this section to David Lewis's analysis of convention in his *Convention* (Cambridge, MA: Harvard University Press, 1969) is deep. In particular, following Lewis I assume intimate relations between conventions, rules, and norms. I am also indebted to George I. Mavrodes, "Convention and the Morality of War," in *International Ethics,* ed. C. Beitz, Marshall Cohen, Thomas Scanlon, and A. John Simmons (Princeton, NJ: Princeton University Press, 1985), 75–89, and to R. B. Brandt, "Utilitarianism and the Rules of War," *Philosophy & Public Affairs* 2 (1972): 145–65. A version of the boxing match model, which I endorse, was developed by Thomas Hurka, "Liability and Just Cause," *Ethics and International Affairs* 21 (2007): 199–218. Jeff McMahan envisages this model in his "On the Moral Equality of Combatants," *Journal of Political Philosophy* 14 (2006): 377–93, 381–84. My version of this model was developed independently of Hurka's and of McMahan's; it also significantly differs from theirs.

lowed rules. I shall delineate the conditions these rules meet if they have such an effect (Sec. III.A) and then show that the *in bello* rules form a convention of this sort (Secs. III.B–C).

A. *On Losing Rights Involuntarily by Virtue of Tacitly Accepting Social Norms*

Assume, with Nozick,[30] that property rights are moral and natural and that, in the standard case, a person relinquishes ownership of an article by freely giving up his claim to it—he sells it, gives it as a present, and so on. Suppose, however, that John unknowingly lost an article he owns. The article has no identifying signs; John won't be able to demonstrate that he owns it. Or suppose John was coerced to drop the article somewhere and leave it unattended. Most legal systems would negate John's ownership, allowing whoever finds the article to appropriate it. Indeed, John relinquished ownership of the article before he gave up his claim on it. Nozick's theory of natural property rights might embrace the above legislation: by losing the article, the owner lost his moral standing in relation to it.

In explaining the change in the moral status of the article we should appeal to an important social fact: our behavior suggests that we subject ourselves to the legal rules that govern exchange of property rights. We do so because we believe (*a*) that the rules are fair, (*b*) that it is mutually beneficial that these rules would be commonly followed, and (*c*) that, since others know that it is mutually beneficial that these rules would be commonly followed, these rules are, in fact, commonly followed. This is a set of true and justifiable beliefs; it constitutes a piece of common knowledge. The legal treatment of lost articles exemplifies both the efficiency and fairness of rules that govern the exchange of property rights. First, the prohibition to use the article would be an utter waste (efficiency). Second—given the fact that many people will deceptively allege the article to be theirs—the fairest way to proceed is to allow whoever finds the lost article first to acquire it. I suggest, in short, that in losing the article, the owner lost his moral claim on it by virtue of tacitly accepting the legal rule that allow others to appropriate it. The relation between morality and legality is subtle: the fair legal norm is tacitly accepted, and this is why it is has a moral impact.

This is not a fully consent-based libertarian story: the rules we accept and endorse are elements in an indivisible system—and most of us have no detailed acquaintance with them. The conventions to which we freely subject ourselves are known to experts (lawyers, legislators, etc.)—whereas we know them by description only, as the legal norms with whose details lawyers are acquainted. Moreover, as Lewis makes clear—the knowledge

30. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic, 1974).

of conventions might be very "poor"; they are only tacitly known to members in the relevant society; in many circumstances, these individuals won't be able to articulate them.[31] In a clear sense, therefore, John lost his claim on the article involuntarily in one version of the above tale and under coercion in the other.

Now, consider a modification of Trolley. A runaway trolley is careering down the mainline track. If it continues along this track, it will run over five people who are walking on the track. The five disobeyed an explicit instruction: there was a sign that warns, "Danger, Do Not Enter."[32] It seems that by deliberately disobeying the instruction, the five lose the right not to be struck by the trolley, if the driver can save them only by killing an innocent bystander. They also lost their right to kill the driver in self-defense. Maybe we can go further than this. What if the five got to the track by mistake? And what if they were coerced to be there? Is it plausible that they lost their right of self-defense mistakenly or under coercion? In light of the above discussion, a positive answer is quite understandable.

B. The Right of Culpable Unjust Combatants to Kill in War

The traditional war convention, in general, and the equality of all soldiers, in particular, are—I now wish to suggest—norms that soldiers accept and endorse. The acceptance of the convention by just combatants frees their enemies from the duty not to attack them within a war of aggression.

Practically, soldiers are equal if—whatever the cause of the war they fight—they are immunized from any criminal prosecution and possess the same set of rights and duties. In practice, they are legally required to respect the *jus in bello* rules only. Soldiers accept these rules because (*a*) they believe the rules to be fair, (*b*) they believe that it is mutually beneficial that these rules would be commonly followed, and (*c*) they believe that, since soldiers and statesmen know that it is mutually beneficial that these rules would be commonly followed, the rules are commonly followed. All these beliefs seem to be justifiable and true. By accepting the traditional war convention on the basis of these beliefs, soldiers free all other soldiers from the duty not to attack them in wars and acquire, in return, a right to participate in wars, whatever their cause.

The justification for the belief expressed in *b* is simple: soldiers and civilians live in states, which form an anarchical society.[33] They would

31. Lewis, *Convention*, 63.

32. Thomson, *Realm of Rights*, 178.

33. The phrase is Hedley Bull's. See his *The Anarchical Society: A Study of Order in World Politics* (Oxford: Oxford University Press, 1977).

be vulnerable to large-scale unjust threats unless their right to life is protected by a powerful political entity. Since these threats are a permanent aspect of the reality in the anarchical society of states, efficient and well-ordered armies are necessary for protecting people's right to life. Yet, a well-ordered military force is efficient only if the great majority of its members are obedient. Indeed, in an efficient army, the loyalty and reliability of the soldiers is unquestionable. Ultimately, this means that soldiers in a well-functioning army give up the right to autonomy and undertake a duty to obey any legal order, however poorly informed they are with respect to the causes of the order. Yet, if soldiers were liable to legal prosecution for participating in an unjust war, many of them would not immediately follow the orders delivered by the political leadership. Since the existence of efficient armies minimizes the extent to which soldiers and civilians are vulnerable to unjust threats, the outcome in which unjust combatants are immunized from all legal responsibility for the killing they commit in wars is (*ex ante*) mutually beneficial.

Of course, soldiers have not relinquished all autonomy. Quite to the contrary. They are entitled to disobey orders that manifestly violate the rules of conduct in war; they, in fact, ought to do so. My contractual argument implies an obvious distinction: under a regime that obliges soldiers to ascertain that the cause with which they fight is just, armies won't be able to efficiently fight a just war, to form a credible deterrent threat, or to wage a just preemptive attack. Under such a regime, armies won't be able to provide efficient national defense. In contrast, a regime that obliges soldiers to follow only *in bello* legal orders does not suffer from these deficiencies. The fact that the *in bello* rules are commonly followed does not obstruct armies from providing self-defense.

Soldiers, I suggest, tacitly believe in the above true story—hence, *b* is true; *c* is true because soldiers can easily see that (broadly speaking) other soldiers respect the legal immunity of soldiers and expect their own states to do so as well. Finally, *a* seems to express a true belief, as well: our interest in self-defense is legitimate. The rules that constitute the war convention protect this legitimate interest.

In accepting the legal rule that disregards the difference between just and unjust combatants, soldiers give up their moral right claim not to be attacked in wars and in return acquire the moral right privilege to follow orders of their political leaders. So when a war starts, the moral status of soldiers is changed by virtue of their prior acceptance of the rules that constitute the war convention. Did just combatants consent to be unjustly attacked? In a sense, yes, but this does not seem to be the best description of the normative reality wars generate. Soldiers lose their title to life in the way that John lost his claim on the lost article; they accepted *ex ante* mutually beneficial rules, and they are now harmed

by people who act in accordance with these rules. Thus, there is a sense in which they lose their right to life involuntarily, as a result of the decision of a corrupt political leader. They did not do anything that caused them to lose it at this particular time. Further, some of them might be forced to join the army; these soldiers lost their title to life as a result of coercion.[34]

It might be thought that the egalitarian convention does not really benefit all implicated parties. In particular, it does not benefit members of military forces who protect a state that is very unlikely to engage in unjust aggressive wars. Such soldiers—the objection goes—would benefit from a different rule which allows blind obedience only to nonaggressive governments. I disagree. First, I take it that in accepting the convention, soldiers of a state S consider the interests of soldiers that will serve in S's military forces as if they are their own interests. Second, I assume that it cannot be known now how aggressive a state is likely to be in the remote future. Hence, in assessing how beneficial a convention is to members in S's military forces, S's presently apparent peaceful dispositions are irrelevant. The equalizing convention is justifiably believed to be mutually beneficial, even by soldiers of a presently nonaggressive state.

It might be further argued that were soldiers accountable for the violence they exercise—were they required to justify the war in which they participate in a national or an international court—the number of unjust threats in the anarchical society of states would be minimized. If this were true, the contractual argument for the traditional convention would have been considerably weakened. Yet, it would not be completely undermined. Thus, suppose that, within the optimal institutional arrangement, soldiers would be legally unequal. Even then the outcome produced by the current egalitarian legislation might be a "suboptimal cooperative equilibrium": although a better outcome might be imagined, no one would be better off had he alone followed another rule. Currently, the general acceptance of the egalitarian convention is, in this weak sense, mutually beneficial.

It would be useful to restate the conclusion of this argument in terms of (first) moral permissibility, (second) justification, and (third) moral obligation. The common acceptance of the war convention frees combatants from making sure that the cause of their war is just. Therefore, the killing they commit within the war is morally permissible in the weak sense defined in the preliminaries (Sec. II.B). The weak permissibility of their killings is important; it distinguishes their acts from

34. In my "Elucidating the Supreme Emergency Exemption" (unpublished manuscript), I describe circumstances in which soldiers have no right to undertake the duty of obedience.

the excused murderer in Robbery; legal institutions have, therefore, no moral power to criminalize these acts. Second, like the unjust combatants described in Section II.F, unjust combatants whose rights are created by the universal acceptance of the convention do not bring about a just outcome or an outcome that contains less evil. Hence, put in terms of impartial justification, they are not justified in realizing their right. Yet, there is a crucial difference between the unjust combatants discussed here and those described in Section II.F. For, it is definitely possible that the former ought not to take advantage of the moral freedom they gained by the common acceptance of the war convention. Soldiers might have a right to participate in an unjust war that they ought to waive.

C. Two Objections

Two objections to this analysis merit close attention.[35] Both are triggered by one of the limitations of the argument. First, the argument shows that unjust combatants have a right to defeat the enemy by killing just combatants. Yet, unjust war is likely to cause harm to civilians and neutrals—and soldiers on one side have no moral power to confer a right to inflict harm on these people. Hence, the objection goes, unjust combatants are under the duty not to cause collateral damage and thereby not to participate in an unjust war. Second, when a war is unjust by virtue of its goal, just combatants cannot release unjust combatants from the general obligation not to do injustice.

Both objections convey deep skepticism as to the validity of the distinction between *jus ad bellum* and *jus in bello*.[36] I cannot defend the distinction here, and critics are clearly right that it is problematic and vague. The following preliminary remarks presuppose that the distinction is valid, but they also might be a kind of first step toward an acceptable reformulation of it.

Consider the second objection first. I already stressed that in some circumstances, soldiers ought to waive their right to participate in an unjust war. Hence, in effect, the second objection leaves the contractual argument intact. Interestingly, however, unjust combatants might exercise their right to contribute to the defeat of the enemy, while fulfilling the obligation to inhibit the achievements of the unjust goals of the war. Here is a simple example. You are a soldier in a colonialist army. The people under occupation justly fight for their national independence. Currently, however, their just war puts at sharp risk the national

35. Both are offered by McMahan, "On the Moral Equality of Combatants," 382; McMahan takes them to be devastating.

36. In Yitzhak Benbaji, "The War Convention and the Moral Division of Labor," *Philosophical Quarterly* (forthcoming), I defend the *in bello/ad bellum* distinction in detail.

security of your country. A defeat would signal political and military weakness: you reasonably predict that other hostile countries will become more aggressive and threatening because of these signals. So a defeat of the enemy is in your legitimate interest. Yet, a victory by your side is likely to cause a continuation of the unjust occupation, which is exactly the goal of your corrupt leader. While holding a right to contribute to the defeat of the enemy, you ought to struggle for the ending of the occupation; the latter moral obligation does not imply that you ought to waive the right of self-defense you possess. You can fulfill it in other ways.

Just combatants might confront similar complexities. In their case, the goal of defeating the enemy is (impartially) justified, rather than merely permissible. Still, their political leaders might have unjust goals that a victory would promote. Probably, they are obliged to block the achievement of these goals. Yet, almost needless to say, that obligation does not wipe out the just combatants' right to contribute to the defeat of their enemy.

Let us now turn to the first objection. Unjust combatants are bound to harm civilians and neutrals; according to the objector, this entails that they have no right to participate in the unjust war. But this simply does not follow. The contractual argument shows that unjust combatants hold a right to fight in order to defeat enemy military forces. This is a permissible but unjustified goal. Now, a further question should be asked: What are the permissible means for achieving the permissible goal of defeating the enemy? My defense of the traditional war convention leaves this question open. Indeed, the stringency of the proportionality constraint might be sensitive to the justice of the ultimate goal of the war. Perhaps, then, a moral but unjust combatant would be ready to contribute to the defeat of the enemy only if no civilians and no neutrals are harmed by the violence he exercises. This possibility is perfectly consistent with the contractual argument, whose modest conclusion is, to repeat, that defeating the enemy is a permissible goal (for soldiers); it leaves the issue of the permissible means unsettled.

D. The Liability of Nonthreatening Combatants to Killing in War

How does the collectivized morality of the traditional convention survive McMahan's Second Argument? Why, in particular, are the nonthreatening soldiers in Sleeping Untrained Soldiers liable to killing?

The answer I shall advance relies on two observations. The first is normative: in war, political leaders control the military forces and as such pose a material threat to their enemy. Most theories of self-defense would imply that they are liable to defensive killing by virtue of this fact. In other words, the war convention immunizes engaged civilians despite their (preconventional) liability. The second observation is fac-

tual: the leaders who are directly responsible for the war could not be dealt with in a precise way like assassination or bombing of (selected) government buildings. For, the responsibility for the ongoing war extends to all the civilians who are involved in the politics of waging it, including the leaders and activists of the political parties that support it. A massive bombing of civilian targets would be necessary in order to eliminate all culpable civilians.

Thus, the war convention immunizes all civilians, by making every soldier (rather than merely threat-posing soldiers) liable to killing. Indeed, I suggest that it is illegal to kill the engaged, threat-posing civilians because killing non-threat-posing soldiers is legal. There is, in other words, a deep relation between these aspects of the convention: the political leaders regain their immunity to killing, thanks to the legal permission to target soldiers—including those who do not pose a threat. I shall argue that this rule is accepted because (*a*) soldiers and civilians believe it to be fair, (*b*) they truly and justifiably believe that it is mutually beneficial that it would be commonly followed, and (*c*) they truly and justifiably believe that, since others know that it is mutually beneficial that this rule would be commonly followed, this rule is, in fact, commonly followed.

Why is it in the interest of the soldiers to immunize engaged, threat-posing civilians? The answer is based on the above factual observation: by doing so, the warfare is removed from the cities to the battlefield—and thereby the chance that helpless innocent civilians will be killed diminishes. Thanks to this convention, the soldiers' family members are safer, released soldiers would have safer places to return to, and wounded soldiers would have protected healing spaces.

But why is it necessary to legalize the killing of nonthreatening soldiers? Why not just agree on immunizing the threat-posing citizens? Answer: the basic aim of a just war is the elimination of an unjust threat posed by corrupt leaders. Leaders can pose such a threat by virtue of the fact that the military forces are subject to their direct control. Hence, an elimination of the threat is possible in one of two ways: either by disabling the leaders (killing them, crippling them, etc.) or by disarming them, that is, defeating the military forces, which are subject to their direct control. As noted, most theories of self-defense allow eliminating the unjust threat by killing the political leaders who cause it and prohibit doing so by killing totally innocent soldiers. Yet, *ex ante*, all sides prefer to avoid the first line of action. So we are left with only one way to eliminate the threat posed by corrupt leaders—namely, disarming them. Innocent soldiers, realizing that this is a way of waging war that is overall much less destructive than most realistic alternatives, accept the rule

that denies their right not to be killed by the enemy, even if they are innocent.[37]

IV. CONCLUSION

I have tried to dissolve the suspicion that the war convention represents a Hobbesian (rather than Lockean) view of self-defense. I argued that the initial aggression in the typical war is a crime, but, as Walzer stresses, it is a crime of the political leader. Once soldiers are pushed into a war, an egalitarian just war theory—built on Thomson's conception of self-defense and on an efficient and fair social norm regarding the protection of the rights to life in the anarchical society of states—is a morally solid framework for a war ethic.

37. Consider a rule that commands only partial immunization of civilians. Suppose that if it is commonly followed, it would produce the benefit that full immunization produces. Even then, the current, cruder convention is justified if the chances that the rule that commands partial immunization won't be commonly followed are sufficiently great. Indeed, the simplicity of the current convention seems to be an essential feature of its moral standing. Note further that there might be particular cases in which the interest of all soldiers is best served if the just war would be aimed at disabling the leader of the aggressive state that causes it. Yet, there can be no commonly followed rule that commands such a practice. For, most soldiers are likely to believe that the war they fight is just. Hence, generally, if rules of conduct in war would depend on the justice of the cause of the war, wars won't be fought in accordance with any rules. This general claim calls for a detailed argument, which I hope to provide elsewhere.