Shooting to Kill



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The Ethics of Police and Military Use of Lethal Force

SEUMAS MILLER





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Introduction

THE WARS IN recent decades in Afghanistan, Iraq, and Syria against the forces of Saddam Hussein, the Taliban, al-Qaeda, and, most recently, ISIS (Islamic State of Iraq and Syria); the humanitarian armed interventions in Bosnia, Rwanda, East Timor, and elsewhere; the targeted killings of terrorists by Israeli and US security forces; the use of unmanned aerial vehicles (UAVs, or drones) by the United States to conduct lethal strikes in the tribal areas of Pakistan, Yemen, and elsewhere; the fatal shooting of an innocent Brazilian, Jean Charles de Menezes, by British police in London in 2005; the recent shooting by a police officer of Michael Brown in Ferguson, Missouri, in 2014, and the ensuing riots; the shooting in the back of an unarmed black man, Walter Scott, by a police officer in North Charleston, South Carolina, in 2015; and the shooting by police snipers of various crazed gunmen in the United States, Australia, and elsewhere in recent years—these events have all contributed to the creation of renewed interest in the ethics of police and military use of lethal force, and in the moral justification or justifications for the use of lethal force. The development of drone technology, in particular, has raised important issues of moral responsibility for such use. For example, there is now the possibility to deploy "human-out-of-the-loop" weapons, notably drones, that once programmed and activated by their human operators—can track, target, and deliver lethal force without further human intervention.1

There have, of course, been many philosophical works concerned with the moral justification of killing in personal self-defense or in war; and there has also been some, albeit limited, discussion in the philosophical

^{1.} Bradley Jay Strawser, ed., Killing by Remote Control: The Ethics of an Unmanned Military (Oxford: Oxford University Press, 2013).

literature of the justification for police use of lethal force. More recently, there have been discussions of specific uses of lethal force, such as lethal strikes by drones. In this work I seek to unearth and analyze the underlying moral justifications and moral responsibilities in play in the somewhat diverse uses of lethal force mentioned above. In doing so, I compare and contrast the use of lethal force by ordinary citizens, police officers, and military personnel. On the one hand, police and military use of lethal force is morally justified in part by recourse to fundamental human moral rights and obligations, especially the right to personal self-defense and the moral obligation one has to defend the lives of innocent others under imminent threat—if one can do so without risking one's own life. On the other hand, arguably, the moral justification for police and military use of lethal force is to some extent role-specific. Both police officers and military combatants evidently have a moral duty to put themselves in harm's way to protect others and, at least in the case of military combatants, put their own lives at high risk. Moreover, the moral justifications for police and military use of lethal force appear to be, in part, institutionally based. Thus police, under some circumstances, have an institutionally based moral duty to use lethal force to uphold the law, and military combatants have an institutionally based moral duty to use lethal force to win (just) wars. Moreover, in recent times there has been a blurring of the police and military roles. In particular, there has been a militarization of some police services, as was the case in Ferguson, Missouri, and the utilization of police in war zones, such as the peacekeeping operations in East Timor.

This work offers a distinctive teleological, institutionally based perspective on the morally justifiable use of lethal force by police and the military. This teleological account is not to be understood as a species of consequentialism, whether in its direct act-based or indirect rule-based form.² Consequentialism, as I understand it, determines the rightness or wrongness of actions on the basis of the *actual consequences* of those actions, irrespective of whether these consequences were intended or otherwise aimed at.³ My teleological account has it that the rightness or wrongness of actions, specifically the lethal actions of police officers and soldiers, derives in large part from the outcomes *aimed at* by

^{2.} Seumas Miller, Social Action: A Teleological Account (New York: Cambridge University Press, 2001).

^{3.} For recent criticisms, see James Griffin, What Can Philosophy Contribute to Ethics? (Oxford: Oxford University Press, 2015).

these role occupants. Moreover, my account contrasts with individualist reductionists—so-called revisionists (e.g. Cecile Fabre, Helen Frowe, and Jeff McMahan⁴)—on the one hand, and nonreductionist collectivists (e.g. Christopher Kutz and Michael Walzer⁵), on the other. It analyzes the different salient moral justifications for police and military use of lethal force, and compares both of these with the standard moral justifications for the use of lethal force by noninstitutional actors (e.g., in personal selfdefense). However, as already mentioned, in doing so, it compares and contrasts these institutional and noninstitutional uses with a view to identifying the underlying moral considerations.

In addition to providing analyses of the main moral justifications for the use of lethal force by the police and the military, the work analyzes the moral responsibility for the use of lethal force by these institutional actors. Here there is a need to distinguish between individual and collective moral responsibility (e.g., the use of lethal force by members of an armed collective, the collective responsibility to engage in humanitarian armed intervention), and also between direct and indirect moral responsibility (e.g., the delivery of lethal force by autonomous drones).

The contents of the chapters are as follows. Chapter 1 maps the conceptual terrain in the state of nature (so to speak) in respect of the morally justified or morally excusable use of lethal force, and thereby paves the way for the more detailed discussions of particular institutional and noninstitutional cases of the use of lethal force. Institutional cases are ones in which the lethal force in question is deployed by institutional actors in their capacity as institutional actors; noninstitutional cases are ones in which lethal force is used by ordinary human beings in their noninstitutional, *natural* capacities. The paradigmatic cases of institutional actors who deploy lethal force are police officers and military combatants, and it is these actors that receive detailed treatment in Chapters 3–10.

The paradigm cases of noninstitutional use of lethal force are ones in which one person, B, mounts a morally unjustified lethal attack against

^{4.} Cecile Fabre, Cosmopolitan War (Oxford: Oxford University Press, 2012); Helen Frowe, Defensive Killing (Oxford: Oxford University Press, 2014); Jeff McMahan, Killing in War (Oxford: Clarendon, 2009).

^{5.} Christopher Kutz, "The Difference Uniforms Make: Collective Violence in Criminal Law and War," *Philosophy and Public Affairs* 33, no. 2 (2005): 148–180; Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 4th ed. (New York: Basic Books, 2006), 36: "the war itself isn't a relation between persons but between political entities and their human instruments."

another person, A, and A responds by killing B in self-defense, or person B attacks A and a third person, C, responds by killing B in defense of A. These are essentially cases in which A's negative rights and, in particular, A's right not to be killed are being violated or, at least, are about to be violated. However, other cases involve killing in defense of so-called positive rights. 6 Moreover, acts of lethal attack, defense, and enforcement are sometimes individual actions and sometimes joint ones; the joint actions in question being ones involving agents acting together to achieve the common end of killing, successfully defending, and/or enforcing, respectively. It is this notion of joint action7 that I use in the construction of organizational action. Roughly speaking, organizational action comprises multilayered structures of joint action.8 Specifically, I employ the notion of joint lethal action to provide an understanding of the lethal actions of institutional actors. In doing so I am, in effect, importing relatively recent theoretical findings from the subdiscipline of social ontology into discussions of the ethics of police and military use of lethal force. However, I am doing so from a distinctive standpoint; namely, one in which although certain basic features of morality are institutionally prior, institutions nevertheless generate additional moral rights and duties. The institutionally based moral rights and duties, for example, of police officers and military combatants, are derived in part from basic natural rights and obligations, such as the right to self-defense and the obligation to defend the lives of others. However, they also derive in part from the collective goods realized by the social institutions in question.

On the standard view of morally permissible killing in self defense—whether by ordinary citizens, police, or military personnel—killing in order to defend one's own life is morally justified on the grounds that each of us has a right to life. Moreover, self-defense (in its various permutations) is evidently one of the fundamental moral justifications in play

^{6.} On the distinction between positive and negative rights inter alia, see Leif Wenar, "Rights," in Edward N. Zalta, ed., *The Stanford Encyclopedia of Philosophy* (2015), http://plato. stanford.edu/entries/rights/. On the enforcement of positive rights, see Seumas Miller, *The Moral Foundations of Social Institutions: A Philosophical Study* (New York: Cambridge University Press, 2010), 202–209; and Seumas Miller, "Civilian Immunity, Forcing the Choice and Collective Responsibility," in Igor Primoratz, ed., *Civilian Immunity in War* (Oxford University Press, 2007), 113–135.

^{7.} Seumas Miller, "Joint Action," *Philosophical Papers* 21, no. 3 (1992): 275–299; and Miller, *Social Action*, Chapter 2.

^{8.} Miller, Social Action, Chapter 5; Miller, Moral Foundations of Social Institutions, 48-50.

in police and military use of military force, as well as in personal self-defense. Hence there is a need to provide an acceptable moral analysis of it. I say this notwithstanding my view that personal self-defense and the related justification of (noninstitutionally based) other-person defense are not the only moral justifications for police and military use of lethal force.

In Chapter 2 the concern is principally with the natural right to self-defense. I argue against prevailing influential theories of the right to self-defense, including those of J. J. Thomson⁹ and Philip Montague.¹⁰ Moreover, I elaborate my own novel account, the fault-based internalist suspendable rights-based theory (FIST).¹¹ On this account, you have a right not to be killed by me, and I have a concomitant obligation not to kill you. However, you suspend your own right not to be killed by me if you come to have all the following properties:

- 1. You are a deadly threat to me.
- 2. You intend to kill me and are responsible for having this intention to kill me.
- 3. You do not have a strong and decisive moral justification for killing me, and you do not reasonably believe that you have a strong and decisive moral justification for killing me.

Note that FIST posits that a culpable attacker suspends his right not to be killed by a defender even in cases in which it is not necessary for the defender to kill the attacker to save his own life. Moreover, each person, X, has a set of suspendable rights not to be killed relativized to every other person; FIST is a partialist account. Thus X has a right not to be killed by Y, and a right not to be killed by Z, and so on. X also has a set of suspendable obligations not to kill: X has an obligation not to kill Y, and an obligation not to kill Z, and so on. Here my right not to be killed generates an obligation on your part not to kill me. However, if X's right not to be killed by Y is suspended by virtue of X attacking Y, it does not follow that X's

^{9.} Judith Jarvis Thomson, "Self-Defense," *Philosophy and Public Affairs* 20, no. 4 (1991): 283–310.

^{10.} Philip Montague, "Self-Defense and Choosing between Lives," *Philosophical Studies* 40 (1981): 207–219.

^{11.} Initially elaborated in Seumas Miller, "Killing in Self-Defence," *Public Affairs Quarterly* 7, no. 4 (1993): 325–340.

right not to be killed by Z has been suspended, although this right of X's might be overridden, allowing Z to justifiably kill X.

In respect of a moral right or duty to kill in defense of others, we need to distinguish between ordinary human beings per se and persons with institutional roles that are defined in part in terms of such rights and duties to kill in defense of others—specifically, the roles of police officer and military combatant. Arguably, in the contemporary context of nation-states, the needs of members of a given community for protection from internal (e.g., criminal organizations) and external (e.g., foreign powers) threats to life and limb can only adequately be met by the organized membership of specialist occupational groups within that community, specifically police organizations and military forces, respectively. Accordingly, the collective responsibility of members of a community to provide mutual protection is relativized to that community; it is partialist and, therefore, does not necessarily extend to the members of other communities. 12 Moreover, such collective responsibilities are often most effectively discharged by establishing police and military institutions comprising institutional role occupants with special rights and duties.

In Chapter 3 I undertake a normative comparative institutional analysis of police officers and regular soldiers in the context of the contemporary liberal democratic nation-state, as a precursor to the detailed discussion in later chapters of police and military use of lethal force. As mentioned above, the normative analysis of institutions is in large part to be understood in teleological terms. Such institutional analysis has, for the most part, been eschewed by philosophers in favor of analyses based on the assumption that the moral justifications for the use of lethal force must ultimately consist either of personal self-defense or of (noninstitutional) other-person defense. An important exception to this is the justification for waging war in terms of defense of the nation-state. David Rodin, for example, has argued against understanding this justification in terms of saving individual human lives. In the context of t

Differentiating police officers from soldiers might seem straightforward enough. The role of the police officer is to maintain order and

^{12.} This is consistent with holding, as I do, that the members of one community may also have collective responsibilities with respect to the members of other communities, and that some of these are based on the positive right to assistance when one's natural right to life is threatened. See Chapter 8.

^{13.} Seumas Miller, "Police, Citizen-Soldiers and Mercenaries: A Comparative Normative Institutional Analysis," *Journal of Military Ethics* 15 (2016).

^{14.} David Rodin, War and Self-Defense (Oxford: Clarendon Press, 2002).

enforce the domestic criminal law of the land—paradigmatically by arresting offenders, but on occasion, and only if necessary, by using lethal force. By contrast, the role of the soldier (or sailor or airman), whether a member of a standing professional army, a member of a voluntary citizen-militia, or a conscripted citizen, is to defend the state (or like political entity) against armed aggression by other states (or like political entities) paradigmatically by the use of lethal force. Evidently, in recent times there has been a blurring of the distinction between police officers and regular soldiers. Arguably, this is in part due to the rise of international terrorism (e.g., al-Qaeda, ISIS), and, as a consequence, the need for closer cooperation between domestic police agencies and military organizations in counterterrorist operations.¹⁵ At any rate, whatever the precise nature, extent, and causes of the blurring of the distinction, I seek (in Chapter 3), first, to clarify these related occupational roles and, second, to unearth the implications in general terms for the morally permissible use of lethal force by the police, on the one hand, versus by the military, on the other.

My approach here is a novel one, relying on my philosophical theory of social institutions developed elsewhere: a normative teleological account. If Suffice it to say here that I frame the problems in question in normative and institutional terms. That is, I take it that differentiating between police officers and regular soldiers is, or ought to be, principally a matter of demarcating their respective institutional roles. This in turn requires a specification of the nature and function of the institutions of which these roles are, or ought to be, constitutive elements. Such specification is, I suggest, essentially a normative undertaking, as opposed to, for example, an exercise in purely descriptive organizational sociology. That said, it is a normative exercise that needs to be anchored in appropriate institutional description. Accordingly, my approach is at odds with some individualist reductivist conceptions, such as so-called revisionist accounts put forward by theorists such as McMahan, Fabre, and Frowe, If

^{15.} Seumas Miller, "On the Morality of Waging War against the State," South African Journal of Philosophy 10, no. 1 (1991): 20–27; Seumas Miller, Terrorism and Counter-Terrorism: Ethics and Liberal Democracy (Oxford: Blackwell, 2009); Stephen Nathanson Terrorism and the Ethics of War (New York: Cambridge University Press, 2010).

^{16.} Miller, Moral Foundations of Social Institutions.

^{17.} McMahan, Killing in War, and "Collectivist Defenses of the Moral Equality of Combatants," Journal of Military Ethics 6, no. 1 (2007): 50–59; Fabre, Cosmopolitan War; Frowe, Defensive Killing.

but nevertheless also inconsistent with nonreductionist collectivist views of theorists such as Walzer and Kutz.¹⁸

Chapter 4 comprises a moral analysis of the use of lethal force by police officers.¹⁹ With the establishment of police services in modern societies, the responsibility for defending oneself, and especially for protecting others, has to a large extent devolved to the police. Crudely, the idea is that if someone's life is threatened, whether my own or someone else's, the first step should be to call the police. However, this in no way means that the rights of ordinary citizens to self-defense and to defend the lives of others have been alienated. In Chapter 4 I argue that the standard view (presented by John Kleinig²⁰ and Jeffrey Reiman,²¹ for example) of the moral justification for police use of lethal force being entirely dependent either on personal self-defense or (noninstitutionally based) defense of the lives of others is not adequate, and instead put forward a different account based in part on the specific institutional role of police officers.

The use of lethal force by police in many counterterrorism operations does not raise moral problems that are essentially different from those that arise in combating other kinds of violent crime. Nevertheless, there do seem to be some important differences when it comes to the use of lethal force against suicide bombers, in particular. In Chapter 5 I focus on some of the moral problems arising from the use of lethal force against suspected suicide bombers operating in well-ordered, liberal democratic states.²² I do so because these operations seem to require a less restrictive use of lethal force on the part of police than do police responses to other related murderous criminal actions, such as, for example, a lone gunman

^{18.} Walzer, Just and Unjust Wars; Kutz, "The Difference Uniforms Make."

^{19.} Seumas Miller, "Shootings by Police in Victoria: The Ethical Issues," in Tony Coady, Steve James, Seumas Miller, and Michael O'Keefe, eds., *Violence and Police Culture* (University of Melbourne Press, 2000), 205–219; Seumas Miller and John Blackler, *Ethical Issues in Policing* (Aldershot, U.K.: Ashgate, 2005), Chapter 3.

^{20.} John Kleinig, The Ethics of Policing (New York: Cambridge University Press, 1996).

^{21.} Jeffrey Reiman, "The Social Contract and the Police Use of Deadly Force," in Frederick Elliston and Michael Feldberg, eds., *Moral Issues in Police Work* (Totowa, N.J.: Rowman and Allanheld, 1985) 237–249.

^{22.} Ian Gordon and Seumas Miller, "The Fatal Police Shooting of Jean Charles de Menezes: Is Anyone Responsible," in Simon Bronitt, Miriam Gani, and Saskia Hufnagel, eds., Shooting to Kill: Socio-Legal Perspectives on the Use of Lethal Force (Oxford: Hart, 2012), 215–239.

shooting dead numerous passers-by who is himself eventually shot dead by a police sniper. One concern in this chapter is to circumscribe the police role in a manner that enables the traditional distinction between police use of lethal force and the military use of lethal force to be maintained, notwithstanding the pressure upon the distinction arising from suicide bombers operating in civilian settings.

A second concern is that of collective moral responsibility for the use of lethal force, given that police officers who shoot suspected suicide bombers dead rely on other police officers for intelligence about the identity of these suspects, rather than relying merely on what is happening before their own eyes. If a police firearms officer shoots dead a suspected suicide bomber on the basis of intelligence provided by other police officers, and the suspect turns out not to be a suicide bomber, then who, if anyone, is to be held morally responsible? Is it only the firearms officer who fired the fatal rounds? Is it not only the firearms officer, but also the members of the surveillance team who provided the incorrect intelligence with respect to the identity of the suspect? Or is it simply an unfortunate outcome for which no one is morally responsible? My discussion at this point relies on a distinctive relational individualist analysis of collective moral responsibility, developed in detail elsewhere.²³

Chapter 6 is concerned with the ethics of the use of lethal force by military combatants (much discussed within the framework of just war theory). Military combatants principally use lethal force in the context of ongoing armed conflicts between the armed forces of political entities such as, but not restricted to, nation-states.²⁴ Such armed conflicts between armed forces include wars between nation-states and wars involving nonstate actors. The latter include civil wars, wars of liberation, and nonconventional wars between state actors and terrorist groups. Given the organizational, indeed institutional, character of military combat, the use of lethal force by military combatants is, I suggest, importantly different from that of the essentially noninstitutional use of lethal force by

^{23.} Seumas Miller, "Collective Moral Responsibility: An Individualist Account," in Peter A. French, ed., *Midwest Studies in Philosophy* 30 (2006):176–193.

^{24.} Seumas Miller, "Just War Theory: The Case of South Africa," *Philosophical Papers* 19, no. 2 (1990): 143–161. For a well informed discussion of the morality of political violence across a broad range of issues see C. A. J. Coady *Morality and Political Violence* (New York: Cambridge University Press, 2008).

individuals in self-defense or in defense of the lives of others (discussed in Chapter 2).

Here my notion of organizational action as multilayered structures of joint action and my notion of collective moral responsibility as joint moral responsibility are again salient. These notions allow me to reframe the "moral equality of combatants" debate between so-called traditionalists, such as Walzer, and so-called revisionists, such as McMahan, in terms of the collective, or joint, moral responsibility of actors engaged in multilayered structures of joint action. While not discounting the moral difference between combatants fighting a just war and those fighting an unjust one, this provides, I suggest, a more nuanced and realistic model of moral responsibility in large-scale collective enterprises, such as armies fighting (just or unjust) wars. In such contexts, decision making is necessarily joint and, therefore, required to be binding on all or most if it is to be effective. For example, no single Australian citizen, whether that person be the prime minister, the chief of the armed force, or merely a low-ranking regular soldier or civilian, can unilaterally decide whether Australia will wage war or refrain from doing so. Likewise, disengaging from a war that is underway requires a joint decision. Accordingly, there is a presumption in favor of an individual who disagrees with such joint decisions to go along with them, her disagreement notwithstanding. Moreover, individual nonparticipation in a collective enterprise such as war may be extremely costly for the individual concerned, and this will be an important moral consideration in their decision making.

Further, the institutional purposes served by military personnel and the nature of military combat are importantly different from the purposes and activities of police. Accordingly, the institutionally based use of lethal force by the military is different from that of the police (discussed in Chapter 4). Importantly, once actually engaged in war military combatants have evidently waived their right to decide whether or not to use lethal force against enemy combatants, and have done so in favor of their superiors (assuming their superiors issue lawful orders). By contrast, police officers do not waive their corresponding right. In general terms, the moral principles governing military use of lethal force are a good deal more permissive than those governing the use of lethal force by police officers.²⁵ More specifically, there are important differences in the application by military personnel—as opposed to ordinary citizens, on the one

^{25.} Miller, "Police, Citizen-Soldiers and Mercenaries."

hand, and police officers, on the other—of the moral principles that govern the use of lethal force, notably the principles of imminence, necessity, proportionality, and discrimination. Moreover, these differences are not simply ones explicable in terms of the larger numbers of defenders and attackers typically involved in military conflict, or so I argue.

In Chapter 7 I explore the principle of discrimination and the closely related notion of civilian immunity in war.²⁶ I do so in the context of (a) the rights-based just war theoretical account of the moral justification for waging war elaborated in Chapter 6, and (b) the contrasting moral duties that police officers contemplating the use of lethal force have to innocent bystanders. As argued in earlier chapters, a police officer's use of lethal force ought not to put the lives of innocent third parties at risk. This requirement derives in part from the primary institutional role of police officers to protect citizens from serious harm—and this typically trumps their other primary role of arresting offenders. By contrast, military combatants can put the lives of innocent citizens at considerable risk on grounds of military necessity. So the principle of discrimination in play is far more permissive.

In relation to civilian immunity, I first address the issue of moral differences between combatants and civilians. In particular, I engage with the argument that, contrary to the standard view, the lives of one's own combatants ought to be given priority over the lives of noncombatants of the enemy state or other collective political entity. I argue in favor of the standard view. Second, I argue that there are two neglected categories of civilians that ought not to enjoy civilian immunity in war.²⁷ The first category consists of the members of civilian groups who have a share in the collective moral responsibility for the violation of non-life-threatening rights violations, yet are not morally responsible for the *enforcement* of these rights violations. Such persons are neither combatants nor their leaders; nor do they necessarily assist combatants qua combatants, as do (say) munitions workers. The second category consists of the members of civilian groups who are collectively morally responsible for culpably refraining from assisting those who have a moral right to assistance from

^{26.} Miller, "Civilian Immunity."

^{27.} Miller, "On the Morality of Waging War against the State," 24–26, and "Civilian Immunity," 123–135.

them. Once again, such persons are neither combatants nor their leaders; nor do they necessarily assist combatants qua combatants.

The general issued discussed in Chapter 8 is the ethics of armed humanitarian intervention.²⁸ In recent times there have been a number of armed humanitarian interventions by nation-states in conflicts taking place within the borders of other nation states. Here one thinks of Bosnia, Kosovo, Somalia, Rwanda, East Timor and, very recently, Iraq (in the context of the rise of ISIS) and Syria (in the context of both the Assad regime and ISIS). In some instances, such as the genocide in Rwanda, armed intervention is or was morally required, but the armed forces deployed were inadequate and/ or arrived too late.²⁹ In other instances, such as Kosovo, armed intervention might have been justified and timely, but arguably the force deployed was excessive, or at least of the wrong form. In still other cases, such as Iraq in the context of ISIS and Syria in the context of the Assad regime and ISIS, armed intervention is morally justified but there are dilemmas concerning not only the precise form it should take, but also who should be the ones to undertake the intervention. At any rate, in this chapter my more specific concern is to explore the notion of collective moral responsibility as it pertains to nation-states contemplating humanitarian armed intervention in a variety of settings involving states or groups perpetrating human rights violations. I do so on the assumption that such interventions are the collective moral responsibility of the community of nation states. Accordingly, there is a distinction to be made between the institutionally prior, patriotic, and essentially partialist collective responsibility of members of a given military force in respect of the protection of the rights of their own citizens and this cosmopolitan and impartial collective responsibility in respect of the protection of the rights of the citizens of other nation-states.

Chapter 9 concerns the ethics of targeted killing³⁰. Assassination of one's political enemies in the context of a well-ordered, liberal democratic

^{28.} See, for example, James Pattison, Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene? (Oxford: Oxford University Press, 2010).

^{29.} Seumas Miller, "Collective Responsibility, Armed Intervention and the Rwandan Genocide," *International Journal of Applied Philosophy* 12, no. 2 (1998): 223–239.

^{30.} See, for example, Bradley Jay Strawser, "Moral Predators: The Duty to Employ Uninhabited Aerial Vehicles," Journal of Military Ethics 9, no. 4 (2010): 342–348. See also Michael L. Gross, Moral Dilemmas of Modern War: Torture, Assassination and Blackmail in an Age of Asymmetric Conflict (Cambridge: Cambridge University Press, 2010); Claire Oakes Finkelstein, Jens David Ohlin, and Andrew Altman, eds., Targeted Killing: Law and Morality in an Asymmetrical World (Oxford: Oxford University Press, 2012).

state is murder and, given the potentially destabilizing effects, a very serious political crime. Accordingly, it ought not to be tolerated; it is both unlawful and morally unjustifiable. What, then, of targeted killing? Here there is a need to get clear on the specific contexts in which targeted killing might take place, such as targeted killing by a military combatant of an enemy combatant in a theater of war versus by a police officer of a suspected terrorist in a civilian setting. Arguably, the former is morally permissible but the latter is not. This raises (again) questions of the institutional role of police versus military, and of war versus civilian settings.

I provide a definition of targeted killing (which serves to differentiate it from assassination, on the one hand, and the use of drone strikes in civilian areas, on the other), and argue that in theaters of war it is, in principle, morally permissible.³¹ However, there are a range of hard cases, such as the killing of Osama bin Laden, which may or may not be morally permissible depending on various factors. I discuss some of these, notably the killing of bin Laden.

Another kind of hard case is the use of drone strikes in counterterrorist operations such as those conducted by the US in the FATA (Federally Administered Tribal Areas) of Pakistan and in Yemen. Insofar as these drone strikes have been genuine cases of targeted killing in a theatre of war and have not violated the principles of *jus in bello*, then, other things being equal, they are morally permissible.

In Chapter 10 I discuss the morality of autonomous weapons.³² The advent of autonomous weapons has raised the issue of the moral responsibility for killing in war in a particularly acute form. Indeed, some theorists³³ have argued, in effect, that autonomous weapons "outsource" human responsibility for killing to machines. Are human beings morally responsible for killings "done" by autonomous weapons? If so, is this responsibility indirect? What are the implications for the use of autonomous weapons? Should they be banned, for instance?

Autonomous weapons are weapons system that, once programmed and activated by a human operator, can—and, if used, do in fact—identify,

^{31.} Seumas Miller, "The Ethics of Targeted Killing: Osama bin Laden, Drones and Counter-Terrorism," *Public Affairs Quarterly* 28, no. 3 (2014): 317–340.

^{32.} Seumas Miller, "Collective Responsibility for the Robopocalypse," in Jai Galliott and M. Lotze, eds., *Super Soldiers: The Ethical, Legal and Social Implications* (Aldershot, U.K.: Ashgate, 2015), 153–166.

^{33.} Rob Sparrow, "Killer Robots," Journal of Applied Philosophy 24 (2007): 63-77.

track, and deliver lethal force without further intervention by a human operator. By "programmed" I mean, at least, that the individual target or type of target has been selected and programmed into the weapons system. By "activated" I mean, at least, that the process culminating in the already programmed weapon delivering lethal force has been initiated. This weaponry includes weapons used in nontargeted killing, such as autonomous antiaircraft weapons systems used against multiple attacking aircraft or, more futuristically, against swarm technology (e.g., multiple lethal miniature attack drones operating as a swarm so as to inhibit effective defensive measures); and ones used, or at least capable of being used, in targeted killing (e.g., a predator drone with face-recognition technology and no human operator to confirm a match).

I argue that the use of autonomous drones is, in principle, morally impermissible. A key claim on which the argument in favor of autonomous weaponry is based is that moral principles, such as military necessity, proportionality, and discrimination, can be reduced to rules, and these rules can be programmed in to computers. However, the irreducibility of moral properties to physical properties³⁴ (i.e., properties detectable by the sensors of computerized robotic weaponry) presents a critical, if not insurmountable, problem at this point. Specifically, I provide what I refer to as the ramification argument: The combination of conceptual interdependence between the three jus in bello principles, the irreducibility of moral properties to physical ones, and their applicability at interconnected individual and collective levels gives rise to moral ramification; moral ramification, in turn, gives rise to the need for complex decisionmaking such that one cannot simply apply one of these principles (or some proxy principle) in a given conceptually discrete and self-contained context involving the use of lethal force without taking into account the other principles and other contexts at other levels. Accordingly, there is a need for context sensitive moral judgment of a kind not able to be rendered into an appropriate form for programming into computers.

Seumas Miller, "The Irreducibility of Moral Properties to Physical Properties," (unpublished).

Morally Permissible Use of Lethal Force

A TAXONOMY

IN THIS CHAPTER the focus is on the morality of the use of lethal force by and against single individuals, or members of small groups, in the state of nature; that is, the focus is on natural, i.e. non-institutional, actors. It is an assumption of this work that institutions presuppose natural (i.e. non-institutional) moral principles, rights and obligations governing the behaviour of non-institutional actors, but also further specify these principles, rights and obligations in order to render them fit for purpose in particular institutional settings.

It is widely accepted that the use of lethal force is morally justified, or at the very least morally permissible, in individual self-defense and by third parties to protect human life. These are the two fundamental moral justifications for the use of lethal force. In due course, however we shall complicate the picture. Here, as elsewhere in this book, I assume moral permissibility is a weaker notion than moral justification. If an action (or intentional omission), x, is morally justified, then there are good and decisive, or at least sufficient, moral reasons to perform it. By contrast, an action, x, might be morally permissible even though there are no good, let alone decisive, moral reasons to perform it; rather, there are merely no good or decisive moral reasons not to perform x. I also assume that there is a distinction between moral responsibility and blameworthiness; blameworthiness entails moral responsibility but moral responsibility does not entail moral blameworthiness (or praiseworthiness). An agent might be morally responsible for

^{1.} Seumas Miller "Against the Moral Autonomy Thesis" *Journal of Social Philosophy* vol.38 no.3 2007 pp.389-391

some morally wrong (avoidable) action but not moral blameworthy since, for example, the agent had a valid excuse for performing the action. I refer to agents who are blameworthy for performing morally wrong actions as morally culpable.

It is argued by many that the protection of human rights—including, but not restricted to, the right to life—justifies the use of lethal force or, at the very least, renders it morally permissible. In this view, if a moral entitlement is a human *right*, then it is a very strong entitlement indeed. As Ronald Dworkin says, "Rights are trumps" and held to be enforceable. So, other things being equal, coercion may be, and perhaps ought to be, used to ensure that such rights are respected. But it is not obvious from this that the use of, or the threat of the use of, *lethal* force is always morally permissible in relation to human rights protection, even in situations in which other lesser forms of coercion are unavailable or ineffective.

In this book I adopt a broadly rights-based approach.³ In relation to the question of the conceptual underpinning of rights, I favor a pluralist approach over monist conceptions, such as interest-, needs-, or agency-based approaches.⁴ Let me begin my making some distinctions with respect to moral rights that are germane to my purposes.

Human rights are to be distinguished from institutional rights, and negative rights from positive rights. Human rights, as opposed to institutional rights, are rights possessed by virtue of properties one has qua individual human being. Thus the right to life is a human right. By contrast, the moral (and legal) right a police officer might have to arrest an offender is an institutional right. I return to the matter of institutional rights, and, in particular, to institutional rights that are also moral rights,

^{2.} Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977).

^{3.} There is a voluminous literature on rights. See James Nickel, *Making Sense of Human Rights* (Oxford: Blackwell, 2007), for a useful introduction. This literature covers, among other things, the logical categorization (so to speak) of rights (e.g. so-called claim rights, liberty rights, privileges and immunities). While not denying its importance, in this work, as far as is possible, I sidestep this level of analysis; to do otherwise would divert me from my central concerns. For a useful discussion of rights in the context of war see Rodin *War and Self-Defense*, Chapter 1.

^{4.} See Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1979), for an interest-based approach; David Wiggins, *Needs, Values and Truth* (Oxford: Oxford University Press, 1987), for a needs-based one; and James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008), for an agency-based conception.

in later chapters. Here I note that the primary notion contrasted with institutional rights is that of natural rights; natural rights are noninstitutional rights. Human rights are also noninstitutional rights; they are a species of natural rights. However, natural rights are not necessarily human rights, as I am using these terms, since some natural rights are not possessed *merely* by virtue of properties that their possessors have qua *individual* human beings. For example, human persons have a natural right to have sex with one another and to form friendships. But these are not moral rights an individual person can possess on his or her own; sex and friendship both require another person who is agreeable to having sex or to forming a friendship. In such cases I suggest that the individuals in question have a jointly held *natural* right not to be prevented from their joint activities by others.⁵

Negative rights are rights one has not to be interfered with by others. So the rights not to be killed or not to have one's freedom restricted are negative rights. By contrast, the right to have sufficient food to keep one alive is a positive right; it is a right to assistance from others, if such assistance is required and they are able to provide it at a relatively small cost to themselves.

As is well known, both of these sets of distinctions are problematic in various ways. Indeed, the very notion of a moral right is problematic. Nevertheless, for my purposes here, I am going to assume that there are natural rights of which human rights are a species, and that these rights include at least some of the ones typically referred to as positive rights. In particular, I am going to assume that natural rights are, or at least include, some or all of those rights that Henry Shue refers to as basic rights. Basic rights include the right to physical security and the right to a subsistence level of food.

Moreover, I am also assuming certain properties of natural rights. First, many natural rights generate concomitant moral obligations on others. So A's right to life generates an obligation on the part of B not to kill A. Second, natural rights are justifiably enforceable.⁷ So A has a right not

^{5.} An alternative to this might be to define such joint rights as joint human rights, in which case the notion of a human right and that of a natural right would be more or less interchangeable.

^{6.} Henry Shue, Basic Rights: Subsistence, Affluence, and US Foreign Policy (Princeton, N.J.: Princeton University Press, 1996).

^{7.} Miller, Moral Foundations of Social Institutions, 202–209; Miller, "Civilian Immunity," 113–135.

to be killed by B, and if B unjustifiably attempts to kill A, then (other things being equal) C is morally justified in using lethal force to prevent B from killing A (if no other means of prevention are available). Note that C might in fact be A, in which case it is an instance of justifiable killing in self-defense, as opposed to killing in defense of another person.

My task in this chapter is to map the conceptual terrain of interest to us in our discussion of the morally justified or morally permissible use of lethal force, and thereby pave the way for the more detailed discussions of particular institutional and noninstitutional (typically, natural) cases of the use of lethal force. Institutional cases are ones in which the lethal force in question is deployed by institutional actors in their capacity as institutional actors; noninstitutional cases are ones in which lethal force is used by ordinary human beings in their noninstitutional (typically, natural) capacities. The paradigmatic cases of institutional actors who deploy lethal force are police officers and military combatants, and it is these that will receive detailed treatment in Chapters 3–10.

The paradigm cases of noninstitutional use of lethal force are ones in which one person, B, mounts an unjustified lethal attack against another person A, and A responds by killing B in self-defense; or, alternatively, person B attacks A and a third person, C, responds by killing B in defense of A. These are essentially cases in which A's negative rights, particularly A's right not to be killed, are being violated. Notice that in these paradigm cases, the threat to A posed by B is an *imminent* threat; so A's (or C's) lethal response is not a preemptive attack on B. Moreover, it is *necessary* for A (or C) to kill B if A's life is to be preserved. Finally, the killing of B is not a *disproportionate* response; after all, it is A's life that has been deliberately and unjustifiably put at risk by B.

These three principles—imminence, necessity, and proportionality—are in part constitutive of justifiable use of lethal force in our paradigmatic noninstitutional cases. However, as we shall see below in this chapter, and in the chapters following this one, the nature or, at least, application of these principles can vary greatly depending on the institutional or noninstitutional context. For example, the principle of military necessity applicable to the use of lethal force by military combatants in a theater of war is quite different from the notion of necessity applicable in noninstitutional cases of personal self-defense in peacetime settings. There is a fourth salient principle; namely, the principle of discrimination. Roughly speaking, this principle captures the fundamental moral intuition that it is only those that are morally responsible for an unjustified lethal attack

that can be justifiably killed by the person attacked or by some third party. However, there are important complications arising from the application of this principle in war and other settings. I discuss these in detail in Chapter 7.

In many of the paradigm cases of noninstitutional justifiable use of lethal force, the agents involved, whether they be defenders or attackers, are acting on their own as single individuals. However, I want to complicate matters in two main ways. First, I introduce cases in which although B does not attack A, A nevertheless has some positive right to assistance from B. For example, A might have a moral right that B provide A with food and water to enable A's survival. If so, then A may well have an enforcement right against B. Moreover, in such a scenario involving a third person, C, A's positive right to assistance from B may well be enforceable by C. Note that although such positive rights are, at least in principle, enforceable, it does not follow that enforcement by means of *lethal* force is morally justified or permissible; perhaps only the use of a lesser form of force is justified or permissible. The reason for this might be that positive rights are, other things being equal, less morally weighty than negative rights. I return to this issue below.

The second complication is the introduction of cases of *joint* action, as opposed to cases of single action. I offer a more detailed account of joint action below.⁸ However, joint action is action in which two or more agents each perform an individual action in the service of some shared or common end, such as an end that each has but which neither could readily achieve by acting alone. (I refer to such ends as collective ends.) Imagine, for example, that agents B1 and B2 want to kill A, but neither can achieve this acting alone. However, acting together, for instance by B1 restraining A while B2 stabs A, they can kill A. If B1 and B2 act in this manner, then they will have jointly brought about A's death, notwithstanding that each acting on his own would not have done so.

In the discussion of joint action scenarios involving violations of negative rights, for the most part I assume that in any given scenario there are multiple attackers, multiple defenders, and multiple third-party enforcers (in cases involving defense of the rights of others), and, in particular, that

^{8.} Miller, "Joint Action"; Miller, Social Action, Chapter 2; Miller, Moral Foundations of Social Institutions, Chapter 1. See also Seumas Miller, "Joint Action: The Individual Strikes Back," in S. L. Tsohatzidis, ed., Intentional Acts and Institutional Facts: Essays on John Searle's Social Ontology (Dordrecht, The Netherlands: Springer, 2007), 73–92.

there is a joint attack and a joint defense (either by the defenders themselves or by third-party enforcers). Similarly, in the case of joint action scenarios involving violations of positive rights, for the most part I assume that there are multiple persons deliberately refraining from discharging their positive obligations (multiple *refrainers*, so to speak), multiple persons whose positive rights are being violated (defenders), and multiple third-party enforcers (in cases involving defense of the rights of others), and, in particular, that there is a joint omission (by the refrainers) and a joint defense of positive rights (either by the defenders themselves or by third-party enforcers).

In section 1.1, I discuss single action scenarios, or scenarios in which there is a single rights violator (either an attacker or, in the case of positive rights violations, a refrainer), a single defender, and a single enforcer (albeit the defender might be the enforcer). In subsection 1.1.1, I consider the use of lethal force in the defense of so-called negative human rights. In subsection 1.1.2, I turn to a consideration of the use of lethal force in order to enforce positive human rights.

In section 1.2, I consider multiple action scenarios, or scenarios in which there are multiple rights violators (whether attackers or refrainers), multiple defenders, and/or multiple rights enforcers, and in which the violators and/or enforcers are acting jointly. For example, a defender's life might be unjustifiably threatened by a number of attackers who are acting jointly—perhaps because none of them could kill the defender if acting alone. Again, a number of persons intervening to protect a defender from an unjustified attack might act jointly, and they might do so because none of them could hope to protect the defender's life if they acted alone. In subsection 1.2.1, I consider joint action cases in which the use of lethal force is in the defense of negative human rights. In subsection 1.2.2, I turn to a consideration of joint action cases in which the use of lethal force is in order to enforce positive human rights.

1.1 Morally Justified/Permissible Use of Lethal Force: Single Action Scenarios

1.1.1 Use of Deadly Force in the Defense of Negative Human Rights

There is a human right to life, and killing another person can only be morally justified or, at the very least, rendered morally permissible in extreme

circumstances. The basic such circumstance is that of self-defense. I am morally entitled to kill another person if that person is trying to kill me and will succeed if I do not kill him or her first. However, self-defense is not the only justification for taking the life of another person. It is widely accepted that each of us also has the right to kill in defense of the lives of others. I am morally entitled to kill someone attempting to kill my wife or husband if this is the only means of prevention. Notice that in such cases of other-person defense, it is widely believed not only that it is morally permissible for a third party to use lethal force, but also that such use of lethal force is a moral obligation, supposing the third party can intervene without incurring any serious cost to him or herself. Accordingly, there is a good and decisive moral reason to use lethal force, and so killing the attacker is the morally preferable alternative.

Killing in order to defend one's own life or the life of another is morally justified on the grounds that each of us has a right to life or, more specifically in the context of a discussion of negative rights, a right not to be killed. 10 Speaking generally, we are entitled to defend the right not to be killed by an attacker posing an imminent threat, and to do so by killing our attacker under three conditions (I provide a more detailed and nuanced account of justifiable killing in self-defense in Chapter 2). First, the (single) attacker is deliberately trying to kill someone—either oneself or another person—and will succeed if we do not intervene. We are not entitled to shoot dead an attacker whom we know is threatening us only with (say) a replica of a gun. Second, we have no way of preserving our own or the other person's life other than by killing the attacker (the above-mentioned necessity condition). The defender may be unable to flee to safety, for example. Third, and more problematically, our attacker does not have a justificatory moral reason for deliberately trying to kill. If all these conditions are met, then the attacker poses a morally culpable unjustified threat to life, and therefore a lethal response is not disproportionate.

^{9.} Note that the use of lethal force might, at least in theory, be morally permissible even though there was a morally equivalent alternative.

^{10.} For a range of accounts of the moral justification for killing in self-defense, see Thomson, "Self-Defense"; Montague, "Self-Defence and Choosing between Lives"; Jenny Teichman, "Self-Defence," in Pacifism and the Just War (Oxford: Blackwell, 1986); Seumas Miller, "Killing in Self-Defence," Public Affairs Quarterly 7, no. 4 (1993): 325–340; Suzanne Uniacke, Permissible Killing (Cambridge: Cambridge University Press, 1995); Jeff McMahan, "The Basis of Moral Liability to Defensive Killing," Philosophical Issues 15 (2005): 386–405.

Having outlined the standard account of killing in self-defense or in defense of the life of others, let me now consider a somewhat different, or at least an expanded kind of, moral justification for killing in defense of a self; namely, killing in defense of moral rights to properties constitutive of selfhood other than life. Note that I am here concerned with violations of negative rights, so my focus is on unjustifiable *attacks* on rights to properties constitutive of selfhood. I discuss the corresponding violations of positive rights in subsection 1.1.2.

In speaking of killing in defense of rights other than the right not to be killed, one would obviously not want to include *all* negative moral rights, or at least not all violations of all negative moral rights (let alone all violations of all positive rights). For example, property rights are arguably moral rights, but for someone to kill someone else to prevent them stealing a handbag, for example, would be morally unacceptable; indeed, it would not only be morally unjustifiable, it would also be morally impermissible.

So the first question is: Are there any negative moral rights, apart from the right not to be killed, the protection of which would justify the use of lethal force, or at the very least render it morally permissible? Candidates for such rights might include a right not to be assaulted or to have one's freedom curtailed. And in the light of my notion of properties constitutive of selfhood, the second (narrower) question is: Are there any negative moral rights to things constitutive of selfhood, other than life, the protection of which would justify the use of lethal force or render it morally permissible, such as the right not to be attacked by someone bent on inflicting severe brain damage?

What is this distinction between rights to things constitutive of an individual human being's selfhood and rights to things not so constitutive? More specifically, what are some of the rights to things which are not constitutive of the self? I suggest that they include many institutional rights, such as the right to property, and perhaps the right to a fair trial and the right to hold offices of various kinds. I further suggest that it is morally justifiable to use lethal force to protect rights to things constitutive of selfhood—where it is understood that such things include, but are not restricted to, life. In particular, there is a justification for killing in what is quite literally self-defense—the defense of the self—and for protecting the self of others. In later chapters I argue that in some circumstances the use of lethal force to protect certain other rights that are rights to things *not* constitutive of selfhood is morally permissible, if not morally justified. Before doing so, however, I want to briefly deal with the claim

that there is no acceptable distinction to be made between rights to things constitutive of the self and rights to things not constitutive of the self.

Surely some such distinction is necessary. For we need to be able to distinguish between, say, a right to life and a right to property. If I defend myself against someone trying to kill me, it is defense of the self, as it is literally the destruction of myself that is in question. Similarly, if I defend myself against someone trying to irreparably damage those parts of my brain by virtue of which I have the capacity to perform intellectual tasks, then it is defense of my selfhood. Such capacities are constitutive of selfhood. However, if I defend my property—say, my car, or an intrusion by an unarmed trespasser in my home—then I am not necessarily defending myself. Neither my car nor my home are constitutive elements of my selfhood. If my car is wrecked, or I sell my house, *I* am nevertheless still intact.

Moreover, it is important not to assimilate the various rights to defend freedoms to the right to defend selfhood, since the various freedoms cut across the distinction between properties constitutive of selfhood and properties not so constitutive. Consider locking someone in a room. This is a violation of their freedom of movement. Yet we can distinguish between the capacity of the agent *in herself* to freely move and the existence of external impediments to the exercise of that capacity. The former, but not the latter, is constitutive (in part) of selfhood. To see this, consider, first, the resistance of a person, A, to an attempt by another person, B, to inject A with a drug that would permanently and irreversibly paralyze A. Here A's capacity to move is destroyed. Contrast this with the case where A is locked in a five-star hotel room for two days—with full room service! Here no constitutive element of A's selfhood is destroyed.

Finally, it is important to recognize that some rights to things not constitutive of selfhood have violation thresholds, such that at points beyond the threshold, violations threaten things that are constitutive of selfhood. For example, if someone is incarcerated and suffers severe and longstanding limitations of their freedom of expression, privacy, and freedom of movement, this may, over time, undermine that person's capacity to think and act independently. Such a loss of agency may come to constitute a partial destruction of selfhood. Likewise, an act of rape or assault may reach a threshold where it threatens to destroy aspects of selfhood, including the capacity to relate sexually or socially with other people.

I do not claim to have *precisely* drawn the distinction between elements of selfhood and other sorts of things to which one has rights. I do not

even claim that the distinction can be precisely drawn. I merely claim that it is evident that there is some such distinction to be drawn. This being so, we need to distinguish between killing in self-defense, or in the defense of other selves—understood as defense of the self—and what I am calling killing in defense of rights not constitutive of selfhood. I note that actions typically or colloquially regarded as actions of self-defense are not acts of self-defense in my (somewhat artificial) sense. For example, if A kills B in order to prevent B slapping A, this might be held colloquially to be an act of self-defense, whereas it would not be held so in my stipulated sense. Let us now turn to positive rights.

1.1.2 The Use of Deadly Force in the Protection of Positive Human Rights

Shue's basic moral rights include the right to security and the right to subsistence.11 Shue argues that these basic rights generate rights to protection and assistance. Let us accept Shue's general line of argument here. Such basic moral rights are not restricted to negative rights; rather, they include some positive rights, such as the right to subsistence. Accordingly, lethal force might be justified, or at least it might be morally permissible, in a situation in which someone is refusing to provide for the basic material needs of someone else. Let us consider a simple example to test our intuitions in favor of this theoretical claim: the case of a drowning man who could easily be saved by a bystander on an adjacent overwater walkway. The bystander simply needs to release the life jacket she is holding and it will drop down to the drowning man. However, she refuses to do so since he is a stranger and she dislikes the look of him. But the drowning man has a speargun and threatens to shoot her dead if she does not release the life jacket to him. She calls his bluff, perhaps doubting his ability to simultaneously tread water and fire an accurate shot. At any rate, the drowning man shoots her dead. As she falls from the narrow unfenced walkway into the water she automatically releases the life jacket thus enabling the drowning man to save himself.12

^{11.} Shue, Basic Rights.

^{12.} Naturally, the mere *threat* of lethal force might be sufficient. The bystander might deliberately drop the life jacket when threatened so as to save her own life.

In this scenario, we are assuming that the threat to the life of the drowning man is imminent; that is, he will drown if he is not rescued within a minute or two. Second, the bystander has a moral obligation to save the drowning man, since she can do so at virtually no cost to herself. Third, it is necessary for the drowning man to shoot the bystander dead if he is to save his own life; he has no other options. Finally, the drowning man's lethal response is not disproportionate, at least in the sense that he is taking one life to save his own life—and, indeed, the life of someone who is morally culpable by virtue of violating the drowning man's positive right to assistance. Accordingly, the scenario is analogous to the paradigm cases described above of killing in defense of one's negative right not to be killed.

Notwithstanding this analogy, the drowning man scenario is in an important respect morally different from the corresponding negative rights violations scenarios. Specifically, the bystander who is killed by the drowning man is not the (intentional or unintentional) cause of the life-threatening situation in which the drowning man finds himself; indeed, she is not responsible, causally or morally, for bringing about the life-threatening situation of the drowning man, albeit had he not acted she would have been morally responsible for failing to save him (and, to that extent, for his death). Accordingly, the justificatory moral reasons for the drowning man killing the bystander have less moral weight than the reasons that the defender (or the third-party enforcer) has for killing his attacker in our corresponding negative rights violation scenario.¹³

Notwithstanding the weaker moral case for the drowning man's lethal response, my intuition is that the drowning man's action is morally permissible. 14 The drowning man has a positive and enforceable right to be assisted, and the bystander is deliberately and unjustifiably refraining from carrying out her moral obligation to assist. Moreover, the assistance in question can be rendered at a very small cost to the bystander. In addition, the three conditions of imminence, necessity, and proportionality obtain.

^{13.} There is a large philosophical literature on these issues of the stringency of positive versus negative rights, of the morality of doing versus allowing, and of acting versus refraining. Suffice it to say here that my claims here are disputable. See, for example, Bruce Russell, "On the Relative Strictness of Negative and Positive Duties," *American Philosophical Quarterly* 14, no. 2 (1977): 87–97.

^{14.} I have argued for this in Miller, "Civilian Immunity," 116–119. See also Miller, Moral Foundations of Social Institutions, 202–209.

It might be argued, contra what I have assumed, that positive rights to assistance are not enforceable, or at least that this one is not. This is implausible. Consider a variation in the scenario in which the drowning man could only shoot non-life-threatening, but nevertheless injurious, rubber bullets at the bystander. Surely he would be morally justified in doing so to save his life. This suggests an alternative qualified view and a corresponding more nuanced argument against the claim that positive rights are not enforceable. This alternative view holds that the positive right to assistance is enforceable, but it also maintains that it is, nevertheless, not enforceable by means of lethal force. Lethal force would be excessive in this second (qualified) view. Therefore, in this qualified view, it is morally impermissible for the drowning man to shoot the bystander dead. However, it is permissible for him to use nonlethal, injurious force, such as rubber bullets.

I do not find the qualified view compelling. Certainly it is incomplete. For surely it would be morally *excusable*, even if not morally justified, for the drowning man to kill the bystander in our scenario. Aside from the impartialist moral considerations detailed above, there is a partialist moral consideration in play. Arguably, the drowning man is entitled to give some additional weight to his own life over that of the bystander, given that the bystander is culpably failing to assist. I conclude that it is morally permissible or, at least, morally excusable for a person to use lethal force to enforce some of his or her positive rights under some circumstances.

In this subsection I have put forward an argument based on the enforceability of positive rights, along with the existence of intuitively appealing scenarios, to the conclusion that it is morally permissible for a person to use lethal force to enforce some of his or her natural positive rights. However, I accept that my arguments in this regard are not entirely compelling. Specifically, it might be claimed that although the positive rights in question are enforceable, the use of lethal force to enforce positive rights, while morally excusable in some cases, is not morally permissible, because it is too extreme a response. Presumably, this claim rests on the moral difference between culpable unjust killing and culpable unjust refraining from preserving life; the latter being a lesser evil than the former (other things being equal).

Thus far we have been discussing scenarios in which the person whose life is at risk is the one who is using or threatening to use lethal force to enforce their positive right to assistance. But what should we now make of the moral obligation of third parties to enforce positive rights? Presumably, it is permissible, and perhaps obligatory, for a third party to enforce some positive rights to assistance under some circumstances. However, the question arises as to whether it would be morally permissible for the third party to use, or to threaten to use, lethal force to ensure compliance. This is less certain. On the other hand, I have argued that one can justifiably, or at least excusably, use lethal force to enforce one's own positive rights, including (presumably) rights to subsistence. Moreover, it is generally agreed that both oneself and third parties can justifiably use lethal force to enforce one's negative rights. Nevertheless, it remains unclear whether it is morally justifiable, or at least excusable, for third parties to use lethal force to enforce positive rights. Let us pursue this matter further.

Consider the following version of our drowning scenario. A young boy is drowning, and a bystander is refusing to discharge her moral obligation to assist him, even though she could easily do so if she dropped down to him the life jacket that she is holding. Now assume that the boy's father—a crippled war veteran—is nearby but unable to help his son, since no life jacket is within his reach. Perhaps he is without his wheelchair. However, the father does have a handgun and—as in the drowning man scenario—he first threatens and then kills the bystander, thereby ensuring that his son is rescued. Surely the father's action is morally excusable, even if not morally justified. For as in the earlier version of this scenario, there is a partialist moral consideration in play, albeit a different one. Arguably, the boy's father is entitled to give some additional weight to the life of his son over that of the bystander, given that the bystander is culpably failing to assist.

I suggest that this scenario demonstrates that it is morally justifiable, or at least excusable, for *some* third parties to use lethal force to enforce positive rights to life (and perhaps rights to other properties constitutive of selfhood); namely, third parties with an especially strong and stringent moral obligation to protect the persons whose positive rights are being, or are about to be, violated, such as third parties who are parents of, or otherwise have special moral duties to, the persons in question. Let us now turn to the morally justifiable use of lethal force in joint action scenarios. We begin with an analysis of the concept of joint action.

1.2 Morally Justified Use of Lethal Force: Joint Action Scenarios

Joint actions are actions involving a number of agents performing interdependent actions in order to realize some common goal. Examples of joint action include two people dancing together, a number of tradespeople building a house, and a group of robbers burgling a house. Joint action is to be distinguished from individual action, on the one hand, and from the "actions" of corporate bodies, on the other. Thus an individual walking down the road or shooting at a target are instances of individual action. A nation declaring war or a government taking legal action against a public company are instances of corporate action. Insofar as such corporate "actions" are genuine actions involving mental states, such as intentions and beliefs, they are, in my view, reducible to the individual and joint actions of human beings. However, I am not going to press this point here, since I take it up in later chapters.

Over the last decade or two, a number of analyses of joint action have emerged. These analyses can be located on a spectrum, at one end of which there is so-called (by Frederick Schmitt) strict individualism, and at the other end of which there is so-called (again by Schmitt) supraindividualism. ¹⁵ A number of these theorists have developed and applied their favored basic accounts of joint action in order to account for a range of social phenomena, including conventions, social norms, and social institutions. ¹⁶ One such theory is my collective end theory (CET), which is elaborated elsewhere. ¹⁷ CET is a form of individualism, and I will use it throughout this book. ¹⁸

^{15.} Frederick Schmitt, Socializing Metaphysics: The Nature of Social Reality (Lanham, Md.: Rowman & Littlefield, 2003), Chapter 1.

^{16.} John R. Searle, "Collective Intentions and Actions," in Philip R. Cohen, Jerry L. Moran, and Martha E. Pollack, eds., *Intentions in Communication* (Cambridge, Mass.: MIT Press, 1990) 401–415; Margaret Gilbert, *Joint Commitment: How We Make the Social World* (Oxford: Oxford University Press, 2014); Michael Bratman, "Shared Cooperative Activity," *Philosophical Review* 101 (1992): 327–341. A fourth relevant influential theorist is Raimo Tuomela. However, Tuomela's view oscillates between the views of the other three. See Raimo Tuomela, *Social Ontology: Collective Intentionality and Group Agents* (Oxford: Oxford University Press, 2013). For criticisms of these theorists, see Seumas Miller, "Intentions, Ends and Joint Action," *Philosophical Papers* 24, no.1 (1995): 51–67.

^{17.} Miller, "Joint Action"; Miller, Social Action, Chapter 2; Miller, Moral Foundations of Social Institutions, Chapter 1.

^{18.} Of the related individualist accounts, Bratman's is the most salient. However, it is not serviceable in later chapters since it does not generalize to social institutions. See his *Shared Agency: A Planning Theory of Acting Together* (Oxford: Oxford University Press, 2014).

Individualism, as I see it, is committed to an analysis of joint action such that ultimately a joint action consists of (1) a number of singular actions, and (2) relations between these singular actions. Moreover, the constitutive attitudes involved in joint actions are individual attitudes; there are no sui generis we-intentions or we-attitudes. It is important to stress that individualism can be, and in the case of CET certainly is, a form of relationalism. So I will dub my account "relational individualism." It is relational in two senses. First, as mentioned above, singular actions often stand in relations to one another (e.g., two partners dancing), and the joint action in part consists of singular actions, and in part consists of the relations between the singular actions. Second, the agents who perform joint actions can have intersubjective attitudes to one another, (e.g., they mutually recognize each other), and some (but not all) of these attitudes are sui generis. Specifically, some cognitive (but not conative) intersubjective attitudes may well be sui generis (e.g., mutual consciousness of one another's consciousness). 19 In virtue of such intersubjective attitudes, they will also typically have interpersonal relations with one another. Intersubjectivity and interpersonal relations in this sense are not necessarily, or at least are not by definition, social or institutional. To suggest otherwise would be to beg the question against individualism (specifically, relational individualism) in any interesting sense of the term.

By contrast, according to supraindividualists, when a plurality of individual agents perform a joint action, the agents necessarily have the relevant propositional attitudes (beliefs, intentions, etc.) in an irreducible "we-form" which is sui generis, and as such not analyzable in terms of individual or I-attitudes. Moreover, the individual agents constitute a new entity, a supraindividual entity not reducible to the individual agents and the relations between them.

Basically, CET is the theory that joint actions are actions directed toward the realization of a collective end. However, this notion of a collective end is a construction out of the prior notion of an individual end. A collective end is an individual end more than one agent has, and is such that, if it is realized, it is realized by all, or most, of the actions of the agents involved; the individual action of any given agent is only part of the

^{19.} C. D. Broad, in *The Mind and its Place in Nature* (London: Kegan Paul, 1928), appeared to have this kind of notion in mind when he spoke of "extraspection." See also Naomi Eilan, Christoph Hoerl, Teresa McCormack, and Johannes Roessler, eds., *Joint Attention: Communication and Other Minds* (Oxford: Oxford University Press, 2005), Chapter 14.

means by which the end is realized, and each individual action is interdependent of the others in the service of the collective end. Thus when one person dials the phone number of another person, and the second person picks up the receiver, each of them has performed an action in the service of a collective end—a collective end that each of them has: to communicate with each other.

On the basis of this individualist notion of a joint action, a number of related notions can be constructed, including the notion of a convention. A convention can be understood as being, in essence, a set of joint actions, each of which is performed in a recurring situation.²⁰ Thus, driving on the right-hand side of the road is a convention that each of us adheres to in order to realize the collective end of avoiding collisions. Accordingly, a convention is a construction out of the prior notions of a joint action and what I will refer to as a *procedure*. One has a procedure if one more or less automatically performs a given type of action in a recurring situation. So, for example, habits are procedures. Armed with the notion of a joint action, let us turn to the matter of the moral justifiability, or at least moral permissibility, of the use of lethal force in joint action scenarios, beginning with those involving the violations of negative rights.

1.2.1 Joint Action Scenarios: Negative Rights Violations

Consider the following collective action situation in which the outcome of the collective action is overdetermined by the actions of the agents involved. Suppose that each of five men inflicts a single stab wound on a sixth man, John Smith, intending to kill him. The stabbings are simultaneous, and Smith dies from his wounds.²¹ However, three stab wounds would have been causally sufficient to kill him. That is, three stab wounds are individually causally necessary, and jointly causally sufficient, to kill Smith. Therefore, no single stab wound (of the five) is either causally

^{20.} Miller, Social Action, Chapter 3; and Seumas Miller, "On Conventions," Australasian Journal of Philosophy 70, no. 4 (December 1992): 435–445. Conventions are to be distinguished from social norms. The latter, but not necessarily the former, have a moral dimension. See Seumas Miller "Social Norms" in (ed.) G. Holmstrom-Hintikka and R Tuomela Contemporary Action Theory (Volume 2: Social Action) (Dordrecht: Kluwer – Synthese Library Series, 1997) pp.211-229

^{21.} Miller, "Collective Moral Responsibility." See also Seumas Miller, "Collective Responsibility," *Public Affairs Quarterly* 15, no. 1 (2001): 65–82; Miller, *Social Action*, Chapter 8; and Miller, *Moral Foundations of Social Institutions*, Chapter 4.

necessary or sufficient for Smith's death. So while each of the men performed an action (a stabbing) that was causally necessary and sufficient for wounding Smith, not one of the five men performed an action that was either causally necessary or causally sufficient for Smith's death. So each of the men is individually morally responsible for wounding Smith, but what about the moral responsibility for killing him? It might be thought that if a person has not performed an action that was either causally necessary or sufficient for a person's death, then that person cannot be held responsible for the person's death. In that case, none of the five men is responsible for Smith's death. But if none of the five is responsible, then presumably no one is responsible. For the cause of Smith's death was the stab wounds, and these were made by the five men.

Notwithstanding the above claimed lack of individual moral responsibility, it might be held that the five men were *collectively* morally responsible for Smith's death. But even this appears to be false, since only the actions of three of the men were necessary for Smith's death. So at best we are entitled to conclude that (an unspecified and perhaps unspecifiable) three of the five men were collectively responsible for Smith's death, but no individual was responsible. This conclusion is very unpalatable, indeed. For one thing, it sets up an unbridgeable gap between collective responsibility and individual responsibility; a collective can be morally responsible for an outcome, even though none of its members are.²² For another, it licenses the commission of immoral acts, so long as they are collective actions involving overdetermination; individual perpetrators are thus not morally responsible for heinous crimes, so long as they commit those crimes collectively, and their actions overdetermine the outcome.

We first need an analysis of the kind of collective actions at issue. We have one at hand—the above-described account of joint actions. So we can conceive of such cases of collective action as actions directed to a collective end; in our example, the collective end is the death of Smith. Each of the five men has the collective end as an end. Moreover, each of the five performs the act of stabbing as a means to the collective end he has. Further, the actions of the five agents are *interdependent*. That is, each performs his contributory action if he believes the others will perform theirs, and each

^{22.} Some theorists, however, such as Russell Hardin, in *Morality within the Limits of Reason* (Chicago: University of Chicago Press, 1988), are prepared to bite the bullet. For criticisms, see Seumas Miller and Pekka Makela, "The Collectivist Approach to Collective Moral Responsibility," *Metaphilosophy* 36, no. 5 (2005): 634–651.

does so only if he believes this. Why are the actions interdependent? They are interdependent by virtue of the existence of the collective end possessed by each of the five agents, and toward the realization of which each of the individual acts is directed. Indeed, there is also interdependence with respect to the shared end that each has, for each would not have as an end the death of Smith if the others did not, since none can realize that end on his own. So there is a shared and interdependent end (a collective end), and there is interdependence of action (i.e., each stabbed only on condition that the others stabbed). So the full set of five acts of stabbing can be regarded as the means by which the collective end was realized; and each act of stabbing was a part of that means. Moreover, in virtue of interdependence, each act of stabbing is an integral part of the means to the collective end. Since killing someone is significant, I conclude that all five agents are jointly—and therefore collectively—morally responsible for killing Smith.²³ For each performed an act of stabbing in the service of that (collective) end (Smith's death), and each of these acts of stabbing was an integral part of the means to that end. Moreover, each agent can be held fully morally responsible for Smith's death; the moral responsibility of each is not diminished by the fact that each of the others is also morally responsible. I am not, of course, suggesting that in all cases of morally significant joint actions, each participating agent is fully morally responsible for the aimed at outcome of the joint action, i.e. the realization of the collective end. In many cases, especially ones involving large-scale joint actions, each participating agent may only be partially morally responsible for the realization of the collective end. (I return to this issue in chapter 5.)

This example demonstrates that an individual's action need neither be a necessary nor a sufficient condition of an outcome for the individual to be fully morally responsible for that outcome. If an individual intentionally makes a causal contribution to an outcome, and does so in the service of a collective end to realize that outcome, then this may well be sufficient—other things being equal—for the individual to be fully morally responsible for that outcome. Or, at least, this is so in some cases of morally significant joint actions involving only a small number of participants.

Let us now assume that the victim of the stabbing attack has a gun and is able to defend himself by shooting his attackers. Bear in mind that he (the defender) does so only when the threat is imminent, so our first

^{23.} Miller, "Collective Moral Responsibility."

principle of imminence is met. Moreover, we know from the example that the defender only needs to shoot three attackers in order to save his life. Therefore, he ought only to shoot three of the five on pain of breaching the necessity principle. So far, so good-but what of the proportionality principle? Would it not be disproportionate for the defender to take the lives of three attackers to save only one life (albeit his own life)? Presumably, it is not disproportionate, given that—as we saw above each of the three attackers would be fully morally responsible for his murder, were he not to defend himself by shooting them. Naturally, matters might be different if each of the attackers was only partially responsible, i.e. each only had a share of the overall responsibility for the plurality of deaths. Joint action in which moral responsibility for the realization of the collective end is shared tends to involve large numbers of participants. Thus in a scenario involving a very large numbers of attackers, each with only a small share of the overall moral responsibility for the realisation of the collective end, matters become less morally clear cut. Consider, for example, a mass killing in which there are a 1000 attackers and a 1000 victims but in which each attacker only kills one victim, albeit each attacker does so in the service of the collective end of the deaths of the 1000 victims. I return to the discussion of the proportionality principle in the next chapter on self-defense and of collective responsibility for large-scale killing in Chapter 8.

I now want to discuss a variation of the above scenario—a variation in which there are five victims rather than one. Moreover, the attackers attack the five victims by shooting at them, and each attacker has a gun with three bullets in its chamber. Further, to be shot dead it is necessary for each of the victims to be hit with two or more bullets. So if the attackers are to kill all five victims, they will need to coordinate their shooting actions. Suppose, for example, each of the five attackers fires his three bullets at the same two victims as the other attackers do. This would have the consequence that three of the victims—those not shot—would escape with their lives. In this scenario, as in the original stabbing scenario, it is obvious that each of the attackers is fully morally responsible for any harm he causes to any of the five victims he hits with one or more of the bullets he fires. But, assuming the attackers do coordinate their actions, is each of the five attackers fully morally responsible for the deaths of all five victims, notwithstanding that any given attacker has shot at most three of the five victims? In the light of the above argument concerning the stabbing scenario, each of the five attackers in this shooting scenario

is fully morally responsible for the outcome consisting of the five deaths. For that outcome was the jointly held collective end of each attacker, and each made his individual causal contribution interdependently with the others and as an integral part of the means to that collective end. This is consistent with an attacker who fires one bullet at a given victim being individually fully morally responsible for wounding that victim, since the attacker shot the victim having as an individual end to wound the victim. It is also consistent with an attacker who fires two bullets at a given victim being individually fully morally responsible for killing that victim, since two bullets is sufficient to kill the victim and the attacker shot the bullets at the victim having as an individual end to kill the victim. So the fact that one attacker, B1, is individually fully morally responsible for killing one victim, A1, does not exclude attacker B1 from being fully morally responsible (jointly with the other attackers) for all five deaths. Nor does it exclude each of the other attackers (B2, for example) being fully morally responsible (jointly with the other attackers, including B1) for all five deaths - including the death of A1.

Here it is important to note the following. First, the content of the collective end (the death of the five victims) is not the same as the content of any of the merely individual ends (e.g. the death of A1). This is to be expected since the collective end is the end of the joint action whereas merely individual ends are the ends of merely individual actions (albeit, the individual actions in question are also in part constitutive of the joint action).

Second, it is important to bear in mind the distinction between individual moral responsibility tout court and individual moral responsibility held jointly with others and, moreover, to ascribe moral responsibility in both senses to participants in morally significant joint actions. Each participant in a morally significant joint action has individual responsibility tout court for her own individual actions. However, each participant has individual responsibility jointly with the others, both for the realization of the collective end of the joint action and, via the interdependence of the individual contributing actions, for the plurality of the individual actions constitutive of the joint action. Thus at one level of description Bi's individual action (of firing two bullets into victim Ai) considered on its own was causally necessary and sufficient for Ai's death and, since Bi deliberately intended his action, Bi was individually morally responsible tout court for Ai's death. At this individual level of description of Bi's action (Bi's action qua merely individual action, so to speak), Bi is individually

morally responsible for Ai's death, and this responsibility is not possessed by B₁ jointly with B₂, B₃ etc. Moreover, as we saw above, at another wider level of description (the collective level, let us say), B1 is individually morally responsible jointly with the others for the realization of the collective end, namely, the plurality of deaths (A1, A2 etc.). Further, via the interdependence of the individual actions constitutive of the joint action, another participant in the overall joint action, say B2, was also morally responsible for Ai's death, notwithstanding that B2 did not (let us suppose) fire any bullets into A1. For in the joint action in question B1 and B2 (and B3 etc.) have as a collective end to kill all five victims and, as a consequence, Bi's action is interdependent with B2's action (e.g. in relation to B2's shooting dead of another victim, say, A2). Accordingly, B1 would not have fired any bullets into A1, if B2 had not fired bullets into A2 (and B3 had not fired bullets into A₃, and so on). So B₂ aimed at A₁'s death (as part of the content of B2's collective end viz. the death of all five victims) and B2 contributed indirectly to Aı's death by (directly) killing A2 in the context of the interdependence of this action with Bi's direct killing of A1. Likewise, B2 would not have fired any bullets into A2, if B1 had not fired bullets into A1. So B₁ aimed at A₂'s death (as part of the content of B₁'s collective end viz. the death of all five victims) and B1 contributed indirectly to A2's death via the interdependence of this action with B2's direct killing of A2. Accordingly, at this collective level of description²⁴, B1 and B2 are jointly (with B3 etc.) morally responsible for the deaths of all five victims and, more specifically, B1 is individually morally responsible for A2's death jointly with the others. Likewise, B2 is individually morally responsible for A1's death jointly with the others.

Now let us assume, as we did in the case of the stabbing scenario, that the victims are armed with guns and able to defend themselves by shooting their attackers. However, in this shooting scenario, involving, as it does, multiple attackers and multiple defenders, the defenders (and not simply the attackers) need to coordinate their actions. For each defender

^{24.} There are, of course, various different collective levels and structures of interdependence, even in simple joint action scenarios. Regarding interdependence, each might perform her contributory action if and only if a sufficient number (but not necessarily all) of the others performed theirs, i.e. a number sufficient in total to realise the collective end. Regarding collective levels, one might refer to the collective level as the level of the aggregate of individual actions, each of which is constitutive of the joint action. Typically, some such aggregate is causally sufficient to realise the collective end in question. If not stipulated, context should make it clear what structure of interdependence of action or sense of collective level I have in mind on any given occasion.

has only three bullets, and if, for example, each defender was to fire his three bullets at the same two attackers as the other defenders do, then the defenders' defense would not succeed; four would likely still be killed by the attackers. In addition, assume that the threat from the five attackers is imminent. In that case, the victims' compliance with the imminence requirement will be met if they respond immediately with lethal force. What of the necessity principle? Presumably, it is necessary to kill all five attackers, since if any one of them is not shot dead he may well kill one of the defenders. Moreover, unlike in the earlier scenario involving only one defender, there is evidently no question of a disproportionately large number of dead attackers. For although there are five dead attackers, it is also the case that there are five defenders' lives saved, and, crucially, the five dead attackers attacked without any moral justification whatsoever, whereas the five defenders had a good moral justification for their actions.

Notice that in this multiple attackers/multiple defenders scenario, any one shot fired by a defender considered on its own is not a necessary condition for saving anyone's life. Indeed, in some versions of the scenario it may well be that two, or even all three, shots fired by any given defender is not necessary to save anyone's life. To see this, consider the following version of the scenario. Assume that defender A1 fires one shot at each of attackers B1, B2, and B3; defender A2 fires one shot at each of attackers B2, B3, and B4; defender A3 fires one shot at each of attackers B3, B4, and B5; defender A4 fires one shot at each of attackers B4, B5, and B1; and defender A5 fires one shot at each of attackers B5, B1, and B2. Here, each attacker gets hit with three bullets, so one bullet is unnecessary for his death. Moreover, each defender only fires one bullet at any given attacker. Accordingly, no single shot of any defender is necessary to kill any attacker. Indeed, no shots of any single defender—whether these shots are taken singly or in aggregate—is necessary to kill any attacker. Therefore, no shots of any single defender—whether these shots are taken singly or in aggregate—is necessary to save any defender's life. Moreover, none of, for example, Ai's shots (whether taken singly or in aggregate) is sufficient to kill any attacker, or, therefore, to save anyone's life. The same point holds for A2, A3, A4, and A5. On the other hand, each of A1's shots made a causal contribution; that is, a causal contribution to, respectively, the death of B1, B2, and B3, and, therefore, to saving at least one person's life—the life that would have been lost had B1, B2, and B3 fired their shots. For B1, B2, and B3, if they fired nine bullets between them must have killed at least one victim (with two bullets fired into him). Similarly,

each of A2's, A3's, A4's and A5's shots made a causal contribution to the death of three attackers, and, therefore, to saving at least one person's life.

The point to be stressed here is that it was common knowledge among the defenders that any given defender's set of actions (consisting of firing three bullets), considered on its own, was neither necessary nor sufficient to realize the collective end of the defenders—namely, the outcome of saving the lives of all the defenders.²⁵ So the principle of necessity is not operative at the individual level. We saw above that the principle of necessity is operative at the collective level in the sense that it is necessary for the defenders to kill all five attackers if they are to achieve their collective end of saving the lives of all the defenders. Let us pursue further this notion of the application of the principle of necessity at the collective level, and let us do so in the context of the assumption made in our scenario that the action of any one of the five defenders considered on its own was not causally necessary to the outcome—and therefore to the realization of the collective end—of saving all five defenders' lives.

Here we need to distinguish two separate propositions: (1) it is necessary for the defenders to kill all five attackers in order to achieve the outcome of saving the lives of all five defenders, and (2) the action (consisting of firing three bullets) of any one of the defenders is necessary to achieve this outcome. While proposition 2 is false, 1 is true. However, it is proposition 1 that instantiates the relevant principle of necessity. Moreover, the truth of proposition 1 is not undermined by the falsity of proposition 2. The joint action of the defenders consists in killing all five attackers, and when this is done, the defenders act in compliance with the principle of necessity at the collective level (the level of joint action). The fact that no single action of any of the defenders was a necessary condition for realizing the collective end of the joint action, and therefore for killing all five attackers, is irrelevant.

An analogous point can be made in relation to the principle of proportionality. To see this, consider yet another variation on our five attackers/ five defenders scenarios. This time the five attackers do not have firearms or knives and are intent on merely giving the five defenders a severe beating with their fists, and want to stop well short of killing them or even seriously injuring them. Moreover, all this is a matter of common knowledge

^{25.} I note that in the five defenders/five attackers' version of the scenario, no single defender and no single attacker can make a causal contribution to the deaths of all five attackers or to the deaths of all five defenders, respectively.

between all the attackers and all the defenders. However, as in our earlier scenario, and unbeknown to the attackers, the defenders each have a gun with three bullets. In this new scenario, each defender fires his three bullets into three separate defenders, having as a proximate individual end to severely wound each of the three attackers in question, but having as an ultimate collective end—held jointly with the other five defenders—to kill all five of the attackers, and thereby save all five defenders from a severe beating. At the individual level, each defender has severely wounded three attackers, and this is not disproportionate, let us assume, to the adverse outcome each was seeking to prevent, which was the severe beating of all five defenders. However, at the collective level (the level of the joint action), the defenders have killed all five attackers, and, arguably at least, this is a disproportionate response to the threat of the five defenders being given a severe beating.

1.2.2 Joint Action Scenarios: Positive Rights Violations

Assume that there are multiple persons whose lives are at high risk, but that there are multiple bystanders who could, if they coordinated their efforts—by performing a joint action, for example—save these lives without significant cost to themselves.²⁶ The bystanders in such scenarios have a collective, or joint, moral responsibility to save those at risk by virtue of the (aggregate) positive rights of the latter. Accordingly, each bystander has an individually possessed moral obligation to perform his or her individual action as a contribution to the joint action, and thus to the realization of the collective end of saving the multiple lives at high risk. However, this obligation is possessed interdependently with the others; it is a joint moral obligation. So joint moral obligations can be derived from collective moral responsibilities to realize morally required collective ends. Roughly speaking, the realization of such a collective end calls for the performance of some salient joint action. The determination of this joint action, in turn, enables the specification of the contributory individual actions, and thereby the generation of the individual moral obligations of the participants. Each participant has a moral obligation to perform a contributory action. However, just as the action of each participant is

^{26.} Seumas Miller, "Collective Responsibility and Omissions," *Business and Professional Ethics Journal* 20, no. 1 (2001): 5–24; Miller, "Civilian Immunity," 113–135; Miller *Moral Foundations of Social Institutions*, 133–139, 202–209.

performed interdependently with the actions of the others, so are the corresponding individual moral obligations interdependent. This is because each individual action is only part of the means to realize the collective end, and its performance would have no point if the others refrained from performing their contributory actions. Accordingly, the moral obligation of each to perform his or her contributory action would lapse if the others did not perform theirs; hence these moral obligations are joint moral obligations.

Let us now turn to the matter of the enforcement of such positive rights. Consider a scenario in which a boat at sea, Boat A, is sinking, and its five passengers are about to drown. Assume that there is a second boat, Boat B, with five crew on board who could cooperate with one another to rescue the passengers, but who are refusing to do so. Suppose further that the joint efforts of only three of the crew would be sufficient to prevent Boat A from sinking, and thereby save the lives of all five passengers. Clearly, the members of Boat A (A1, A2, etc.) have a positive right to be rescued, and the crew members of Boat B (B1, B2, etc.) have a joint moral obligation to rescue them; so each has a moral obligation to assist interdependently with the others. Suppose Boat A has a heavy machine gun on deck but it has broken off its mount. However, if A1, A2, etc. combine their efforts to hold the gun steady, sight it, and fire it, they can make it work. They proceed to combine their efforts in this manner, to perform the joint action in question, and now threaten to begin shooting the crew members of Boat B dead one by one if they do not assist. The crew members of Boat B are steadfast in their refusal. So the passengers on Boat A utilize the machine gun and fire a volley at Boat B, killing B1. The remaining Boat B crew members have second thoughts and immediately commence the rescue operation, which ultimately proves successful.

In this scenario, there is an imminent threat to the lives of the passengers, and the members of Boat B's crew have a joint moral obligation to assist them. Moreover, it is necessary for the passengers on Boat A to perform a joint lethal action against one of Boat B's crew members if their lives are not to be lost; that is, if they are to enforce their own positive rights. Accordingly, the passengers on Boat A have a joint right, if not a joint obligation, to use lethal force in the manner described. So each is individually possessed of a moral right (if not obligation) to perform the contributory action. However, this right—insofar as it is derived from the collective end of the joint action (i.e., the end of saving the lives of all the passengers), is possessed interdependently with the other enforcers; it is a joint moral

right. Thus joint moral rights can be derived from morally required collective ends in a manner analogous to the derivation of joint moral obligations discussed above in relation to the joint moral obligations of the members of the crew of Boat B.

Moreover, unlike in the analogous single-action positive-rights drowning scenario in subsection 1.1.2 above, the action of killing one person to save five self-evidently not only complies with the proportionality principle, it seems to be required by it (other things being equal).²⁷ For if the passengers had refrained from killing one crew member, there would have been a morally disproportionate outcome: one life would have been spared, but five would have been lost. However, there are other moral considerations in play. There is the matter of the moral stringency of positive versus negative rights. For the moral rights of the passengers to be rescued are positive rights whereas the (pro tanto) right of B1 not to be killed is a negative right, and, as noted above, violating a negative right is, other things being equal, morally worse than violating the corresponding positive right. Specifically, the members of the crew, and B1 in particular, are not the source of the threat to the lives of the passengers in the sinking boat; the crew members of Boat B are not violating the negative rights of the passengers. Accordingly, it might be argued—as it was in subsection 1.1.2 above—that notwithstanding the disproportionate loss of life, it is not morally permissible to use lethal—as opposed to merely injurious, nonlethal—force to enforce positive rights. Or, to put it another way, the negative right of B1 not to be killed by the passengers is not extinguished or overridden by Bi's refusal to respect the positive rights of the passengers to be rescued. On the other hand, it would surely be morally excusable for the passengers to kill B1 in order to save their lives.

Moreover, this line of reasoning could be maintained in relation to a third-party (members of Boat C) intervention of exactly the same kind (shooting B1 dead) to enforce the positive rights of the passengers in Boat A. Naturally, it could be argued that in the case of the third party, the moral obligation to rescue might be more stringent or stronger if, for example, the crew members of Boat C comprised the parents of, or otherwise had special moral duties to, the passengers in Boat A. However, as we saw with the single action drowning scenario in 1.1.2, this might not be sufficient to move those whose intuitions tell them that it is not morally permissible to use lethal force to enforce *positive* rights even if it is morally

^{27.} Considered merely in terms of the outcomes of the available options.

permissible to do so to enforce (some) negative rights. Yet again, it would surely be morally excusable for the crew members of Boat C to use lethal force to save the lives of their children in Boat A.

Moral intuitions may well vary one way or the other if adjustments are made to our boating scenario. On the one hand, the scenario could be adjusted so that it was necessary to kill all five crew members of Boat B to save all five passengers' lives. This adjustment might serve to strengthen the initial intuition among some that the passengers' use of lethal force to enforce their positive rights was not morally permissible.²⁸ Suppose, for example, that the two possible outcomes were the following: [1] the crew members of Boat B towing Boat A to safety, or [2] the passengers killing all of the crew of Boat B by means of a single cluster bomb and then commandeering Boat B as the means to preserve their own lives. On the other hand, the scenario could be adjusted in the opposite direction by stipulating that the number of passengers on Boat A is one hundred, and that the equation therefore involved saving one hundred lives versus killing one person. This might generate the intuition that killing a single crew member would be morally permissible. If not, let us ramp up the numbers even further to (say) one thousand saved versus killing one culpable wrongdoer. Surely it is morally permissible to kill the one culpable wrongdoer in these circumstances.

As with our joint action scenarios in 1.2.1, there is a distinction to be made between the application of principles at a collective level and at the individual level. The relevant principle of necessity operates at a collective level level rather than at the individual level. In this case, the collective level in question is that of the joint action of the passengers. That is, passengers A1, A2, etc. *jointly* killed B1, and their killing B1 was necessary to save their lives. This is so, notwithstanding that a number of their single contributory actions might not have been necessary for this outcome (e.g., the actions of only two of the passengers might have been sufficient to mount the gun and hold it steady, even though three did so). An analogous point holds for the application of the proportionality principle. In a variation on the above cluster-bomb boating scenario, let us assume that there are five passengers on Boat A and ten crew members on Boat B. Assume further that firing the cluster bomb at Boat B will kill all ten crew members, albeit this is the only means for the five passengers to save

^{28.} Or it might generate this intuition among some of those who did not originally have this intuition in the version of the scenario in which only one crew member is killed.

themselves (given the refusal of these crew members to rescue them). In this version of the boating scenario the (joint) action of firing the cluster bomb and killing ten crew members is, let us assume, disproportionate to the outcome of saving five lives. This might be so, notwithstanding that it might reasonably be maintained that at the individual level some actions were not disproportionate. For example, it might be held that the single action—considered on its own—of one of the three passengers who assisted in the mounting of the launcher by holding it steady was not morally disproportionate.

1.3 Conclusion

In this chapter I have developed a taxonomy of the morally permissible use of lethal force across two main dimensions: individual and joint action, on the one hand, and negative and positive moral rights, on the other. The claim that it is morally permissible to use lethal force to enforce some negative rights, notably the right not to be killed, is relatively uncontroversial. However, I have argued that it may well be morally justifiable, or at the very least morally excusable, to use lethal force to enforce some positive rights, notably the right to preserve one's life. Moreover, if there is a large number of persons whose positive rights are being violated, and the number of positive rights violators to be killed to bring about a cessation of these rights violations is small, then the use of lethal force may well be morally justifiable and not merely excusable.

In cases of multiple attackers/refrainers and multiple defenders/enforcers, the use of lethal force typically involves joint actions. Therefore, I have provided an analysis of such joint actions. I note that philosophical analyses of the moral permissibility of the use of lethal force are typically framed in terms of individual, as opposed to joint, actions, ²⁹ albeit the "individuals" in question are sometimes collective entities, such as military forces. ³⁰

^{29.} Jeff McMahan, "War as Self-Defense," Ethics and International Affairs 18, no. 1 (2004): 75.

^{30.} Some theorists argue that such collective entities are irreducibly collective agents; see, for example Margaret Gilbert, *On Social Facts* (Princeton, N.J.: Princeton University Press, 1992); and Christian List and Philip Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford: Oxford University Press, 2011). For an individualist response, see Seumas Miller, "Against the Moral Autonomy Thesis," *Journal of Social Philosophy* 38, no. 3 (2007): 389–409. I have argued in a number of publications, commencing in 1992, that there are multilayered structures of joint action; see, for example, Miller, "Joint

In light of my analysis of joint actions, an individual whose action is a causal contribution to, and is performed in the service of, some morally significant collective end can be held morally responsible—jointly with others—for the realization of that end, notwithstanding that the action considered on its own was neither necessary nor sufficient for the realization of the end. In addition, of course, the individual can be held morally responsible tout court for the performance of his or her individual action (considered on its own), and for any benefit or harm that it may have directly and exclusively caused. It is also evident that the contributory action of an individual participating in the joint enforcement of negative or positive rights often makes a causal contribution to the enforcement outcome (a collective end) without in itself being either necessary or sufficient for that outcome. Nevertheless, such an individual can be held morally responsible (jointly with others) for the outcome—a cessation of the rights violations in question—and should be praised accordingly.

Further, the members of a group of bystanders confronting members of another group with positive rights to assistance are possessed of a collective (i.e., joint) moral responsibility to provide assistance by performing a joint action, should this be necessary. In such scenarios, each bystander has a moral obligation to perform a contributory action. However, this obligation is possessed interdependently with the other bystanders; it is a joint moral obligation. So joint moral obligations can be derived from collective moral responsibilities to realize morally required collective ends. Importantly, each member of a group of third-party enforcers who are possessed of a collective (i.e., joint), moral responsibility to intervene by performing a joint (lethal) action to bring about the cessation of some positive or negative rights violation is individually possessed of a moral obligation to perform a contributory action. As just mentioned, this individual obligation is a jointly held moral obligation, and as such it is derived from, in this case, the collective moral responsibility to bring about the cessation of rights violations.

Finally, my analysis of lethal joint actions, and their associated joint moral rights and obligations, enables the distinction between necessity at the level of the individual action considered on its own and necessity at the wider level of the joint action (at a collective level) to come into view. The moral principle of necessity, in respect of lethal joint actions, is frequently applicable at this collective level rather than at the individual level.

Action", Social Action Chapter 3, and Miller, Moral Foundations of Social Institutions, Chapter 1. For a detailed discussion, see Chapter 3 of this work.

Killing in Self-Defense

CHAPTER 1 YIELDED a taxonomy of the morally permissible uses of lethal force by noninstitutional actors engaged in both individual and joint action. This chapter¹ provides a more detailed analysis of the moral permissibility of noninstitutional actors' use of lethal force in defense of their own lives (self-defense). To provide such an analysis is both important in its own right and a necessary preliminary to the moral analysis of the (in part) institutionally based use of lethal force by police officers and military combatants. For according to my favored conception, the morally permissible use of lethal force by institutional actors, such as police officers and military combatants, both presupposes the *natural* moral right to self-defense (and the natural right to defend others) and yet is somewhat different from it by virtue of the larger institutional purposes served by these actors. This point is illustrated and elaborated in Chapters 3, 4, and 6, in particular.

Under what conditions, if any, is it morally permissible or morally justified for one person to kill another person? This question is asked in a variety of contexts, and it receives a variety of answers. Prima facie, the central cases in which a person is entitled to kill another person are of two sorts. First, there is the standard self-defense situation.² Second,

An earlier version of much of the material in this chapter appeared in Miller, "Killing in Self-Defence."

^{2.} See, for example, G. P. Fletcher, "Right to Life," *The Monist* 63 (1980): 135–155; Montague, "Self-Defense and Choosing between Lives"; Paul H. Robinson, "Causing the Conditions of One's Own Defense," *Virginia Law Review* 71, no. 1 (1985): 1–63; Cheyney C. Ryan, "Self-Defense, Pacifism and the Possibility of Killing," *Ethics* 93, no. 3 (1983): 508–524; Judith Jarvis Thomson, "Self-Defense and Rights," in W. Parent (ed.), *Rights, Restitution, and Risk* (Cambridge, Mass.: Harvard University Press, 1986), 33–48; David Wasserman, "Justifying Self-Defense," *Philosophy and Public Affairs* 16, no. 4 (1987): 356–378; Jenny Teichman,

there is the case where some third person kills the attacker; this is killing in defense of another. Killing in self-defense is my focus in this chapter, albeit my account has implications for killing in defense of others. I note that, in respect of both categories, there are instances in which life is not being threatened, but nevertheless the wrong done, or about to be done, warrants a life-threatening response.³ For example, arguably, I am morally justified in killing an attacker who, while not seeking to kill me, is nevertheless seeking to do me grievous bodily harm (i.e., my selfhood is at high risk—see Chapter 1, section 1.1.1).

2.1 The Simple Right to Life Theory

Most of the available accounts of the justification of killing in self-defense have come under attack.⁴ The most obvious theory is the simple right to life account. This views posits a basic right to life or right not to be killed. On this view, I am entitled to kill in self-defense in virtue of my having a right to life, coupled with the fact that my life is under threat, and I will be killed unless I intervene by killing my attacker. The general problem here is that the attacker himself has a right to life (or right not to be killed), and it is not clear how it is not being violated by the person killing the attacker in self-defense.⁵

There are three obvious permutations of the simple right to life view. First, there is the possibility that the right to life is an absolute right; second, this is a right that can be forfeited; and third, it is a right that is neither absolute nor able to be forfeited, but one that can be overridden.

[&]quot;Self-Defence," in *Pacifism and the Just War* (Oxford: Blackwell, 1986), Chapter 8; J. J. Thomson, "Self-Defense"; Seumas Miller, "Self-Defense and Forcing the Choice between Lives," *Journal of Applied Philosophy* 9 (1992): 239–243; Jeff McMahan, "The Basis of Moral Liability to Defensive Killing," *Philosophical Issues* 15 (2005): 386–405.

^{3.} See, for example, Kai Nielsen, "On Justifying Violence," *Inquiry* 24, no. 1 (1981): 21–57; C. A. J. Coady, "The Morality of Terrorism," *Philosophy* 60 (1985): 47–69; Miller, "On the Morality of Waging War against the State"; Miller, "Just War Theory."

^{4.} See especially Thomson, "Self-Defense and Rights"; Thomson, "Self-Defense"; and Wasserman, "Justifying Self-Defense." On Thomson's positive account, see Teichman, "Self-Defence." See also Miller, "Self-Defense and Forcing the Choice between Lives."

^{5.} See Ryan, "Self-Defense, Pacifism and the Possibility of Killing"; and Thomson, "Self-Defense and Rights," 5. This point is made by a number of commentators. See, for example, Thomson, "Self-Defense and Rights," 35. For general attacks on the notion of forfeiture, see Ryan, "Self-Defense, Pacifism and the Possibility of Killing," 511.

The view that the right to life posited by the simple right to life theory is an absolute right has untoward consequences. If everyone has an absolute right to life, then attackers have an absolute right to life. But if attackers have an absolute right to life, then there are no circumstances in which defenders are justified in killing their attackers in self-defense. The notion of an absolute right to life is too robust. It has the effect of ruling out the possibility of justified killing in self-defense. We need a less robust notion of the right to life.

On the forfeiture account, any agent's right not to be killed is forfeited if that agent tries to kill another agent, and will kill her unless the defending agent intervenes to defend himself. However, this account also has untoward consequences. Consider a man who tries to kill someone, and would have killed that person if the person had not intervened. The defender saves her own life, but his defensive action is such as to cause the attacker to lose an arm and a leg (albeit, the attacker does not lose his life). Assume that this attacker is arrested, convicted of attempted murder, and serves a thirty-year sentence. Assume also that he feels remorse for his action and that while in jail he undergoes a process of moral regeneration. This causes him to spend all the money he earns in jail on educating the children of the man he tried to murder. On the theory under consideration (the forfeiture account), such a would-be murderer does not have any right not to be killed. His right was forfeited by virtue of his attempt on someone else's life. Accordingly, he has no right to self-defense.

Now suppose that shortly after completion of his jail sentence he is attacked by three robbers who will kill him if he does not kill all of them. *Ex hypothesi*, he—even though now a defender—has no right to life or right not to be killed, and he has no right to defend himself. So, arguably, his attackers do not forfeit their rights to life or rights not to be killed by virtue of their attack, for the defender has no right to life or right not to be killed. Accordingly, the defender is obligated to allow the attackers to kill him on pain of violating their rights not to be killed. Moreover, even if his three attackers do forfeit their rights not to be killed, say, by virtue of attacking someone who is not attacking them, the defender is, nevertheless, not permitted to kill these attackers. In this situation, neither the attackers nor the defenders has any rights to self-defense; however, other things being equal, it is better that one life be lost than three. So, presumably, the defender is morally obligated to allow them to kill him.

^{6.} This point is made by Wasserman, "Justifying Self-Defense," 359.

The version of the simple right to life theory in terms of forfeiture is highly problematic. Unlike the notion of an absolute right, the notion of a right that is able to be forfeited is not robust enough. We thus need a more robust notion of the right to life. As we saw above, the notion of an absolute right to life has the consequence that a person cannot justifiably kill an attacker in self-defense. While the notion of a right to life that can be forfeited enables justified killing in self-defense, it does so at too high a cost. The cost is that unsuccessful attackers lose their own right to self-defense forever, and consequently are not morally entitled to defend themselves against any future unjustified attacks. Accordingly, we need a different notion: one that permits killing in self-defense but does not entirely extinguish the right to self-defense of attackers. The obvious candidate is a right to life (or right not to be killed) that cannot be forfeited but can be overridden.

On this account, while neither the attacker nor the defender has an absolute right to life, both the attacker and the defender maintain their right to life (or right not to be killed). Accordingly, in the standard self-defense case, there is a choice to be made between two persons, both of whom have an (overridable) right not to be killed. So we need to find a moral consideration that overrides the attacker's right not to be killed, but not the defender's right not to be killed. This moral consideration cannot be merely that the attacker is a deadly threat to the defender, or that the attacker intends to kill the defender—or both of these considerations. For in our standard self-defense case, the defender, in defending him or herself, will constitute a deadly threat to the attacker and intends to kill the attacker.⁷

Perhaps the difference between the attacker and the defender is that the attacker, but not the defender, intends to kill the defender without having any reasonable justification for doing so: the attacker intends to kill the defender because (say) the defender is an irritating person. By contrast, the defender has a moral justification for killing the attacker; the defender kills to preserve his or her life. So the moral difference between

^{7.} There are some cases in which the defender does not intend to kill her attacker but, nevertheless, the attacker is killed in the course of the defensive actions. However, there are many other cases in which the defender cannot avoid *intentionally* killing her attacker if she is to survive his attack, e.g. if her only means of defense is to fire her anti-tank gun at him. For my purposes the theoretically interesting cases are the latter ones and I will focus on these. Unless otherwise indicated, I assume that the intentions in question are under the agent's control, i.e. in my terminology the intention to kill is deliberate.

the attacker and the defender consists in the difference between the reasons each has for intending to kill the other.

On the view under consideration, we have the following justification for killing in self-defense. In the self-defense scenarios in question, someone's right not to be killed will be infringed; the only question is whether it will be the right not to be killed of the defender or that of the attacker. It is morally preferable to infringe the right not to be killed of a person who intends to kill without a moral justification than it is to infringe the right not to be killed of a person who intends to kill in order to save his or her life. Accordingly, it is morally permissible for the defender to kill the attacker in self-defense.

Evidently, this account accommodates cases involving one attacker and one defender. But what of cases in which a single defender confronts a number of attackers engaged in a single joint attack? Assume that it is a joint attack by five men in which the actions of the attackers are jointly sufficient to kill the defender, but no single action on its own is sufficient. Assume further that the actions of three of the attackers (any three) are necessary (and sufficient) to kill the defender. In this scenario it will not be sufficient for the defender to kill one of the attackers; if the defender is not to be killed, he or she will have to kill at least three of the attackers.

The question that now needs to be asked of this version of the simple right to life theory is as follows: How does the fact that the attackers' attempt to kill the defender had no moral justification override the competing consideration based on the number of lives lost? After all, if the defender kills in self-defense, then *three* persons—each with a right not to be killed—will be killed, whereas if the defender does not kill in self-defense, then only one person will be killed (and there will be only one infringement of the right not to be killed). That is, how can three infringements of the right not to be killed—albeit a set of infringements committed in order to save a (single) life—be morally preferable to one infringement of the right not to be killed—albeit an infringement without any justification whatsoever?

The general problem with this version of the simple right to life theory is that the notion of an overridable right not to be killed, while less robust than the corresponding absolute right and more robust than the corresponding forfeitable right, is nevertheless inadequate; it still does not get the correct balance between the right to life of the attacker and the right to self-defense. Specifically, the right to self-defense is a right that one is entitled to exercise whether an attack is perpetrated by one or by many. So

while the right to life it posits is less robust than an on absolutist account it is, nevertheless, excessively robust.

The failure of the simple right to life theory, whether it is presented in terms of a right to life that is absolute, able to be forfeited, or able to be overridden, suggests that we ought to look to the notion of a suspended right. A suspended right is akin to a forfeited right in that it is a non-absolute right. However, a right that is suspended under certain conditions is not necessarily forfeited. On the other hand, a suspended right is not simply a right that is overridden; unlike a right that is overridden, in the case of a suspended right there is a period of time—the period of suspension—in which, in effect, one does not have the right. The notion of a suspended right not to be killed is taken up in section 2.6.

The failure of the simple right to life theory also suggests that we need to look at theories that either abandon or significantly complicate the notion of a right to life. I will now look at three influential theories, each of which does one or another of these things.

2.2 Forcing the Choice

Philip Montague provides the first of these accounts.⁸ Another who follows him is Jeff McMahan.⁹ Montague's is a fault-based account of justified killing in self-defense—whether or not one agent is entitled to kill another in self-defense is partly a matter of whether the attacker was at fault in constituting a threat to her life. However, there is a difference between Montague's theory and standard fault-based accounts, in that Montague construes justified killing in self-defense as a species of forced choosing between lives. That is, the attacker is forcing the choice between two lives, his own and the defender's.

On the forced-choice conception, attacker B forces a choice on defender A between two lives, namely A's life and B's life. A has to choose between allowing herself to be killed by B, on the one hand, and killing B (and thereby saving herself), on the other. But, so the argument goes, that A confronts this choice is the fault of B—B forced this choice on A. So A, in choosing between her own life and B's life, can take B's fault into

^{8.} See Montague, "Self-Defense and Choosing between Lives." I discuss the forced-choice theory in Miller, "Self-Defense and Forcing the Choice between Lives."

^{9.} McMahan, "The Basis of Moral Liability to Defensive Killing."

consideration. The relevant difference between the two options facing A is that it is B's fault that the choice between these lives has to be made. Therefore A is morally entitled to kill B.

I have three objections to this account. First, it simply fails to justify killing in self-defense. The basic problem for any theory seeking to justify killing in self-defense is that the defender, in trying to save her own life, intentionally kills another person (the attacker). Accordingly, the defender apparently commits a very serious wrongdoing, and one that is as bad, or nearly as bad, as that of the attacker. On one way of taking the forced-choice account it works by trying to undercut our normal assumption that the defender is responsible for killing her attacker.¹⁰ The idea here would be that the attacker, by forcing the choice on the defender, is somehow, albeit indirectly, responsible for his own death. If this is not the case, then it remains unclear how the theory justifies the act of killing in self-defense. Rather, we are simply left with the defender being fully morally responsible for killing the attacker, and the attacker morally responsible only for attempting to kill the defender. But in that case we are back to where we started from; we have apparently made no progress in the attempt to justify killing in self-defense. It seems that the forcedchoice conception interpreted in this manner fails to relieve the defender of full moral responsibility for the death of the attacker, and therefore fails to show why killing in self-defense is morally justifiable.

It is not the case that in our (above described) standard self-defense situation the attacker is forcing a choice between lives, in any sense of forcing the choice that would enable the attacker to be held fully morally responsible for his own death. B does not intend to bring about a situation in which A faces a choice between killing B and allowing A to die. Nor does B typically have any knowledge that his actions will bring about this situation. Indeed, if the attacker, B, has any intention or belief with respect to bringing about a situation of choice for the defender, A, it is the intention that A not have, or the belief that A will not have, such a choice. Therefore, B does not negligently or recklessly bring about the situation in

^{10.} Montague states in his reply to earlier criticisms of mine (Miller "Self-Defense and Forcing the Choice between Lives") that defenders are responsible for the deaths of the attackers that they kill but, nevertheless, he apparently maintains that attackers are responsible (in some sense) for the situation in which defenders have to choose between allowing themselves to be killed and killing their attackers. Certainly, attackers are causally responsible for this situation. See Phillip Montague "Forced Choices and Self-Defense" *Journal of Applied Philosophy* 12:11995 90.

which A faces a choice between killing B and allowing A to die. Consider, for example, a scenario in which B ambushes A with the intention not only to kill A, but also to ensure that A has no opportunity to defend herself. Accordingly, let us assume that the attacker does not believe, let alone intend, that the defender will have an opportunity to defend herself but, nevertheless, this opportunity does arise and the defender takes it and kills the attacker in self-defense. Presumably, in this scenario it cannot be the attacker, but must rather be the defender, who is fully morally responsible for the killing of the attacker. But in that case, we have not yet been provided with a reason for thinking that the defender is morally entitled to kill the attacker. We are left with a situation in which the defender, A, is responsible for killing the attacker, B, and B is responsible only for attempting to kill A. So, to reiterate, we are back to our starting place.

It might be argued, however, that we are not quite back to where we started from. For we have isolated an additional morally relevant element; namely, the element of forced choice in a narrow causal sense. The fact that the attacker, B, unintentionally and unknowingly brought about a set of circumstances in which the defender, A, had to choose between her own life and that of B, is morally relevant. The attacker, B, has (unintentionally, and unknowingly, let us assume) structured the choice options of the defender, A. In short, B is causally responsible for the choice situation A now finds herself in. This is undoubtedly true. However, the question now arises as to whether B is culpable for bringing about these circumstances, especially since he did so unintentionally and unknowingly. Perhaps it was foreseeable that A *might* face this choice if attacked by B, and thus avoidable. However, there are many relevant cases in which this choice outcome does not eventuate. These are of two main types: (1) cases in which there is no possibility of A even contemplating self-defense (e.g., an ambush scenario in which A is asleep or unconscious and B comes upon him and shoots him dead), and (2) cases in which A has a third option (e.g., to disable B without killing him or to flee to safety).

In type 1 cases the attacker does not structure the defender's choice options; defender does not have any choices to make, e.g. she is simply killed in her sleep. Therefore, these are not instances of forcing the choice. Nor, of course, are they cases of self-defense. Nevertheless, these cases raise a question about the moral significance of forcing the choice. For there does not seem to be any relevant moral difference between an attacker who culpably and unjustly kills someone in her sleep, and an attacker who culpably and unjustly kills someone who wakes up in time

to try to defend herself by killing the attacker but who is unsuccessful (and is, therefore, killed by her attacker). In the former case, the attacker did not force any choice on the victim, whereas in the latter case he did. So whether or not the attacker forced the choice on the defender does not seem to make any difference to the culpability or, moral fault of the attacker.

In type 2 cases the attacker does structure the defender's choice options. However, the defender's option set is wider than merely killing the attacker or allowing herself to be killed. Nevertheless, again there does not seem to be any relevant moral difference between an attacker who culpably and unjustly kills someone in her sleep, and an attacker who culpably and unjustly kills someone who unsuccessfully tries either to flee or to defend herself. In the former case, the attacker did not force any choice on the victim, whereas in the latter case he did. So, again whether or not the attacker forced the choice does not seem to make any difference to the culpability or, moral fault of the attacker.

In all this it is crucial that we distinguish between forcing the choice in its narrow causal sense and being culpable or otherwise at fault for forcing the choice. A drug-crazed attacker might be forcing the choice but might not be morally responsible for doing so, and therefore is nonculpably doing so. Let us try to get clearer on the notion of culpable or, at least, fault-based forcing the choice.

Consider the following scenario. Agent X puts a gun at agent Y's head and orders Y to kill Z or be killed herself. Here X is forcing a choice on Y. But notice two differences between this case and the standard selfdefense case. First, X does not simply intend to kill Y in the sense that killing Y is the content of X's intention (i.e. X intends [X kill Y]). Rather, at most X has an intention with the following conditional content: X kill Y if Y does not kill Z (i.e., X intends [X kill Y if Y does not kill Z]). Second, X's act of forcing a choice consists in more than the fact that X will (intentionally) kill Y unless Y intervenes by killing someone (in this case, Z). For X intentionally creates a situation in which Y has to make a choice between lives (i.e., X intends [Y has to choose between killing Z and being killed by X]). The X/Y/Z example serves to highlight the existence of a thick and a thin sense of forcing the choice between lives. In the thick sense—the sense involved in the X/Y/Z example—forcing the choice is intentionally creating a situation which consists in someone having to make a choice between lives, i.e. the choice between lives is intentionally created. In the thin sense—the sense involved in the standard self-defense case—forcing

the choice between lives is simply our above notion of (unintentionally and unknowingly) causing a situation in which there are two choices facing the defender (either kill the attacker or allow oneself to be killed by the attacker). This thin causal condition is not the simple causal condition of being a deadly threat, for that latter condition is intended by the attacker. But now we can see that describing the standard self-defense case as a forced-choice situation is false, if we mean forced choice in the thick sense. What of the notion of forced choice in the thin sense? We saw above that the fact that the attacker is forcing the choice in the thin sense does not relieve the defender of moral responsibility for killing the attacker, supposing she does kill him. Thus we are left with the matter of the moral justification for the defender's killing of the attacker. Here one thing is clear: the moral justification for killing in self-defense cannot consist merely in the fact that the attacker is forcing the choice in the narrow causal sense. This brings me to my second objection to the forced choice conception.

My second objection to the forced-choice conception is that it fails to invoke a consideration that surely must be invoked, if killing in selfdefense is to be shown to be morally justifiable. Speaking loosely, there are two things the attacker might be said to have done in the standard self-defense scenario. He might be said to have (unintentionally and unknowingly) brought about a situation in which the defender had to choose between two lives. The attacker forced a choice between lives in the thin sense of forcing a choice. Secondly, the attacker intended to kill the defender. Now the attacker's second "doing" constitutes a morally relevant consideration in the defender's decision as to whether or not to kill the attacker. To see this, consider the possibility of a deaf, dumb, blind, and radioactive man who—unaware that he is radioactive—tries to put his arms around a woman in an expression of friendliness. She is aware that he is radioactive, and that his action is threatening her life. But she is also aware that she cannot communicate this to him. Moreover, she knows that she cannot escape his clutches other than by spraying him with a substance that she knows will prevent him from getting too close for too long, but will do so by killing him. He is unintentionally and unknowingly forcing a choice between lives. But it is by no means clear that she is entitled to kill him. Certainly the moral grounds for killing him are much weaker than in the standard self-defense case. So, in the standard self-defense case, the fact that the attacker is performing the "action" of intending to kill the defender is a morally relevant consideration. Since,

on the thin forced-choice conception, this other "doing" of the attacker is not morally relevant, that account is defective. Of course, Montague's forced choice conception is not merely the thin forced choice conception; rather it is the latter supplemented by the notion of fault, e.g. an intention to do what is wrong. However, as we saw above the intention in question on the forced choice conception must be an intention with respect to the act of forcing the choice (thin sense). But even supposing this intention exists - and we have seen that it typically does not - this is the wrong intention. The intention that is relevant to the moral fault of the attacker is his intention to kill the defender, not an intention to bring about a situation in which the defender must choose between the attacker's life and her own. Further, the intention to kill is an intention with respect to the causal condition that consists in being a deadly threat to the defender. Accordingly, it is this causal condition (being a deadly threat) that provides (part of) the justification for the defender's lethal response rather than the causal condition that consists in forcing the choice.

My third objection is that the forced-choice conception has the effect of obliterating a morally important distinction. It seems clear that in our standard case of killing in self-defense, (1) the defender, A, has a right but not an obligation to kill the attacker, B; and (2) a third party, C, has an obligation to kill B, if that is the only way to prevent B from killing A (and C can kill B without harming C or any D). In other words, the defender is entitled not to exercise her right to self-defense, if he or she wishes. But matters are different for the third party, C. The third party ought to intervene on behalf of the defender. (And the only form of successful intervention in the type of case in question consists in the killing of the attacker.) The third party does not have a right that he or she can choose not to exercise; the third party is not entitled to allow the defender to be killed, even though the defender is entitled to allow herself to be killed by not exercising her right to self-defense. (I note that the right to self-defense is not identical with the right to life or the right not to be killed. Arguably, these latter rights are inalienable or, at least, the defender is not entitled to waive them in the face of a culpable attacker.)

However, on the forced-choice conception, the situation of the defender (morally speaking) is precisely the same as that of the third party. Each is confronting a choice between two lives, and each must invoke the same morally relevant consideration in making that choice. This consideration is the fact that the attacker is forcing the choice (and at fault in doing so). Accordingly, both defenders and third parties are under obligations

to choose in favor of the life of the person who is not forcing the choice in this sense. But, as we have just seen, the defender is not under any such obligation; the defender has a right, but not an obligation, to kill the attacker. In assimilating the moral situation of the defender to that of a third party, the forced-choice conception obliterates a morally significant difference between these situations or, at the very least, needs to help itself to some further moral consideration it has not yet countenanced.

2.3 The Hobbesian Rights-Based Approach

The second theory is a new version of the Hobbesian rights-based account. This account gives a priority to self-defense over other moral requirements. The emphasis here is on the importance to an individual of his or her own life, and the special responsibility an individual has for preserving his or her own life. This account makes a significant adjustment to the basic right to life account by positing an absolute but agent-centred right to self-defense.¹¹

It is a strength of Teichman's quasi-Hobbesian account that this morally significant distinction is preserved. On her account, in the standard self-defense case a defender has a right of self-defense, but a third party has a duty and not a right to preserve the life of that defender. Moreover, Teichman's recourse to Hobbes's notion of a basic and absolute right to self-defense enables many of the familiar objections to rights-based accounts of self-defense to be met. However, as we shall see, the account is problematic in other ways.

The Hobbesian rights-based approach has a weak and a strong form. In the strong form, I have an absolute right to self-defense, even if the threat to my life is innocent—e.g the (so-called) attacker does not intend to kill me. Now such cases do not seem to be cases of self-defense, rather they seem to be cases of self-preservation. But this makes little difference here. In such cases is there a right to preserve one's life by killing the innocent? This is disputable. Firstly, *it* is surely the case that, other things being equal, an *intentional killing* is a greater evil than an unintentional killing.¹³

^{11.} Since it is the right to self-defense, rather than the right to life, that is absolute, and since this right is agent-centered, the Hobbesian account differs from the absolutist right to life account discussed above.

^{12.} Unless pacifism is true. In that case, no one is ever entitled or obligated to kill.

^{13.} See Frances Kamm, Ethics for Enemies: Terror, Torture and War (Oxford: Oxford University Press, 2011), 78. Kamm makes the normative theoretical claim that when an

But in that case, arguably, it is better to allow oneself to be killed unintentionally than intentionally to kill the innocent person threatening one.

A stronger objection to this view is that it fails to take into account the possibility that the defender is in some way culpable. Consider a person, B, who dislikes another person, A, and wants to kill A. B puts a bomb in A's lunch box. However, A, rather than going off to lunch in the park, confronts B in the office. A has been told by C that B has switched sandwiches on him. B rushes down the stairs to get away from A, but A threatens to throw the lunch box down at him. With time running out, and A dismissing B's claims about a bomb, and insisting on throwing the lunch box down to him, B turns around and shoots A dead. Presumably B is not entitled to kill A, notwithstanding the fact that he does so *in* self-defense. The relevant moral consideration is the fact that B culpably placed the bomb in A's lunch box. This consideration overrides any right to self-defense B may have had.

On the weaker Hobbesian view, there *is* an absolute right to self-defense, if the threat to one's life is intended. But once again this fails to take into account relevant moral considerations. The defender may have culpably brought it about that the attacker is trying to kill him. Or the defender may in some other way have provided the attacker with a morally justifiable reason to kill him. Or both of these conditions may obtain.

An example of the first possibility would be one in which B attempts to murder A by shooting him. Assume that A grabs the gun, and that each is now trying to kill the other; each is thus trying to kill the other in self-defense. But surely the fact that B initially attempted to murder A defeats B's right to self-defense.

An example of the second possibility would be the case of the prisoner in a concentration camp who tries to kill one of the guards. The guard is not threatening her life, but he has murdered all her family, and continues to murder others. Surely the guard is responsible for so much *evil*, and will be responsible for so much more evil, that he has provided the prisoner with a morally justifiable reason for killing him. Moreover, this reason overrides any right to self-defense the guard may have.

act is otherwise morally permissible (notwithstanding the harm it produces), intending the harm need not affect the permissibility of the act; however, her argument for this seems to me not to work. For in her examples of morally permissible actions involving bad intentions, these bad intentions are constrained by good second-order intentions with respect to the bad first-order intentions. See my review of *Ethics for Enemies* in *Notre Dame Philosophical Reviews* (2012). See also Chapter 7.2.2.

An example of the third possibility is even more convincing. Suppose an SS guard in a concentration camp wants to be attacked by one of the prisoners so he can kill the prisoner. The SS guard shoots the prisoner's family in front of the prisoner and then offers a knife to the prisoner. The prisoner then attacks the SS guard, who pulls out his gun and shoots the prisoner dead. The SS guard has intentionally, indeed culpably, brought it about that the prisoner will try to kill him. He has forced the prisoner's choice in the thick sense (see section 2.2). Moreover, he has also provided the prisoner with an adequate moral justification for killing him. In this case, any right to self-defense the SS guard may have is clearly overridden.¹⁴

2.4 The No-Fault Rights-Based Theory

The third theory is the no-fault rights-based theory. On this account, whether or not an attacker is at fault in constituting a deadly threat to some defender is irrelevant to the question of the justifiability of killing in self-defense. It is the fact that the attacker is a deadly threat—coupled with the fact that the defender cannot disarm the attacker—that is critical. This account focuses on the attacker qua deadly threat. In her paper "Self-Defense," Judith Jarvis Thomson argues that considerations of fault are irrelevant to the justification of killing in self-defense. In place of fault-based theories of self-defense, she puts forward her own account. In this section I will attempt to demonstrate the inadequacy of Thomson's account.

Under what conditions is it permissible for agent A to kill agent B in self-defense? According to Thomson, other things being equal, every agent has a right not to be killed by any other agent. What make other things unequal? Thomson provides one condition that does *not* make things unequal; namely, the fact of being a bystander. If C is a bystander, then C has a right not to be killed. On Thomson's account, C is a bystander

^{14.} See Teichman, "Self-Defence."

^{15.} Thomson, "Self-Defense." Thomson does not think that considerations of fault are always irrelevant to the justification of killing in self-defense. They can be relevant in some cases of self-defense in which the defender does not have to choose between his or her own life and the life of the attacker. See Suzanne Uniacke, *Permissible Killing: The Self-Defence Justification of Homicide* (Cambridge: Cambridge University Press, 1994).

^{16.} Thomson, "Self-Defense," 299-300, 303-305.

if C is not causally involved in the situation that consists in the agent, A, being at risk of death.¹⁷

On the other hand, things are not equal—which is to say attacker B does *not* have a right not to be killed by defender A—if B is a deadly threat to A, and indeed B will kill A unless A intervenes and kills B.¹⁸ Thomson construes the concept of killing quite narrowly.¹⁹ Agency is not required in order for someone to kill someone else. So if a fat man is pushed off a cliff and lands on a person below, crushing the person to death, then the fat man killed the person.

It is important to stress here that, on Thomson's account whether or not B intends to kill A, or is otherwise at fault in constituting a threat to the life of A, is not necessary for B not to have a right not to be killed by A. Fault, she says, is irrelevant to determining the justifiability of killing in self-defense.²⁰

A final feature of Thomson's account is that, morally speaking, an agent stands to her would-be killer as a third party stands to that killer.²¹ Thus, if it is permissible for A to kill B in self-defense, then it is permissible for some third party, C, to kill B, given that A is unable to defend herself. So if B does not have a right not to be killed by A, B does not have a right not to be killed by C, or D, and so on.

I have three objections to Thomson's account. My first objection makes use of Thomson's example of the drug-crazed truck-driver (agent B). Thomson claims that it would be morally permissible for agent A to kill the driver to save himself even though (since drug crazed) B is not at fault.²² We have seen that Thomson claims that one cannot use bystanders

^{17.} Thomson, "Self-Defense," 288.

^{18.} Thomson, "Self-Defense," 289,300-301,303-305. In fact, as we will see, there is some confusion as to Thomson's precise position.

^{19.} Thomson, "Self-Defense," 299.

^{20.} Thomson, "Self-Defense," 285, 294–295. At times (e.g., p. 301), Thomson seems to think that there is some distinction to be made between her theory of self-defense and her commitment to the irrelevance of fault in the justification of killing in self-defense. But this distinction makes little difference to her commitments. For she commits herself to the theory taken independently of the irrelevance of fault thesis—the theory that B does not have a right not to be killed by A, if (1) B is a deadly threat to A and (2) B will kill A if A does not kill B—and she commits herself to the irrelevance of fault thesis.

^{21.} Thomson, "Self-Defense," 306. McMahan's liability theory shares this feature (McMahan, "The Basis of Moral Liability to Defensive Killing").

^{22.} Thomson, "Self-Defense," 284.

to save oneself. But let us complicate her example. Assume that A could throw bystander C in front of the trunk, and thereby save himself. Now the difference between the truck driver and the bystander, on Thomson's account, is that the truck driver, but not the bystander, is the threat. Therefore, A is not entitled to throw the bystander, C, in front of the truck. So far, so good. But now let us assume that the bystander is in fact the person who injected the truck-driver with the drug in order to get the truck-driver to kill A. On Thomson's account, this makes no difference; it would still be wrong for A to throw C in front of the truck. For the only morally relevant consideration is that C is a bystander; the fact that C is at fault is morally irrelevant. But surely the defender, A, would be entitled to throw the bystander, C, in front of the truck to save himself, and for the reason that C was at fault in injecting the drugs into the truck driver. This example demonstrates that at least one sort of fault is relevant to killing in self-defense. The sort of fault in question is (roughly) that of intentionally setting in train a causal process that will result in a person being killed, and doing so for the purpose of achieving that result. Indeed, the example is sufficient to show that in at least some cases one ought to kill the person at fault rather than the person who constitutes a threat to one's life.

It might be argued that the bystander is the threat to one's life in that he caused the truck driver to go berserk. Certainly persons at fault—in the sense of fault at issue here—are causally involved. But on Thomson's account, agent C being a threat to A's life means C's action of injecting drugs into B is in part constitutive of the situation that consists in A being at risk. Thomson does not think being causally involved is sufficient for being in part constitutive of the situation that consists in someone being a risk.²³ Instead she says that the presence or absence of the initiating villain—the one who injected the truck driver—makes no difference to A's right to kill B.²⁴ In the truck-driver case, the bystander, C, is not about to bring about the death of A, and thus C is not the threat to A's life; rather, B is the threat. Accordingly, by Thomson's lights, A has a right to kill B but not C. This is strongly counter-intuitive.

However, let us consider a revised version of Thomson's account in which being causally involved, even indirectly, is sufficient for being in part constitutive of the situation. Here we can imagine a similar case

^{23.} Thomson, "Self-Defense," 298-299.

^{24.} Thomson, "Self-Defense," 305.

in which C had unknowingly (and without fault) injected the drug into the truck driver. On the assumption that C (although without fault) is the ultimate cause of the threat to A's life, Thomson (on this more permissive cause-based account) would have to hold that it is permissible for A to kill C. But under these circumstances, it would surely not be permissible for A to throw C in front of the truck. The reason is simply that C is not at fault.

We have seen that Thomson's no-fault account is problematic. So it might now be accepted that, contra Thomson, fault is indeed relevant to determining the permissibility of an agent's act of killing in self-defense. Contra Thomson, A is entitled to kill bystander C, rather than attacker B, given that C is at fault and B is not. Nevertheless, it might be claimed that Thomson has provided a sufficient condition for extinguishment of an agent B's right not to be killed, namely, that B is a deadly threat to A, and B will kill A unless A kills B.

Moreover, in the light of the admission that fault can be relevant to determining the permissibility of an agent's act of killing in self-defense, let us now allow that if an agent, C, is at fault by virtue of intentionally, albeit indirectly, causing a threat to another agent, A, then C no longer has a right not to be killed. Accordingly, in the drug crazed driver scenario, neither attacker B nor bystander C have a right not to killed, or at least neither would have a right not to be killed, absent the other. So if C was not present, it would be permissible for A to kill B. And if B leapt out of the truck, leaving A with the option only of throwing C in front of the truck, then it would be permissible for A to so kill C.

So on this revised conception, it is permissible for A to kill either B or C, but there is no substantive moral consideration by means of which to make a choice between them should the need arise. Rather, there are simply two sets of sufficient conditions for losing one's right not to be killed: (1) B is a deadly causally *direct* threat to agent A, and B will kill A unless A kills B; (2) C is a *culpable* deadly *indirect* threat to A, and C will indirectly cause A's death unless A kills C. This alleged moral equivalence of the two conditions is counterintuitive. Surely we have a strong moral preference in favor of killing C and sparing B, rather than killing B and sparing C.²⁵

^{25.} It might be thought that neither A nor C has lost their right not to be killed. If so, then the objection to the sufficiency of Thomson's conditions still stands. Moreover, this thought is consistent with there being a moral difference between killing A and killing C, but it would not be the moral difference between justified and excusable killing.

Moreover, there is a readily available explanation for the existence of this strong moral preference. In cases where there is no choice to be made, since only C can be killed, it is permissible for A to kill C. In cases where a choice can be made between either killing C or killing B, it is impermissible for A to kill B. In cases where there is no choice to be made and it is only possible to kill B, then it is at best only excusable for A to kill B. If this explanation is accepted—and I believe it should be—then the weaker Thomson thesis is false. Thomson has not provided a sufficient condition for extinguishment of an agent B's right not to be killed. The fact that B is a deadly threat to A, and that B will kill A unless A kills B, is not sufficient to extinguish B's right not to be killed.

I conclude that the drug-crazed truck driver example (in its various versions) demonstrates that Thomson's account of self-defense is inadequate in two important respects. First, Thomson is wrong to maintain that fault is irrelevant to determining the permissibility of an agent's act of killing in self-defense. ²⁶ Second, it is not the case that a sufficient condition for extinguishment of an agent B's right not to be killed is that B is a deadly threat to A, and B will kill A unless A intervenes and kills B.

A second problem with Thomson's account concerns the grounds for an agent *not* having a right not to be killed. Here it is important to note three things. First, the right not to be killed is, by definition, a negative right, unlike the related right to life. Second, the right not to be killed is an individual natural right, as opposed to an institutional or collective right. Third, (and more controversially) the right not to be killed is an intrinsic, as opposed to a derived, right. The right not to be killed does not derive from some other right, or rights, such as a right to autonomy.²⁷

According to Thomson, B being a deadly threat to A is not sufficient for B losing his right to not to be killed. Yet she rejects the possibility that a further necessary condition is that B is in some way at fault. Rather,

^{26.} To suggest that fault is relevant to determining whether or not one has lost one's right to life is not to suggest that fault provides a sufficient condition for losing one's right to life. Certainly fault, in the sense of intention to kill, is not a sufficient condition. But we have been speaking of fault as involving not only simply intentions and the like, but also causal involvement.

^{27.} Perhaps the right not to be killed derives from the right to life. At any rate, some have argued that the right to life itself is derived. For discussion, see Jonathan Glover, *Causing Death and Saving Lives* (London: Penguin, 1977), Chapter 3. Glover argues against the influential view of the sanctity of life (i.e., that killing is intrinsically wrong, since life has value in itself). He argues that killing someone is *directly* wrong even in the absence of harmful side effects, but that it is *not intrinsically* wrong.

Thomson believes that the further necessary condition is (roughly) that the defender cannot preserve his life other than by killing the attacker. I take it that the intuition guiding Thomson's account at this point is that one ought not to kill one's attacker unless one really has to. If one can disarm one's attacker, then one ought to disarm him. I do not dispute the validity of this intuition. I do, however, dispute that the basis of this intuition is that the attacker retains his right not to be killed if the defender can disarm him. So I am distinguishing between conditions under which an attacker loses the right not to be killed by a defender, on the one hand, and conditions under which it would be morally permissible for an attacker to be killed by a defender, on the other. Accordingly, an attacker might not have a right not to be killed by a defender, but it might nevertheless be morally impermissible for the defender to kill the attacker. At any rate, I will argue against Thomson's claim that a necessary condition for an attacker losing the right not to be killed is that the defender cannot disarm the attacker.28

Suppose there is a not insignificant possibility that a defender will be killed if he chooses the option of disarming, rather than killing, his attacker. Now, on the rendering of Thomson's account under consideration, the defender would nevertheless be under a strong moral obligation to try to disarm the attacker. For the attacker has a right not to be killed if the defender can disarm the attacker. But surely, in this kind of case, the defender is not obliged to put his life at risk to preserve the life of someone who is culpably and unjustifiably trying to kill him. So the condition needs to be weakened to accommodate this kind of counter-example. It should read: the defender cannot disarm the attacker without putting the defender's life at risk.

But it might be the case that the defender's life is not at risk, but that he will lose an arm and a leg in the process of trying to disarm the attacker. Presumably, the condition needs to be further weakened to: the defender cannot disarm the attacker without either putting his own life at risk or incurring serious harm to himself.

But what if the attacker has tried to kill the defender in the past and will try to kill the defender in the future (and neither the police nor anyone else is able to provide adequate protection for the defender)? Presumably, the defender is entitled to kill to prevent an otherwise unavoidable and

^{28.} I argued for this in my 1993 paper, "Killing in Self-Defense". Since then others have done so, e.g. Uwe Steinhoff in his "Self-Defense and the Necessity Condition" (unpublished).

certain future deadly threat of this sort.²⁹ We now have a double-barreled condition of the form: (a) the defender cannot disarm the attacker without putting his own life at risk or incurring serious harm himself, or (b) the defender's disarming of the attacker will not remove an unavoidable and certain (probable?) future threat posed by the attacker to the life of the defender.

Unfortunately, even this heavily qualified and complicated condition is inadequate. Imagine a defender who also happens to be an agent-centered pacifist. Assume that this defender will have to either severely wound or kill his attacker if he is to preserve his own life. The pacifist has a threefold choice: (1) allow himself to be killed, (2) kill his attacker, or (3) severely wound his attacker by severing the attacker's weapon-using right arm. The pacifist chooses to allow himself to be killed, and is killed. In this scenario, the option of disarming rather than killing the attacker is available to the pacifist defender. Therefore, on Thomson's account, the attacker retains his right not to be killed. But in this pacifist scenario, this seems incorrect; surely the attacker does not have a right not to be killed. To see this, imagine that there is a nonpacifist bystander with a gun who is unable to disarm attacker, but who could kill the attacker and, thereby, preserve the pacifist defender's life. It is clearly morally permissible for the bystander to kill the attacker, and indeed the agent-centered pacifist defender may thank him for doing so. However, by Thomson's lights, the attacker has a right not to be killed since the pacifist defender could have disarmed the attacker. Therefore, it would be morally wrong for the bystander to kill the attacker. So much the worse for Thomson's account. The example shows that yet another modification of the necessary condition for losing one's right not to be killed is called for.

We have now arrived at the following proposition: A necessary condition for an attacker losing his right not to be killed is: (a) the defender cannot disarm the attacker without either putting his own life at risk or incurring serious harm to himself, and/or (b) the defender's disarming of the attacker will not remove an unavoidable and certain future threat posed by the attacker to the life of the defender, and/or (c) the defender chooses not to disarm the attacker, even though the defender knows that if he so chooses the attacker will kill him.

^{29.} On this issue, see Miller, "Shootings by Police in Victoria," and Miller and Blackler, Ethical Issues in Policing, Chapter 3.

Even this host of qualifications is incomplete. For example, what of future threats to the lives of the defender's family? Surely the attacker does not have a right not to be killed by the defender if the defender knows that if he spares the attacker the attacker will, at some future date, kill the members of the defender's family.

What is the upshot of this discussion of Thomson's second necessary condition for a defender losing his right not to be killed? The first point to be made is that the condition cannot be the simple and straightforward one that she has provided. Rather, if it exists—and this is far from self-evident—this necessary condition is an enormously complicated and heavily qualified version of the condition she has provided.

The second point is that, contra Thomson, this putative condition, even if it can be precisely specified, is in all probability not a necessary condition for someone having a right not to be killed. It needs to be stressed that the required condition is not a condition under which the right not to be killed is overridden, or under which a defender might be excused for killing in self-defense. Rather, it is a central and necessary condition for the possession by an agent of the right not to be killed.

It is implausible that such a contingent, complex, and changing set of facts about other agents could ground a basic, negative, individual human right, such as the right not to be killed. Perhaps positive rights, institutional rights, and derived rights may go in and out of existence, depending on various contingent, complex, and changing circumstances that are external to the bearers of those rights. And any right, including the right not to be killed, might be overridden, or its violator excused, on the basis of various, contingent, and external circumstances. But what is in question is whether the existence of a basic, negative, individual natural right could depend on such contingent, complex, and changing circumstances that are external to the rights bearer. Surely such a natural right is only dependent on natural properties possessed by the rights-bearer qua human being. At any rate, I have argued that the required recourse to a wide variety of contingent, external circumstances for the existence of this natural right renders Thomson's account of the right not to be killed implausible.

The upshot of this discussion is as follows: Thomson has claimed that a necessary condition for an attacker losing the right not to be killed is that the defender cannot preserve his or her own life other than by killing the attacker. But this condition is unacceptable as it stands. It needs to be replaced by some notional condition that describes a complex, changing,

and contingent set of facts external to the attacker—facts such as the ability or willingness of the defender to defend him or herself. Thomson has not provided an adequate specification of such a condition. More important, the view that any such condition grounds a basic, negative, individual natural right, such as the right not to be killed, seems inherently implausible.

My third objection concerns Thomson's claim that if it is permissible for you to intervene by killing your attacker, then it must be permissible for a third party to intervene on your behalf (given that you are unable to intervene on your own behalf.) My argument here is directed against Thomson's claim that such a third party is in the same moral predicament as the (self) defender.

Let us consider a variation on Thomson's fat man example. Assume that the man at the bottom of the cliff has no means to prevent the fat man landing on him and killing him. Assume further that there is a third party with a bazooka who could fire this weapon and, thereby, cause the disintegration in midair of the fat man. (Note that, other things being equal, the fat man will survive the fall. He will die only if someone kills him by, for example, shooting him with a bazooka.) Now, on Thomson's account, the fat man has no right not to be killed by the third party, and the man at the bottom of the cliff has a right not to be killed by the fat man. Therefore, she ought to conclude, it is permissible for the third party to kill the fat man, just as it would have been permissible for the person at risk to kill the fat man if he had been able to.

According to Thomson, the man at the bottom of the cliff has a right not to be killed and the fat man has no such right. But *if* this is so, then it is not simply permissible for the third party to kill the fat man. Rather, it is morally obligatory for the third party to kill the fat man in order to save the man at the bottom of the cliff. The third party is under an *obligation* to remove the deadly threat, to kill the fat man. For the third party confronts a choice between killing a person who does not have a right not to be killed (in order to save the life of a person who has a right not to be killed) and allowing a person with a right not to be killed to be killed (by a person who does not have a right not to be killed).³⁰ (If the reader is unhappy as I am

^{30.} It might be suggested that whereas some third parties, such as police officers, might have this obligation to kill, by virtue of their institutional role to intervene in life-threatening situations involving others, most third parties do not have any obligations to intervene by killing. So if the third party was a police officer, he or she would be under an obligation, but not if the third party was an ordinary citizen. I do not agree with this, but

with Thomson's claim that it is in fact permissible for the person at risk to kill an innocent fat man, no matter. Simply assume that the fat man is guilty; assume that he was not pushed but rather jumped intending to kill the person below.) But now we can see how the logic of Thomson's position works against her impartialist claim that the third party is in the same moral predicament as the defender. For that logic leads to the partialist conclusion that she wants to resist, namely, that there is a disanalogy between the moral predicament of the third party and that of the person at risk. For the person at risk—if he was able to defend himself, and could do so only by killing the fat man—would not be under an obligation to kill the fat man, as is the case with the third party; rather, at most it would be *permissible* for the person at risk to kill the fat man. The man at the bottom of the cliff is presumably entitled—if he so chooses—not to exercise his right to self-defense.

2.5 The Responsibility Account

The failure of Thomson's no-fault theory suggests a variation on it: an impartialist account that strengthens the conditions under which an agent does not have a right not to be killed. Here there are a number of possibilities, but perhaps the most salient is that provided by Jeff McMahan.³¹ On McMahan's account, agent A does not have a right not to be killed (or, to use McMahan's terminology, A is liable to be killed) if A is a deadly threat to agent B; A is responsible for being a deadly threat, and it is necessary for B to kill A to remove the threat.

Notice that McMahan endorses the necessity condition,³² and is therefore open to the objections to that condition made above (section 2.4) in respect of Thomson's account. However, in this section I focus on other aspects of McMahan's account that differentiate it from Thomson's—in particular, on his invocation of a notion of responsibility. Consider McMahan's case of the conscientious car driver, B, who is an accidental (but non-negligent and non-reckless) deadly threat to a pedestrian

even if it is accepted, my basic point against Thomson holds; to see this, simply assume that the third party is in fact a police officer or like official.

^{31.} McMahan, "The Basis of Moral Liability to Defensive Killing."

^{32.} McMahan, "The Basis of Moral Liability to Defensive Killing." See also McMahan, Killing in War, 9.

A. A can prevent A being killed by B, but only by killing B. Here B is responsible for being a deadly threat to A, since B is intentionally driving his car knowing that in so doing there is some small risk to the lives of pedestrians. Accordingly, in these circumstances the car driver does not have a right not to be killed, and so the pedestrian is justified in killing the car driver in self-defense.³³ Moreover, since the car driver, B, does not have a right not to be killed and the pedestrian, A, retains her right not to be killed, then some bystander, C, would also be morally entitled (indeed, perhaps morally obliged) to kill B in order to save A. This putative right or obligation of bystander, C, to intervene by killing B seems counterintuitive. I return to this point shortly.

In McMahan's conscientious car driving scenario we need to distinguish between B not having a right not to be killed and B having a right to be killed that is, nevertheless, overridden by other moral considerations. I suggest that while the latter may well be true, the former is not. Accordingly, and contra McMahan, the example ought to be understood as follows: The pedestrian retains her right not to be killed, as does the conscientious car driver. However, in the circumstances in question, the pedestrian's right to self-defense overrides the right of the driver not to be killed.

To see this, consider another version of this scenario, in which the principles of proportionality and impartiality play a decisive role. In this version, the conscientious car driver is actually five drivers who jointly drive (let us say) a goods train, and the only way to prevent the train from accidentally running off the track and killing the single pedestrian now in the path of the train is for a third party, C, to fire a rocket at the train which will kill all five drivers. As was the case with the conscientious car driver, the train drivers are conscientious; they are an accidental (but non-negligent and non-reckless) deadly threat to the pedestrian. Surely C would not be morally justified in firing the rocket. For, on the one hand, C (unlike, I suggest, the pedestrian in both McMahan's car-driving example and in the train-driving scenario) must act impartially, and, on the other hand, killing five innocents to save one is a disproportionate response. Yet on McMahan's account, C would be morally justified in firing the rocket, since, unlike the pedestrian, none of the drivers has a right not to be killed (i.e., each of the drivers is liable to be killed). They are each liable, since they jointly cause the accident (or rather will cause it absent

^{33.} McMahan, "The Basis of Moral Liability to Defensive Killing," 394.

C's intervention). Their joint action is as follows, let us assume: Driver B1 shovels the coal to keep the engine running, B2 monitors the speed of the train, B3 scans the track ahead, and so on. So each driver makes a causal contribution to the accident in the course of performing their joint action of driving the train. Moreover, while each is conscientious in his or her role, each knows that there is a small risk of a derailment in which an innocent pedestrian may be killed; indeed, this is a matter of mutual knowledge.³⁴

Like the no-fault theory, McMahan's responsibility account is an impartialist theory of the morality of killing in self-defense, and this makes it vulnerable to further objections. Consider McMahan's rendering of the tactical bomber scenario, in which a tactical bomber foreseeably, but unintentionally, kills a small number of innocent civilians in the course of bombing a strategically important munitions factory. His action is morally justified because he does not intentionally kill the civilians, and because the bombing saves the lives of a considerably larger numbers of other innocent civilians. According to McMahan, the tactical bomber is not liable to defensive killing—he retains his right not to be killed because his action was morally justified.³⁵ However, since the innocent civilians about to be bombed have not wronged anyone or violated anyone's rights, they are not liable to be killed either; they also have a right not to be killed. Thus the innocent civilians would be morally justified in shooting down the tactical bomber in self-defense, just as he is morally justified in unintentionally but foreseeably killing them. So far, so good; this accords with our intuitions.

However, it is not clear that this view of the matter can be consistently adhered to by an impartialist such as McMahan. For partialism intrudes; specifically, in respect of the right to self-defense. Let us assume that it is not the innocent civilians that are in a position to shoot down the tactical bomber, but rather some third party. From an impartialist standpoint the third party is confronted with the same two options that confront the innocent civilians contemplating shooting down the tactical bomber; morally speaking, the third party and the civilians are in the same predicament. The first option is to shoot down the tactical bomber and, thereby, save the small number of innocent civilians from being (unintentionally) killed

^{34.} Each knew, and each knew that all the others knew, etc.

^{35.} McMahan, "The Basis of Moral Liability to Defensive Killing," 399.

by the tactical bomber, but at the expense of the much larger number of innocent civilians who would be saved by the tactical bomber's action. The second option is not to shoot and, thereby, allow the small number of civilians to be killed but preserve the lives of the much larger group of civilians. For the third party the principle of proportionality is surely decisive; the third party does not have a partialist right of self-defense in play, as do the innocent civilians about to be killed by the tactical bomber. Accordingly, the third party applies the test of proportionality and, as a result, correctly decides not to shoot down the tactical bomber on the grounds that the death of the small number of innocent civilians killed by the tactical bomber is outweighed by the larger number of lives saved by his destruction of the munitions factory. That is, given the principle of proportionality, it is morally impermissible for the third party to shoot down the tactical bomber. This also seems correct. But if impartialism is correct, how can it be morally permissible for the innocent civilians to kill the tactical bomber but impermissible for the third party to do so? It is agreed on all hands that both the tactical bomber and the innocent civilians retain their right not to be killed. However, the principle of proportionality requires that the innocent civilians, rather than the tactical bomber, be killed. Specifically, if impartialism is correct, then there can be no decisive moral difference between the justification available to the innocent civilians for killing or not killing the tactical bomber and that of the third party. Accordingly, consistent with his impartialism, McMahan ought to hold that it is not morally permissible for the innocent civilians to kill the tactical bomber. However, it is surely morally permissible for the innocent civilians to kill the tactical bomber (on grounds of self-defense), notwithstanding the requirements of the proportionality principle. So much the worse for impartialism—and therefore so much the worse for McMahan in so far as his account is to be understood as impartialist.36

2.6 The Fault-Based Internalist Suspendable Rights-Based Theory (FIST)

All the theories we have considered are inadequate. However, their failure points to a number of criteria of adequacy for any account of justifiable

^{36.} From an institutionalist perspective, it might be argued that whereas the tactical bomber, as a military role occupant, is morally obliged to apply the proportionality principle, innocent civilians are not thus obliged. I return to this issue in Chapters 6 and 7.

killing in self-defense. First, the justification of killing in self-defense is not simply that there is a deadly threat or that there is a deadly threat that can only be removed by killing the person who constitutes the deadly threat. Fault is involved in the justification of self-defense. The objection to the no-fault theory brings this point out. Second, any right to life, or right not to be killed, that an individual might have is dependent on, or in some way linked to, that individual discharging his or her obligation not to kill others. In other words, the moral value of an agent's life is partly dependent on the value that agent puts on the lives of others. The objections to the Hobbesian account bring this out. Third, the linkage has to be such that the right not to be killed is suspended, and not canceled or overridden. The objections to the simple right to life theories seem to justify this claim. I note that suspension of a right is consistent with the right in question being inalienable; at a deep level one retains and cannot transfer one's suspended right even though it is not in effect. Fourth, the linkage has to relativized, to some extent, to the defender and the attacker. The defender is not obligated to respond to the life-threatening attack in the way that a third person is obligated to respond. One's legitimate interest in one's own life, and the responsibility for it, is different from another person's legitimate interest in, or responsibility for, one's life. The third objection to the force-choice theory evidences this consideration. Moreover, whatever force the Hobbesian account has—and it has some force—rests on this intuition. Fifth, the attacker's reason for attacking is a morally relevant consideration. The objections to the Hobbesian view brings this out. Sixth, whether or not the attacker forced the choice (thick sense) can be a morally relevant consideration in some scenarios. Whatever appeal the forced- choice theory has—and it has some appeal rests on this thought.

Given these criteria of adequacy, I suggest the following fault-based internalist suspendable-rights theory (FIST).³⁷ You have a right not to be killed by me, and I have a concomitant obligation not to kill you.³⁸ However you suspend your own right not to be killed by me if you come to have all the following properties:

^{37.} See John Locke, *Second Treatise on Government*, Chapter 3. Montague (in "Self-Defense and Choosing Between Lives," 214) discusses this matter in relation to Locke.

^{38.} So the right in question is a so-called claim right.

- 1. You are a deadly threat to me.
- 2. You intend to kill me and are responsible for having this intention to kill me.
- 3. You do not have a good and decisive moral justification for killing me, and you do not reasonably believe that you have a good and decisive moral justification for killing me.

Accordingly, each person, X, has a set of suspendable rights not to be killed: X has a right not to be killed by Y, and a right not to be killed by Z, and so on. X also has a set of suspendable obligations not to kill: X has an obligation not to kill Y, and an obligation not to kill Z, and so on. Here my right not to be killed generates an obligation on your part not to kill me.

There are three conditions on the suspension corresponding to three features of the attacker, it being understood that the attacker himself suspends his right in virtue of possessing these three features. Condition 1 simply states what being an attacker consists in—namely, being a deadly threat. Condition 2 expresses the requirement that the attacker must be morally responsible for the fact that he is a deadly threat. Finally, condition 3 signals the relevance to justified killing in self-defense of the attacker's justification for his attack. This justification is neither objectively sufficient nor reasonably believed to be sufficient.

Note that the above definition provides a set of necessary conditions that are jointly sufficient but not jointly necessary for the suspension of the right not to be killed. One reason for this is that there may well be closely related sets of conditions that are jointly sufficient (e.g., that the attacker seeks to torture me for the rest of my life or cause severe brain damage of a kind that disables my intellectual faculties, although I remain alive and conscious).

These rights are such that when one member of the set of rights is suspended, the other rights (and concomitant obligations) remain in force. Thus, if B's right not to be killed by A is suspended, then A no longer has an obligation not to kill B (based on that right). However, B still has a right not to be killed by C, and thus C's obligation not to kill B remains in force. Accordingly, this is not an impartialist account, as are those of, for example, Thomson and McMahan.

It must also be noted that these rights not to be killed are not only able to be suspended, they can also be overridden. So while B might still have a right not to be killed by, say, C, it might be the case that it is morally permissible for C to kill B. This would be the case if B's right not to be killed by C was overridden (but not suspended).

Moreover, B might still have a right not to be killed by A in circumstances in which B intentionally tries to kill A because B wrongly, but reasonably, believes he has a good and decisive justification. Suppose, for example, A is the twin brother of a mass murderer and A knocks on B's door seeking assistance with a broken-down car. Person B wrongly but reasonably believes A is the mass murderer and tries to kill A. A responds by killing B in self-defense. Here B's right not to be killed is not suspended. Rather, B's right not to be killed is overridden by A's right not to be killed, given B wrongly, but excusably, is trying to kill A. Notice that A would not be justified in killing B unless it was necessary to do so.

According to FIST, that a person stands to his attacker in a different way from the way in which a third person stands to that attacker makes a crucial difference to the kind of moral justification available to the third person for killing the attacker.³⁹ If she can decisively intervene to save the defender's life, but only by killing the attacker, the third person confronts a choice between two lives, one guilty and one innocent. From the point of view of the third person, both the defender and the attacker have a right not to be killed, and consequently the third person has a stringent obligation not to kill the attacker (or the defender). However, the third person confronts a choice between killing a would-be murderer and allowing an innocent person to be killed. In that case, she ought to choose to preserve the life of the innocent person. Here the third person's obligation not to kill the attacker remains, but it is overridden. The duty of the third person to preserve an innocent life, coupled with the fact that the attacker is the guilty party, is sufficient to override the attacker's right not to be killed by the third person.

Moreover, even in cases where an attacker's right not to be killed by a defender is not suspended, there are moral differences between the defender and a third party due to the partialist nature of the right to self-defense. For in cases in which the rights of both defenders and attackers not to be killed have not been suspended, it is morally permissible, other things being equal, for a defender to give greater weight to his or her own life than to the life of a defender, whereas this is not so for a third party; other things being equal, third parties have to act impartially. This

^{39.} Ryan (in "Self-Defense, Pacifism and the Possibility of Killing," 519) makes this kind of point in his discussion of "negative bonds."

moral difference is evident in my versions of McMahan's conscientious car driver and tactical bomber scenarios discussed above. In these scenarios the third party ought to act impartially, whereas it is excusable for the defender to act partially in his or her own favor. Accordingly, it is morally excusable for the defenders (the pedestrians and the innocent civilians, respectively) to kill their attackers (the car driver, the joint train-drivers, and the bomber, respectively) but not for the third party to do so.

An important feature of FIST is that the attacker suspends his right not to be killed in cases in which the defender does not have to kill the attacker to save his life.40 In this respect, FIST is different from most contemporary accounts, including those of Montague, Thomson and McMahan. There are two general background intuitions here. First, whether or not a person has such a fundamental right as the right not to be killed must depend on properties of that person. It cannot depend on whether someone else, such as the defender, has or does not have a capacity to defend himself. Second, if a person deliberately kills other people without any justification whatsoever, then that person has called into question their very entitlement to live; a person's right to live is not something that exists independently of the respect that that person has for the right to life of others. However FIST focuses, in particular, on the absence of any right of the attacker that he be spared by the defender—the one the attacker sought to kill. When the defender disarms the attacker, everything is not as it was before the attack. Before the attack, the presumption is that the attacker-to-be recognizes the defender's right not to be killed. The attack reverses this presumption. The presumption must now be that the attacker does not recognize the existence of his obligation not to kill the defender.

Notwithstanding my commitment to FIST, an account in terms of an attacker's suspension of his right not to be killed, I am still able to maintain, and do maintain, that the defender has, or might have, a moral obligation (of a different kind) not to kill the attacker in cases in which it is not necessary to kill the attacker to preserve her own life. If so, this obligation is not the obligation generated by the right that each agent has not to be killed. Rather it would be one of a number of obligations. Some of these are generated by features of the attacker. For example, there is the obligation not to destroy what has moral value, and the life of the attacker still has, or may well have, moral value. And there is the related obligation

^{40.} See Ryan, "Self-Defense, Pacifism and the Possibility of Killing," 512.

to be merciful to those who have wronged you. Other obligations involve considerations that are external to the attacker. For example, there may be dire consequences for the attacker's family if you kill him. Importantly, there will be dire consequences for the community if defenders generally kill their attackers. Hence the existence of laws to the effect that one must not kill in self-defense unless one has to. So my account is able to accommodate the intuition that one ought not to kill in self-defense unless one has to.

In FIST the right not to be killed is relativized to single agents. Nevertheless, FIST can accommodate killers who seek not to kill victims qua individuals, but qua members of some group. Suppose some person has a policy of killing people who belong to a certain category, such as a certain racial group, or persons with a price on their head. Suppose also that I am a member of this category and have reason to believe that, unbeknown to the killer, I am the next person belonging to that category that he will try to kill. Perhaps my name is on the latest hit list the killer is about to receive. In this kind of case, the killer has an intention to kill someone belonging to the category to which I belong, and as a result will kill me unless I intervene. In such cases, although the killer only has an intention to kill me qua member of some category—it is not personal, so to speak—his right not to be killed by me is nevertheless suspended. Potentially, at least, this has implications for military combatants fighting wars, as we shall see in Chapter 6.

2.7 Objections to FIST

Having outlined my favored account of the justifiable killing in self-defense, namely FIST, I will now deal with a number of objections to it. First, it might be objected that the intuition that one ought not to kill one's attacker, unless one really has to, is not sufficiently catered for by FIST. In particular, it might be claimed that the right of the attacker not to be killed by me is not suspended if I can defend myself without killing my attacker. On this view, the fact that the attacker is a deadly threat who intends to kill the defender without good reason is not sufficient for it to be the case that the attacker's right not to be killed is suspended. The further condition required is that it is not the case that the defender can disarm the attacker. Let us term this alternative conception to FIST the fault-based externalist suspended rights-based theory, or FEST. However, I have already argued

above in relation to Thomson's account that it is not a necessary condition of the attacker's right not to be killed by the defender being forfeited or suspended that the defender can defend himself without killing the attacker.

To recap: The argument revealed that a necessary condition for an attacker's right not to be killed being suspended is (a) the defender cannot disarm the attacker without either putting her own life at risk or incurring serious harm to herself, and/or (b) the defender's disarming of the attacker will not remove an unavoidable and certain future threat posed by the attacker to the life of the defender, and/or (c) the defender chooses not to disarm the attacker, even though the defender knows that in this event the attacker will kill her. However, as we saw, even this host of qualifications is incomplete.

There are two relevant points to be made concerning FEST. First, it is gradually moving away from its original position, and closer to FIST. Eventually, the positions will become more or less indistinguishable. FEST becomes weak FEST becomes very weak FEST . . . becomes FIST. At that point, FEST will have surrendered to FIST; FIST has remained unchanged through the objector's process of transformation.

Second, as argued above in relation to Thomson's account, FEST is committed to the *existence* of the natural right not to be killed being dependent on a variety of contingent, complex, and changing circumstances that are external to the rights bearer. Surely such a natural right is only dependent on natural properties possessed by the rights-bearer qua human being. More specifically, FEST requires that the possession or not of the natural right of the attacker not to be killed depends on facts about the ability or willingness of the defender to defend herself. Surely, whether or not an agent has such a basic right cannot be located in facts about another agent. For these reasons, FIST ought to be preferred to FEST.

A second objection to FIST is as follows: Whereas this conception of a suspended right not to be killed has some plausibility when we consider the moment of the attack, it becomes implausible when we consider later times. Surely the former attacker has a right not to be killed by his former defender when they meet ten years later. Yet according to FIST, there would be no such right.

On FIST, the presumption is that the former attacker does not recognize any obligation not to kill the former defender, and is therefore a

deadly threat to the former defender. However, presumptions can be overridden. So the matter turns on whether or not the former attacker has—in virtue of his actions in the ten year period—overturned the presumption.

If it is not the case that there is strong evidence that the former attacker now accepts the right of the (former) defender not to be killed, and is therefore no longer a standing deadly threat, then the presumption has not been overridden. Such evidence might consist of such things as remorse on the part of the former attacker that he once tried to kill the former defender, and a sustained attempt on the part of the former attacker to reform his character.

Moreover, even if the presumption against the attacker has not been overturned there are various other moral barriers to the former defender killing the former attacker. For there are obligations to preserve what has moral value, to obey the law, to take into account consequences, and so on. The passage of time has possibly strengthened some of these. For example, if the former attacker has completed a prison sentence, and this has had a deterrent effect on him, then there might now be strong consequentialist grounds for leaving him be.

A third objection is as follows: By the lights of FIST in the case of justified lethal intervention by a third party, the right of the attacker not to be killed remains but is overridden. However, it might be argued that if that is the case then the attacker (or, at least, the attacker's family or some such) is owed compensation by the third party for infringing this right. But surely the attacker is not owed compensation. At this point we need to distinguish between (1) suspending a right, (2) violating a right, and (3) justifiably infringing a right. In the case where the right of the attacker is suspended, obviously there is no entitlement to compensation. By contrast, in the case where a right is violated, compensation is called for. What of the case of justifiable infringement? This is the kind of case of interest to us. Here there are multiple possibilities; sometimes compensation is warranted, sometimes not. In the standard scenarios of justified killing in defense of others no compensation is warranted, since the attacker culpably brought about the circumstances in which (a) the third party is morally obliged to intervene, and (b) the third party has no option but to intervene if this obligation is to be discharged.

2.8 Conclusion

In this chapter I have elaborated and criticized the main contemporary theories of justifiable killing in self-defense, and also elaborated my own alternative account, namely, the fault-based internalist suspendable-rights theory (FIST).41 As the name indicates, FIST is a fault- and rights-based account, and to this extent it is familiar. However, it has two distinctive features. First, it is a partialist account in the following respect:42 The rights not to be killed are such that when one member of the set of rights is suspended, the other rights (and concomitant obligations) remain in force. Thus if A's right not to be killed by B is suspended, then (other things being equal) B no longer has an obligation not to kill A. However, A still has a right not to be killed by C, and thus C's obligation not to kill A remains in force. This condition is conservative in that it has the effect of curtailing the putative right of third parties to kill in defense of the lives of others. Nevertheless, it is morally permissible for third parties to intervene when the moral considerations for doing so override the right not to be killed of culpable attackers.

The second distinctive feature pertains to the necessity condition. According to FIST, a culpable attacker suspends his right not to be killed by a defender even in cases in which it is not necessary for the defender to kill the attacker to save her own life. This feature of FIST is permissive in that it has the effect of strengthening the right to self-defense. Nevertheless, the defender typically has a moral obligation not to kill the attacker in cases in which it is not necessary to kill the attacker to preserve her own life. This moral obligation is based in large part on the dire consequences for the members of a community if defenders are generally allowed to kill their attackers. For such a practice, if it goes unchecked, it will almost certainly lead to interpersonal and communal violence spiraling out of control.

^{41.} I first elaborated FIST in 1993 in my article "Killing in Self-Defense". Recently, other theorists have proffered accounts that are similar in some respects, e.g. Uwe Steinhoff "Self-Defense and the Necessity Condition (unpublished).

^{42.} It is also partialist in the manner of Hobbesian accounts, but this is not a distinctive feature of FIST.

Police Officers, Regular Soldiers, and Normative Institutional Analysis

IN THIS CHAPTER I undertake a normative, comparative institutional analysis of police officers and regular soldiers in the setting of the contemporary liberal democratic nation-state. This will serve as a precursor to the detailed discussion in later chapters of police and military use of lethal force. I do so in the overall context of my favored normative teleological account of institutions and institutional roles, according to which the latter presuppose logically prior *natural* moral rights, obligations, and goods (the natural right to self-defense and natural obligation to defend the lives of others, in particular), but I nevertheless adjust or further specify these natural rights and obligations in light of the institutional purposes or, more precisely, collective ends served by these institutions.

The occupational roles of police officers and regular soldiers are related by virtue of an important feature that they share in common—a feature that is evidently one, but not the only, defining feature of each. The feature in question is their use of coercive, indeed lethal, force. That this is a defining feature of the police, in particular, might be controversial in some quarters, but it is, to say the least, an influential view,² and one that

An earlier version of much of the material in this chapter appeared in Miller, "Police, Citizen-Soldiers and Mercenaries."

^{2.} See for example, Egon Bittner, *The Functions of Police in Modern Society* (Washington, D.C.: US Government Printing Office, 1970). For social contract justification of police use of lethal force, see Kleinig, *The Ethics of Policing*, Chapter 6; and Reiman, "The Social Contract and the Police Use of Deadly Force."

I have defended elsewhere.³ At any rate, it is an assumption of this chapter and elsewhere in this book. Granted that this defining feature—the use of coercive or lethal force—serves to demonstrate that the two roles are related, how are they to be differentiated?

Differentiating police officers from regular soldiers might seem straightforward enough. The role of the police officer is to maintain order and enforce the domestic criminal law of the land—paradigmatically by arresting offenders, but on occasion, and only if necessary, by using lethal force. By contrast, the role of the regular soldier (or sailor or airman), whether they be members of a standing professional army, members of a voluntary citizen-militia, or conscripted citizens, is to defend the state (or like political entity) against armed aggression by other states (or like political entities⁴)—paradigmatically by the use of lethal force. I will refer to naval and air force personnel, as well as army personnel, as regular soldiers, in part for ease of exposition, and in part to signal that they are members of the armed forces of the nation-state—specifically, the contemporary liberal-democratic state. The contrast here is with *irregular* soldiers, such as mercenaries, armed insurgents, terrorist-combatants, and the like.

In recent times this way of differentiating police from soldiers has come under some pressure. Are not many regular army soldiers engaged in peacekeeping missions, and as such focused on maintaining order and upholding the law? Are not these soldiers essentially functioning as police? Consider also armed police squads engaged in shoot-outs with heavily armed bank robbers or terrorist groups in, for example, India and South Africa. Are not these police essentially functioning as combatants?

Evidently, there has been a blurring of the distinction between police officers and regular soldiers. Arguably, this is in part a consequence of the rise of international terrorism (e.g., al-Qaeda and ISIS), and, as a consequence, the need for closer cooperation between domestic police agencies and military organizations, for example, in the intelligence-gathering/sharing area. The so-called war on terror has also, one way or another,

^{3.} Miller and Blackler, *Ethical Issues in Policing*, Chapter 1. For a different view, see Kleinig, *Ethics of Policing*, Chapter 2.

^{4.} I would include some, but not all, terrorist and/or revolutionary organizations among these political entities.

^{5.} Arguably, it is important to have an institutional demarcation between intelligence-gathering agencies, such as the CIA, and military forces, and also, within the intelligence-gathering community, between those with a domestic focus (e.g., MI5 in the UK) and

led to a great expansion of security agencies and an attendant outsourcing of security functions to the private sector, notably to private military forces (PMFs) in Iraq, Afghanistan, and elsewhere.⁶ At any rate, whatever the precise nature, extent, and causes of the blurring of the distinction, in this chapter I seek, first, to clarify these related occupational roles, and, second, to unearth the implications in general terms for the morally permissible use of lethal force by the police, on the one hand, versus the military, on the other.

My general approach here is to frame these problems in normative and institutional terms. That is, I take it that differentiating between police officers and regular soldiers is, or ought to be, principally a matter of demarcating their respective institutional roles. This, in turn, requires a specification of the nature and function (or end or telos) of the institutions of which these roles are, or ought to be, constitutive elements. Such specification is, I suggest, essentially a normative undertaking, as opposed to, for example, an exercise in purely descriptive organizational sociology. That said, it is a normative exercise that needs to be anchored in appropriate institutional description.

In proceeding in this manner, I eschew the essentially noninstitutional, individual-based approach favored by many contemporary philosophers.⁸ In doing so, I am not engaging in sociology, much less endorsing some

those with an external focus (e.g. MI6 in the UK). The CIA's use of UAVs (unmanned aerial vehicles), or "drones," is a concern in this regard.

^{6.} Perhaps the initial impetus for privatization was the ending of the Cold War, which brought with it not only the discharging of millions of soldiers, but also the end of serious resistance to free-market ideology. See P. W. Singer, Corporate Warriors: The Rise of the Privatized Military Industry (Ithaca, N.Y.: Cornell University Press, 2003), and Andrew Alexandra, "Mars Meets Mammon," in Andrew Alexandra, Deane-Peter Baker, and Marina Caparini, eds., Private Military and Security Companies: Ethics: Policies and Civil-Military Relations (London: Routledge, 2008), 89–101. More recently, the rise of the Chinese state and economy—dominated as these are by hybrid public/private sector state-owned enterprises (SOEs)—has arguably tempered the enthusiasm for markets, at least in their pure form, and perhaps caused a rethink of the privatization/outsourcing, etc. of security functions in particular. At the very least there is growing concern in respect of Chinese firms taking over the operation of critical infrastructure and, more generally, of the security risks China Inc. poses (e.g., in the area of cybersecurity).

^{7.} Miller, Moral Foundations of Social Institutions.

^{8.} See, for example, McMahan, "Collectivist Defenses of the Moral Equality of Combatants." I broadly agree with McMahan's criticisms of collectivist views, such as that espoused in Kutz, "The Difference Uniforms Make." However, my institutional view offers a relational individualist analysis and, as such, sidesteps both narrowly individualist as well as collectivist accounts.

metaphysical view to the effect that institutions are *suprahuman* agents, the actions of which cannot be reduced to those of individual human agents. Far from it; sociologist tend to reject normative analysis, and I certainly reject the metaphysical extravagance of the likes of Peter French, Margaret Gilbert, and some Hegelians of old. Rather, I am insisting on defining the notions of police officer and regular soldier by recourse to normatively specified, descriptively anchored, organizational roles—a procedure that might be referred to as institutional ascent. Institutional ascent contrasts with the noninstitutional, individual-based approach of attempting to identify features of salient individuals who have, or might have, occupied the occupational roles in question, and using these features to generate a set of necessary and sufficient conditions for someone to be a police officer or regular soldier.

On the other hand, given my rejection of supraindividual institutional agents, the procedure of institutional ascent needs to offer a theoretical account of the relationship between institutional roles and the individual human beings who occupy those roles and, in particular, their preinstitutional (logically prior) *natural* rights and obligations. Here I invoke the quasi-theoretical notion I have analyzed elsewhere of acting qua member of an institution. I explain this notion in the context of my outline of the key theoretical concept for my purposes in this chapter—namely, that of an institutional role.

I stress that my procedure of institutional ascent is consistent with individualism broadly understood. Within individualism, we need to distinguish between atomistic accounts and relational accounts. Historically, atomism has been associated with methodological individualism and posits rationally self-interested actors who cooperate only insofar as each believes it to be in his or her own individual interest, or at least a means to his or her own individual end. McMahan offers an atomistic individualistic account of war in that he seeks to generalize from the individual case of self-defense to ever more complex cases involving numerous individuals attacking and defending one another over extended periods

^{9.} Peter A. French, "The Corporation as a Moral Person," *American Philosophical Quarterly* 16, no. 3 (1979): 207–215; Margaret Gilbert, *On Social Facts* (Princeton, N.J.: Princeton University Press, 1992).

^{10.} Miller, Moral Foundations of Social Institutions, 52-54.

^{11.} David-Hillel Ruben, *The Metaphysics of the Social World* (London: Routledge and Kegan Paul, 1985), Chapter 4; Charles Taylor, *Philosophical Papers*, Vol. 2, *Philosophy and the Human Sciences* (Cambridge: Cambridge University Press, 1985), 15–57.

of time.¹² However, war involves joint action, particularly joint action in organizational settings. Yet there is no easy theoretical route from individual action to organizational action. Indeed, most contemporary social ontology theorists hold that organizational action is conceptually irreducible to individual action.¹³ At any rate, at this point McMahan and other reductive individualists require an adequate individualistic theoretical account of joint action and of joint action in organizational settings, in particular—something that they have not provided. My own account provides the required theoretical account of joint action in organizational settings (see below).

3.1 Institutional Roles

The occupational roles of police officer and regular soldier are institutional roles; that is, they are constitutive in part of social institutions, namely, police organizations and military forces, respectively. So how are we to understand social institutions? In this discussion, social institutions are to be understood, in the first instance, as organizations and systems of organizations. As such, they have three key dimensions: function, structure, and culture. The function is the goals or ends or purposes—collective ends, in my parlance—that the institution serves—military institutions have as a purpose to fight and win wars, for example. The structure is the (usually formal) structure of task-defined roles constitutive of the institution, such as the rank structure favored by most police and military organizations. The culture is the ethos, or "spirit," that pervades an organization; it consists in the informal attitudes that influence the way in which tasks are performed, and, on occasion, whether they are performed at all. Notoriously, for example, police culture is solidaristic and puts a premium on loyalty to fellow officers, even to the point of shielding corrupt officers.

Elsewhere¹⁴ I have argued for what I term a teleological *normative* theory of contemporary social institutions and their constitutive occupational

^{12.} Jeff McMahan, "War as Self-Defense," *Ethics and International Affairs* 18, no. 1 (2004): 75. I am not suggesting that he is committed to the rationally self-interested version of atomism.

^{13.} John Searle, Making the Social World: The Structure of Human Civilization (Oxford: Oxford University Press, 2010); Raimo Tuomela, Social Ontology: Collective Intentionality and Group Agents (Oxford: Oxford University Press, 2013); Gilbert, On Social Facts.

^{14.} Miller, Moral Foundations of Social Institutions, Chapter 1.

roles. ¹⁵ Put simply, on this account social, institutions are organizations and systems of organizations that not only realize collective ends, but also provide collective goods by means of joint activity (i.e., the collective ends are collective goods). This is what might be referred to as the general theory of social institutions. However, the collective goods in question vary from one institution to another. They include the fulfilment of a variety of aggregated moral rights, such as needs-based rights for security (police organizations), material well-being (businesses operating in markets), education (universities), governance (governments) and so on. Hence the requirement for what might be referred to as special theories of particular social institutions, such as the normative theory of a police force as opposed to a military force.

The central concept in the teleological account of social institutions is that of *joint action*. ¹⁶ As we saw in Chapter 1, joint actions are actions involving a number of agents performing interdependent actions in order to realize some common goal or collective end (e.g., members of a mortar squad loading and firing a mortar having as a common goal to destroy an enemy gun emplacement). I defined a collective end as an individual end more than one agent has, and which is such that, if it is realized, it is realized by all, or most, of the actions of the agents involved; the individual action of any given agent is only part of the means by which the end is realized, and each individual action is interdependent with the others in the service of the collective end.

Organizational action typically consists in, what I have elsewhere termed, a *multilayered structure of joint actions*.¹⁷ As I have argued in various places, ¹⁸ one important illustration of the notion of a layered structure of joint actions is an armed force fighting a battle. Suppose at an organizational level a number of joint actions ("actions") are severally necessary and jointly sufficient to achieve some collective end. Thus the "action" of the mortar squad destroying enemy gun emplacements, the "action" of the flight of military planes providing air cover, and the "action" of the infantry platoon taking and holding the ground might be severally

^{15.} In relation to professional roles in particular.

^{16.} The notion of joint action can in turn be used to construct more complex notions, such as that of joint activity and joint task, in the manner in which action can be used to construct notions of activity, task, and the like.

^{17.} See, for example, Miller, Moral Foundations of Social Institutions, Chapter 1.

^{18.} Miller, "Joint Action"; Miller, Social Action; Miller, Moral Foundations of Social Institutions.

necessary and jointly sufficient to achieve the collective end of defeating the enemy; as such, these "actions," taken together, constitute a joint action. Call each of these actions "level-two actions," and the joint action that they constitute a "level-two joint action." From the perspective of the collective end of defeating the enemy, each of these level-two actions is an individual action that is a component of a (level-two) joint action: the joint action directed to the collective end of defeating the enemy.

However, each of these level-two actions is already in itself a joint action with component individual actions; and these component individual actions are severally necessary (let us assume this for purposes of simplification, albeit it is unlikely that every single action would in fact be necessary) and jointly sufficient for the performance of some collective end. Thus the individual members of the mortar squad jointly operate the mortar in order to realize the collective end of destroying enemy gun emplacements. Each pilot, jointly with the other pilots, strafes enemy soldiers in order to realize the collective end of providing air cover for their advancing foot soldiers. Further, the set of foot soldiers jointly advance in order to take and hold the ground vacated by the members of the retreating enemy force.

At level one, there are individual actions directed to three distinct collective ends: the collective ends of (respectively) destroying gun emplacements, providing air cover, and talking and holding ground. So at level one there are three joint actions: the members of the mortar squad destroying gun emplacements, the members of the flight of planes providing air cover, and the members of the infantry taking and holding ground. However, taken together, these three joint actions constitute a single leveltwo joint action. The collective end of this level-two joint action is to defeat the enemy; and from the perspective of this level-two joint action, and its collective end, these constitutive actions are (level two) individual actions.

I note that the relationship between an officer and his or her subordinates may involve a second-order joint action that consists in coordination of a first-order joint action. The officer commanding the mortar squad, for example, may issue commands to the members of the mortar squad in the course of their activities, such as commanding them to fire more rapidly, or to adjust the direction in which they are firing. The officer's commands are joint with the members of the mortar squad insofar as members of the squad adjust their actions in compliance with these orders.¹⁹ It follows that the individual actions constitutive of a joint action

^{19.} Miller, "Joint Action," 287.

are not necessarily autonomously performed, any more than an intentionally performed single action is necessarily autonomously performed.

The notion of acting qua occupant of an institutional role (e.g. that of foot soldier) is simply that of performing the tasks definitive of the institutional role (including the joint tasks), conforming to the norms and regulations that constrain the tasks to be undertaken, and pursuing the purposes or ends of the role (including the collective ends).

Collective goods of the kind I have in mind have three properties: (1) they are produced, maintained or renewed by means of the *joint activity* of members of organizations or systems of organizations (i.e., by institutional role occupants); (2) they are *available to the whole community* (at least in principle); and (3) they *ought* to be produced (or maintained or renewed) and made available to the whole community, since they are desirable goods and ones to which the members of the community have an (institutional) *joint moral right*.²⁰ Notice that the institutional role occupants in question have a collective, or joint, moral responsibility to produce, maintain, or renew these collective goods, and this responsibility is to the members of the particular community in question. So it is a partialist collective responsibility. Moreover, the rights and duties constitutive of the occupational roles in questions are special rights and duties in two respects. First, they are partialist rights and duties, and, second, they are rights and duties that other members of the community may not have.

Notwithstanding that natural rights, such as the right to life and the right not to be tortured, and their correlative obligations are logically prior to social institutions, many moral rights, duties, values, principles, and so on are *not* logically prior to social institutions. Such institutional moral rights and duties include ones that are (a) derived at least in part from collective goods, and (b) constitutive of specific institutional roles, such as the rights and duties of a fire officer, police officer, or regular soldier.

Importantly, institutional arrangements assign *moral* rights and duties to natural persons (so to speak) that those persons did not previously have, and in some cases that no person previously had.²¹ They are institutional rights and duties that are also moral rights and duties. Indeed, they are *special* moral rights and duties. In the case of the institutional role of police

^{20.} Miller, Social Action, Chapter 7.

^{21.} Miller, Moral Foundations of Social Institutions. For a contrary view see Bernard Gert, Common Morality (Oxford University Press, 2007).

officer, for example, the moral basis appears to be something like the collective good of aggregate human security in the jurisdiction in question. Perhaps each member of a community has an individual human right to, say, some minimum level of security, if he or she needs it. However, it is only when a certain threshold of aggregate need exists that the establishment of an institution takes place (and ought to take place). For example, a police organization with its constitutive institutional role occupants (police officers) is not established because a single person's right to security is not being realized. When such a threshold of aggregate need exists, what is required is collective or joint action on the part of many persons (indeed, a multilayered structure of joint actions). Accordingly, a cooperative enterprise or institution is established that has as a collective end the provision of security to the needy many by means of the joint activity of the police officer members of the institution.

The (collective) moral obligation to assist may, then, in certain cases, imply the obligation to establish and support institutions to discharge the original obligation to assist. Once such institutions with their specialized role occupants are in place, it may be that those of us outside the institution generally have no further duty to assist within the area of the institutions' operations. Indeed, it may be that, generally, we should not even try to assist, given our relative lack of expertise and the likelihood that we will get in the way of the role occupants. Moreover, these specialized role occupants have duties that they did not have before, and that in fact no one had before the establishment of the institutional role with its specific duties. For example, police officers may have an institutional and, indeed now, moral duty to put themselves in harm's way in a manner and to an extent (e.g. by arresting armed and dangerous offenders across the entire community (jurisdiction)) that is not morally required of ordinary citizens, and that was never morally required of anyone prior to the establishment of police organizations. Notice that the special (institutional and moral) rights and duties of police officers are jurisdictionally relative; an Australian police officer, for example, does not have these institutional rights and duties in China.

Once institutions and their constitutive roles have been established on some adequate moral basis, such as the duty to aid, then those who undertake these roles necessarily put themselves under obligations of various kinds—obligations that attach to, and are in part constitutive of, those roles. To understand the specific content of institutional role morality, then, we need to examine the purposes—to meet aggregate security

needs, in the case of police officers—that the various institutions and their constitutive roles have been formed to serve, and the way in which roles must be constructed in order to achieve those purposes. Of course, one only comes to have an institutional role through voluntary action, but the morality that comes with that role is not itself ultimately grounded in the individual's choice, but rather in the larger purposes (collective ends that are collective goods) of the role.

A further point to be made here is that any given institution is typically one component in an overall structure of institutions, and the single institution in question serves its institutional purpose (produces the relevant collective good) in the context of the other institutions serving theirs. For example, the police are a component in the overall criminal justice system. Moreover, some institutions, notably governments, are meta-institutions; that is, they coordinate and regulate other institutions. The point to be stressed here is that single institutions have important structural and functional relationships to other institutions within the nation-state, and frequently, in a rapidly globalizing world, to institutions in other nationstates; indeed, many institutions are transnational in character. Hence my emphasis in the sections following this one on normatively appropriate institutional relationships between different security agencies, (e.g., the military and the police), on the one hand, and between security agencies and fundamental institutions (e.g., the judiciary and the democratically elected government of the day), on the other hand. This might involve the need for a degree of institutional independence of police agencies from government).22

In light of the above general normative teleological-cooperation theory of contemporary social institutions and their constitutive occupational roles, a number of points can now be made in relation to security agencies, in particular. First, the general theory requires that the special normative theory of any given security agency be anchored in empirical reality. If the Australian Defence Force, for example, never trained for, or engaged in, any wars of national self-defense, then this would put pressure on the special normative theory that the Australian Defence Force ought to exist to protect the Australian citizenry from external aggression.

^{22.} The importance of a degree of police independence is obvious when one considers that police officers need to investigate the criminal activities of, for example, politicians. On this issue see Seumas Miller and Ian Gordon *Investigative Ethics: Ethics for Police Detectives and Criminal Investigators* (Oxford: Blackwell Publishing, 2014) Chapter 4.

Moreover, new security needs may well give rise to the establishment of new or substantially redesigned institutional roles and, therefore, new structures or configurations of special moral and institutional rights and duties. National cyberwarfare forces are a case in point. Arguably, cyberwarfare, understood as involving offensive cyberattacks on the communication and information technology infrastructure of an "enemy" state, for example, is a form of conflict short of war in the conventional sense, but not really police work, since it is (presumably) a matter of national defense rather than an attempt at (domestic or international) law enforcement. Normatively speaking, the establishment and ongoing maintenance of such institutional roles (cyberwarfare roles) would only be justified if the needs in question persisted and cyberwarfare roles were fit for purpose. If so, then an appropriate special normative theory of cyberwarfare forces should be developed; a normative theory anchored in empirical reality. Indeed, it seems that such normative theorizing is currently underway.²³

Second, at the level of the individual role occupant, as opposed to the institution per se, there is conceptual, and typically also some actual, space between, on the one hand, the collective end and activities that are definitive of an occupational security role by the lights of the relevant normative theory, and, on the other hand, the ends and activities actually pursued by a given role occupant. Accordingly, any actual role occupant can be closer to or further away from the institutional ideal. For example, a good police officer would correctly exercise his or her expertise in the service of, say, deterring gangs of youths from engaging in assault, and thereby protect the personal security of vulnerable citizens; a bad police officer might ignore the problem or take ineffective measures, and thus fail to realize these ends. Naturally, at some point a bad or incompetent, putative police officer will cease in reality to be a police officer (e.g., if the officer is incapable of understanding any of the laws she or he is supposed to be enforcing).

Third, the relevant special theory will prescribe the appropriate normative relationship of a given security agency to the state or other political entity and do so by recourse to the collective good(s) that the agency in question exists to provide. For example, the above-mentioned independence of police agencies vis-à-vis other institutions derives from their defining collective good of upholding law and order.

^{23.} Fritz Allhoff, Adam Henschke, and B. J. Strawser, eds., Binary Bullets: The Ethics of Cyber-Warfare (Oxford: Oxford University Press, 2016).

Here it is important to note that market-based, commercially driven organizations, such as private military forces (PMFs) do not, and ought not, have the same institutional relationship to, for example, the executive branch of government as do public sector agencies, such as most military forces. For market-based organizations and public sector agencies by their very nature have disparate institutional commitments. Markets are a specific institutional arrangement in which organizations engage in commercial competition with one another under conditions of more or less free and fair competition, and each pursues profit maximization as an organizational goal. The collective good is realized indirectly-not by each organization consciously aiming at it, but by virtue of the socalled invisible hand. The government via its regulators intervenes only to ensure a given market is functioning as it should: there is free and fair competition and the invisible hand is working. PMFs are market actors operating under this institutional arrangement. The market is not the institutional arrangement in which public sector agencies, such as most police and military forces, operate.²⁴ The latter are tax-funded organizations that directly and consciously aim at their relevant defining collective good (e.g., law and order, national security). Moreover, the appropriate normative institutional relationship between each of these different kinds of security agency and government is, in both cases, a complex matter. I seek to unravel these two institutional relationships in the relevant sections below. Suffice it to say here that neither of these institutional relationships is that which obtains between governments and market actors such as PMFs.

By the lights of the normative theory of institutional roles outlined above, there is a need to distinguish the institutional point to the effect that someone is acting qua this or that occupational role occupant, (e.g., a police officer or soldier intentionally doing his duty) from the noninstitutional, individual-based points about the actual motives of individual regular soldiers and police officers (e.g., that some regular soldiers are primarily motivated by money, whereas most regular soldiers are not, or that all have mixed motives). These latter points are to be understood

^{24.} Free market ideology has to some extent permeated the public sector in recent years, and this has led to attempts to introduce market-derived "reforms" of various kinds into the public sector. Insofar as these have not simply consisted in wholesale privatization, they have resulted in public sector agencies with some of the trappings of the market and, I would argue, a degree of institutional confusion, notably in relation to their institutional purposes (collective ends).

as statements to the effect that someone (or many or most persons) is acting qua individual person, in his or her personal—as opposed to institutional—capacity.

Finally, I should point out that by the lights of my normative teleological-cooperation model, the existence of the phenomenon of individuals acting qua occupants of an occupational or other institutional role does not imply that there are agents other than individual human beings in play here; it does not imply, in particular, that there are supraindividual, institutional agents. The above invocation and description of multi-layered structures of joint action ought to allay this concern.

3.1.1 Institutional Responsibility

An important aspect of institutional roles is the ascription of institutional responsibility and, specifically, the relationship between institutional responsibility and moral responsibility. This relationship is a difficult one to unravel, not the least because the notion of moral responsibility is itself theoretically complex and a matter of controversy. Moreover, I cannot in this short section elaborate on these complexities and controversies. However, there are some general points that can be raised. In raising them I assume that (roughly speaking) an agent, A, is morally responsible for an action (or omission), x, or the foreseeable and avoidable outcome of x, if x is morally significant (and A is aware, or should be aware, of this moral significance), A intentionally performed x, A's intention to x caused x, and A's intention to x is under A's control.

Obviously some institutional actions – actions performed by the human occupants of institutional roles in their capacity as institutional actors - are not morally significant and some morally significant actions are not institutional. On the other hand, as we have seen in respect of police officers and military personnel, many institutional actions are morally significant and not the least of these is the use of lethal force.

Let us henceforth consider only institutional actions that are morally significant and known to be so by the relevant institutional actor — or, at least, the institutional actor should know the actions in question are morally significant. A question now arises as to whether or not with respect to these actions at least, moral responsibility tracks institutional responsibility. If so, then an institutional actor who performs a (morally significant) institutional action, or fails to perform one, is necessarily morally responsible for the performance of that action or omission, and for its foreseeable

and avoidable outcomes. However, this appears not to be case. Consider, for example, a senior government official, such as a cabinet minister, a number of whose subordinates engage in serious and ongoing war crimes, such as torture. Such acts are morally significant and the subordinates are morally responsible for perpetrating them. What of the senior government official? Under some institutional arrangements, the senior official might be held institutionally responsible for failing to ensure that such crimes as this did not take place and, consequently, might be forced to resign. Nevertheless, the senior official might not be morally responsible for failing to prevent these crimes.²⁵ Let us assume that the senior official could have prevented these crimes, if he knew about them and he could have known about them if he had spent a good deal of his time focused on war crimes prevention. However, he did not; he had other legitimate and more pressing priorities. Perhaps the senior official took all the steps that might reasonably be expected of him to prevent these crimes but his job is an onerous one, the war criminals were exceptionally clever, and so on. In short, whereas he is institutionally responsible for failing to prevent these crimes he is, arguably, not morally responsible. So apparently institutional responsibility does not necessarily track moral responsibility. Nor is it obvious that such an institutional arrangement, supposing it exists, is necessarily deficient qua institutional arrangement. I note that Schauer, for example, has argued in detail²⁶ that institutional arrangements, including laws, are necessarily blunt instruments and, as such, cannot be sensitive to all the requirements of morality.

A second claim concerning the relationship between moral responsibility and institutional responsibility is that institutional arrangements can sometimes make a difference with respect to whether moral responsibility is full or partial. Thus, as a consequence of institutional arrangements put in place to deal with some collective action problem, each agent might, it is claimed, have full moral responsibility (jointly with others) for some adverse outcome O – notwithstanding the fact that each only made a very small causal contribution to the outcome. Suppose

^{25.} But, of course, his culpability may be rightly suspected and, indeed, proven in a court of law. In relation to torture (or so-called 'enhanced interrogation') by US military and CIA officials in Abu Ghraib prison in Iraq see the *Torture Memos* prepared by the US Department of Justice.

^{26.} Frederick Schauer *Profiles, Probabilities and Stereotypes*, (Harvard University Press, 2003).

the impoverished members of sailing ships' crews in the 18th century are informed of a law to the effect that anyone stealing one or more of the (somewhat expensive) screws inserted into their ship's woodwork to hold its wooden planks together will be flogged and, further, if the ship sinks as a consequence of multiple screws being removed in this manner then anyone who has removed at least one of these screws will be held to be fully legally responsible for any deaths resulting from the ship sinking and to be legally liable to the death penalty. Let us assume that this admittedly harsh criminal law is morally justified in the circumstances, perhaps in part because of the difficulty of identifying which sailors removed screws. At any rate, this apparently harsh law is the only means to prevent these wooden ships frequently sinking and, therefore, the only means to prevent great loss of life. In that case it might be thought to be morally justified for each screw-thief who contributed to causing a ship to sink be held fully legally responsible for the loss of life, notwithstanding that his causal contribution to the sinking might be minute. This being so, it might be further argued that each such screw-thief is also fully morally responsible for any loss of life. If so, then the establishment of institutional arrangements can evidently transform prior partial moral responsibility for an adverse outcome (e.g. prior to the existence of a relevant law) into full moral responsibility (post the enactment of the law). Moreover, it can do so notwithstanding that the underlying causal responsibility is unchanged and is only partial causal responsibility for the adverse outcome.

A final claim concerning the relationship between moral responsibility and institutional responsibility is one we have already discussed, namely, that institutional arrangements assign moral responsibilities to agents that those agents did not previously have and, indeed, in some cases that no agent previously had. We have already mentioned a number of these in relation to police officers and military personnel and we return to this issue below and in Chapters 4 and 6, in particular.

3.2 The Institutional Role of Police Officer

In this section I discuss the institutional role of the police officer, with a view to differentiating it from that of the soldier. I also address the question of what the implications would be for the role of the police officer of any attempt to introduce market-based, commercially driven police services.

Elsewhere,²⁷ I have defined the police role in terms of (1) the collective end of protecting the legally enshrined, justifiably enforceable, moral rights of citizens from violation by fellow citizens,²⁸ including citizens who are also institutional actors, such as government officials²⁹ (i.e., the collective good of internal security³⁰); (2) the exercise of this role by means of the use of coercive force, or the threat thereof; and (3) a jointly held moral obligation on the part of all citizens to protect the moral rights of fellow citizens from their fellow citizens (i.e., to provide the collective good of internal security). This latter, jointly held, moral obligation could be discharged by an all-citizen police service, but in contemporary societies it is discharged by establishing the institution of the police and its constitutive occupational role of police officer. (I return to this issue in Chapter 4).

An important aspect of all this is the institutional division of labor involved. It is by means of a kind of institutional division of labor that the members of various institutions in a given community or nation-state discharge different sets of jointly held obligations that are in fact held by all (e.g., soldiers in a standing professional army, police in a police service). However, it remains true that all able-bodied citizens have a jointly held obligation to provide for security. It is just that if a subset of the community (e.g., the members of a police service) provide collective security for all, then their fellow citizens are not needed to perform policing duties, and so are not obliged to perform them. Nevertheless, members of the citizenry who are not police officers have residual joint obligations in relation to collective internal security, such as paying for police salaries, assisting the police by reporting crime, appearing as witnesses, and so on. Indeed, to do their job properly, police rely on the assistance of the citizenry at large.

^{27.} See Miller and Blacker, Ethical Issues in Policing, Chapter 1.

^{28.} This is not quite right since the violations in question might be perpetrated by residents who are not citizens, for example.

^{29.} When institutional actors violate the rights of citizens they might be doing so in their private capacity or their institutional capacity. If the latter, they are typically also violating the law, at least in liberal democratic states. However, this is not necessarily the case, e.g. a given law might itself be a violation of moral rights as past laws banning homosexual acts between consenting adults were.

^{30.} I have argued elsewhere that *order*, in *law and order*, is not reducible to respect for legally enshrined moral rights, since there can be order and yet rights violations. However, I also argue that if there is respect for the law and the law enshrines moral rights, then there will be a high degree or order. See Miller and Gordon, *Investigative Ethics*, Chapter 1. I do not need to pursue these complications here.

So even when the institution of the police is set up, the jointly held obligation of the citizens to provide for their collective security does not disappear; rather, there is no need for it to be directly discharged by, for example, engaging in police work. However, if the police were found to be incapable of providing collective security, then citizens might need to once again discharge their jointly held obligation by engaging in activities akin to those undertaken by members of specialized police organizations (e.g., by establishing neighborhood patrol groups in townships in South Africa during the breakdown of law and order in the apartheid years). However, it is important to stress that this jointly held obligation of citizens to provide for their collective security (directly or, more likely, indirectly) is relatively inchoate and unspecified and, therefore, stands in considerable contrast with the well-developed and clearly specified rights and duties constitutive of the role occupants of police and military institutions (of which more in Chapters 4 and 6).

This jointly held moral obligation on the part of all citizens to provide collective internal security is a weighty, albeit relatively inchoate and unspecified, moral obligation that must be discharged, even if citizens incur significant costs in so doing. In well-ordered, contemporary, liberal democracies, such costs would typically consist in large part in the payment of taxes to fund police organizations. The moral obligation to see to it that security is provided is a weighty one, because security is a human good of great importance; indeed, it is a necessary condition for the enjoyment by humans of most, if not all, other collective goods.

We have been speaking somewhat loosely in terms of collective internal security. However, it is now time to return to our initial specification of the institutional ends of police organizations provided at the beginning of this section—namely, the collective end of protecting the legally enshrined, justifiably enforceable, moral rights of citizens from violation by fellow citizens. I want to discuss the relation of the police to the law on this account; specifically, that the moral rights in question are legally enshrined, notably in criminal codes (e.g., laws against murder, assault, fraud, and theft). My focus is on the implications that the institutional end of upholding the law has for the role of police officer.

There are three points to be made here. First, as argued above, the primary and (typically) overriding commitment of the police must be to ensure that the law³¹ is upheld, as opposed to ensuring that they comply

^{31.} Of course, the law is here to be understood as enshrining the justifiably enforceable moral rights of the citizens.

with the directives of government. In this respect police have a quasi-judicial role,³² and are therefore somewhat different from civil servants and the military, who are essentially the instruments of the elected government. Please note that this point should not be confused with the requirement that all citizens and institutional role occupants, including police, comply with the law. Second, and notwithstanding their primary and overriding commitment to law enforcement, the police must be responsive to the elected government of the day. In this regard they are somewhat different from the judiciary, for example. Moreover, this requirement stands in some tension with their quasi-judicial role. Third, in order to ensure that they are able to enforce the law in a given jurisdiction (which might be a city or other subpolitical entity rather than the state itself) they must enjoy a monopoly of coercive force in that jurisdiction.

Let me now discuss each of these three points in somewhat more detail, beginning with the first one. Evidently, police need to have a considerable degree of operational autonomy, if they are properly to discharge their functions of upholding the law, investigating crime, and the like. This is partly a matter of efficiency and effectiveness; the police are, or should be, not simply competent practitioners, but (so to speak) the experts. In this regard the police are no different from the military.

However, given their primary institutional end of ensuring that the law is upheld, the police need to have a substantial degree of institutional independence of government in particular; something which the military do not need and ought not to have to the same degree. Politicians, for example, need to be subject not only to an independently adjudicated law (the role of the judiciary), but also to an independently enforced law (the role of the police). If a powerful politician, or powerful group of politicians, act unlawfully, the police must investigate, arrest, and charge them. In order to ensure that the police effectively carry out these investigative tasks in relation to government, the police need to have a substantial degree of institutionally based independence from government. Naturally, what

^{32.} The terminology used in by the UK's commission into the police in arguing for police independence, *The Royal Commission on the Police: Cmnd. 1728: Final Report, 1962*, paras. 87 and 88. For a similar argument on the importance of police independence, see also Justice Lusher, *Report of the Commission to Inquire into New South Wales Police Administration* (Sydney: NSW Government Printer, 1981), 680.

must go hand in glove with independence is accountability; police must be held accountable for the exercise of their independence.

This institutional independence needs to be seen in the context of the so-called separation of powers. Specifically, the executive, the legislature, and the judiciary ought to be kept separate; otherwise, too much power is concentrated in the hands of a unitary state agency. It is highly dangerous for those who make laws also to be the ones who apply those laws. Politicians, for example, need to be subject to laws adjudicated by judges who are institutionally independent of politicians, on pain of undue influence on judicial processes and outcomes. Likewise, the enforcement of these laws needs to be undertaken by an agency with some independence from those it might have to enforce it against, including government officials.

There are grave dangers attendant upon police coming simply to be the instrument of government, rather than to have as their priority to serve the law and, on my account, to protect moral rights enshrined in the law. In this connection, consider the police states of communist Eastern Europe, Nazi Germany, Iraq under Saddam Hussein, and the like. These former police states serve to illustrate the importance of a substantial degree of police independence from government in favor of serving legally enshrined moral rights. Indeed, police operational autonomy has on occasion been abridged by democratically elected governments in order, for example, to create and preserve a manageable level of public disorder from which the incumbent political party and its supporters may politically or materially benefit.

We have been discussing institutional independence in the context of the interface of police and the government of the day. Enough has been said by way of demonstrating that the notion of the police as simply the instrument of government is unsustainable. On the other hand, determining the precise nature and extent of police independence is extremely difficult, given a contrasting institutional constraint on police forces—namely, their need to be responsive to the democratically elected government of the day (of which, more below). Moreover, there are dangers attendant upon high levels of police independence. After all, the police are the coercive arm of the state, and historically the abuse of their powers has been an ever-present threat. Specifically, the police institution as the coercive arm of the state does need to be subjected to (at least) the constraint and influence of the community via democratically elected bodies, notably the government of the day.

If independence is a key requirement for police and police organizations, then it is presumably also a requirement for investigators in other sectors. In recent times there has been a rebirth of private policing, most prominently in the protective services area (e.g., armed guards for banks, armed escorts for personnel), but also in the investigations area. For example, in the important area of fraud investigation, many corporations are employing their own investigators. The increase in the numbers of private sector security personnel raises the important ethical issue of their independence. For example, conflicts of interest can and do arise for private sector personnel when the interests of the employing private company or corporation are held to be of greater importance than those of bringing the lawbreaker to justice.

Our second point, standing in some tension with the need for police independence, was the requirement that police be responsive to the democratically elected government of the day. The argument made above for this requirement is in essence that police services are established in accordance with the principle of a division of labor to discharge the joint moral obligations of all citizens to contribute to their own collective internal security; "collective internal security" being understood as a state of general compliance with the law (which in turn enshrines the moral rights of the citizenry). On this view, the police are ultimately the servants of the citizenry, and they therefore must be responsive to the government as the representative body of the citizenry.

So the question arises as to whether a market-based, commercially driven organization could reasonably be expected to have the required level of responsiveness to government, as opposed to, for example, its own shareholders. Given its commercial imperatives, this seems extremely doubtful. Consider in this connection the "responsiveness" of private sector banks to governments in the lead up to the global financial crisis of 2007–2008. This "responsiveness" consisted in large part in attempting, and often achieving, regulatory capture. The tail ended up wagging the dog.

Our third point pertained to the need for police in a given jurisdiction to have a monopoly of coercive force in that jurisdiction. Police services not only must have the capacity to use coercive force to uphold the law on behalf of the community, they must also have a monopoly on the use of coercive force within the bounds of their own jurisdiction, on pain of not being able to guarantee the upholding of the law in the jurisdiction in question. In short, neither the government, the state's police force,

nor, more importantly, the citizenry can countenance the possibility of competing private sector, or otherwise entirely government-independent, security agencies possessed of sufficient coercive capacity to challenge the state's police force in this regard.

At this point an even more radical proposal might be put forward; namely, one in which the state's police force is disestablished in favor of a market in which private security agencies compete. This would effectively denude the state of its authority. Without the capacity to enforce the laws it promulgates, the state would be at the mercy of the privacy security agencies in question, and would in time simply go out of existence. The proposition that the state could enforce its will domestically, notwithstanding the presence of private domestic organizations possessed of greater enforcement capacity is incoherent. If X (private security company) is possessed of a greater enforcement capacity than Y (state police force) then other things being equal—X can enforce its will at the expense of Y doing so. Thus, in the envisaged scenario, the state and, in a liberal democracy, the citizenry could no longer reliably enforce its will.³³ The related, but nevertheless distinct, issue of the state's externally focused enforcement capacity (i.e., military force), is considered in the next section. In short, the notion that commercially driven organizations operating in a free market could effectively substitute for police services in a liberal democratic state—as opposed to providing subsidiary and complementary security services—is evidently profoundly misguided.

I have outlined the institutional role of police officers and argued that it is required of police services by virtue of this institutional role that they have institutional independence, be responsive to government, and possess a monopoly of coercive force in their respective jurisdictions. I have further argued that market-based commercially driven private security firms cannot meet these requirements, and therefore cannot intelligibly replace public sector police services (which is not to say that they might not have a legitimate subsidiary role). I also suggested in passing that military forces do not, by virtue of their institutional role, require the degree

^{33.} The possibility of a weak state requiring temporary assistance to, for example, quell an illegitimate internal armed insurrection does not affect this fundamental point about the need for the state to have a monopoly (or near monopoly) on the use of force. Such a weak state fails a key test of legitimacy if its inability to deal with internal armed insurrections is permanent rather than merely temporary. In short, I suggest that the state's monopoly of the use of force domestically is a necessary condition of its legitimacy. See Miller, *Moral Foundations of Social Institutions*, Chapters 9 and 12.

of institutional independence of government that police forces do. Let us now turn directly to external collective security, and therefore to the role of the regular soldier.

3.3 The Institutional Role of Regular Soldier

Regular soldiers who are members of a professional standing army, a citizen militia, or citizens operating under a system of universal conscription have jointly held obligations to protect the moral rights of fellow citizens, as do their fellow citizens who are not soldiers.34 As is the case with the police, it is by means of an institutional division of labor that this comes to be. So all citizens, including the professional soldiers in the standing army—have a jointly held moral obligation to protect the moral rights of fellow citizens. However, well-ordered, contemporary liberal democracies typically rely on soldiers who are members of a professional standing army to discharge the jointly held obligation of all citizens to provide collective external security; or at least they rely on professional soldiers. Accordingly, ordinary citizens do not need to discharge their jointly held obligation by taking up arms; instead, they are able to discharge it by paying taxes that fund a professional standing army (and navy and air force). However, the jointly held moral obligation of all citizens to provide collective external security does not disappear; it remains, although, under the terms of an institutional division of labor, others discharge the obligation on their behalf. Indeed, should a professional standing army be no longer able to adequately provide collective security against external threats as was the case in the Second World War then ordinary citizens may well need to take up arms under, for example, a system of universal conscription.

As is the case with police, the jointly held obligations of soldiers are relativized to their fellow citizenry. Thus soldiers have a jointly held moral obligation to protect the moral rights of their *fellow citizens only* (i.e., the citizens or residents of their communities or nation-states), but not necessarily the citizens of other communities or countries. This is not to say that citizens of one community or nation do not have moral obligations to assist the citizens of other communities or nations; far from it. For example, there was a clear moral obligation on the part of the United Nations to

^{34.} For a related view, see Fabre, Cosmopolitan War. For a somewhat different view, see Rodin, War and Self-Defense.

intervene to prevent the genocide in Rwanda in 1994.³⁵ Rather, the moral obligations to assist the members of other communities or nations have less moral weight. I return to this issue in Chapter 8 on armed humanitarian intervention. Thus citizens might not be obliged to bear significant costs to assist members of other communities to the point, for example, of risking their lives.

The institutional role of the regular soldier can be roughly defined in terms of: (1) the realization of the collective end of protecting the moral rights of fellow citizens from violation by members of the armed forces of external communities/nations (i.e., the collective good of external security); (2) by means of the use of deadly force, or the threat thereof; and (3) on the basis of a jointly held obligation on the part of all citizens to protect fellow citizens from external threats (i.e., to provide the collective good of external security).³⁶ This latter, jointly held, moral obligation could be discharged by a citizen-militia to which all citizens belong. However, as noted above, in contemporary liberal democracies it is typically discharged by establishing standing professional armed forces (possibly supplemented in wartime by an armed force of citizen conscripts).

Notice that in contrast with the threat to collective internal security—a threat paradigmatically involving the rights violations of individual or groups of citizens by fellow citizens or groups thereof—external security paradigmatically (e.g., in wars of conquest) involves a threat to the integrity of the state or community. Accordingly, it is not simply a matter of individual lives or other goods to which individuals have moral rights (e.g., individual freedom), even in aggregate, being at stake—although these things are also at stake. Rather, to say that the integrity of the liberal democratic state or community is at stake is to say such things as that the existing citizenry will no longer be the joint decision makers (via their elected government) with regard to their territorial exclusion rights, their laws, their policies, their way of life, and so on.³⁷ Naturally, there are many wars fought on lesser issues than the integrity of the state.

The claim that a liberal democracy's military forces have as their primary and (typically) overriding institutional purpose the collective good of the nation's external security needs to be distinguished from two other

^{35.} See Miller, "Collective Responsibility, Armed Intervention and the Rwandan Genocide."

^{36.} Miller, "Police, Citizen-Soldiers and Mercenaries."

^{37.} Sometimes referred to as self-determination.

related claims. First is the claim that no other nation's military forces have this as their *primary* institutional purpose. This claim is in fact true. However, it would not follow from this that a liberal democracy's military forces might not also have as a *secondary* institutional purpose the collective good of a fellow liberal democracy's external security, as in the case, for example, of the members states of NATO.

Second is the proposition that the nation-state claims a monopoly on the use of force in the pursuit of its external security. This proposition is ambiguous. It could mean that each nation-state claims a monopoly on the use of force vis-à-vis *other nation-states* in pursuit of its external security. This proposition is false since some nation-states have less military power than others and some might on occasion need to rely on their more powerful allies for their external security. Alternatively, the proposition could mean that each nation-state claims a monopoly on the use of force vis-à-vis *other internal domestic entities*, such as domestic private companies, in pursuit of its external security. This proposition is true. There is a need for the state to have a monopoly on the use of force internally and externally relative to other actors within the state.³⁸

This jointly held obligation to protect collective external security does not include infringing the rights of foreign citizens or members of other communities by, for example, engaging in wars of conquest on behalf of one's own national leadership. There is no such institutional moral obligation. Accordingly, the members of nationalist armed forces, such as the German armed forces under Hitler, do not have jointly held obligations to prosecute wars of conquest. The so-called *ius ad bellum* is an attempt to spell out the relevant moral principles governing the waging of war, including by liberal democratic states.³⁹ However, in accepting various

^{38.} There is a further issue in relation to the possibility of transnational private military companies. However, such companies are jurisdictionally based (e.g., incorporated in some nation-state such as the United States or the United Kingdom. As such, they are under the authority of some nation-state or other; or, if not, they ought to be, on pain of not being subject to *enforceable* law. Accordingly, at least in principle, they cannot, or at least ought not, threaten the monopoly on the use of force of their parent nation-state. This is not to say that some PMC's might not be possessed of greater coercive force than some nation-states. This has clearly been the case (e.g., in Sierra Leone). See Dimitrios Machairas, "The Ethical Implications of the Use of Private Military Force," *Journal of Military Ethics* 31, no. 1 (2014), 58f, for discussion of these and related issues.

^{39.} These principles and, of course, just war theory more generally, are the subject of a voluminous philosophical, not to speak of legal literature and the literature of other fields. However, Walzer's *Just and Unjust Wars*, is a useful starting point.

moral constraints on waging war derived from the institutional role of regular soldiers in a liberal democratic state, one does not have to endorse that doctrine in all its particulars.

Moreover, there is a moral obligation on the part of military forces and individual soldiers to comply with moral principles constraining the use of lethal force in wartime—the so-called *jus in bello* principles,—such as not to intentionally kill innocent civilians (principle of discrimination), only to use an extent of deadly force that is militarily necessary (principle of military necessity), and, when deadly force is militarily necessary, to avoid a disproportionate extent of (unintended) civilian deaths (principle of proportionality).

Having provided ourselves with an explicit, albeit rough, definition of the role of regular soldier, let us now compare it with that of the police officer elaborated in the last section. As already stated, the two roles are similar in two fundamental respects, namely that (1) they both involve the use of coercive force as a means, and (2) they are both performed in the service of the collective end, indeed collective good, of protecting the moral rights of fellow citizens. What of the differences?

The first and perhaps most obvious difference is that the police defend citizens against one another (i.e., their orientation is internal to the state), whereas soldiers defend the citizenry against threats external to the state (e.g., armed aggression by other nation-states). Moreover, the external threats in question are threats to the state, or at least to its vital interests, and as such are *ultimately* political threats posed by political entities, though typically the threat is a military one in the first instance.

This picture is complicated by the existence of international terrorist groups such as al-Qaeda and ISIS. However, it is not fundamentally altered, or so I have argued in other places. ⁴⁰ For insofar as terrorist groups have a substantial lethal capability and constitute a serious external threat requiring a military response, they are simply a different kind of external political entity. On the other hand, insofar as terrorist groups ⁴¹ constitute, as they often do, an internal threat, they are a matter for the police to deal with; this is terrorism as domestic crime.

Naturally, an insurrection, whether orchestrated by terrorist groups or nonterrorist ones, can get to the point where a police response is no

^{40.} Miller, Terrorism and Counter-Terrorism.

^{41.} And, for that matter, nonterrorist insurrectionary groups.

longer adequate. The liberal democratic state in question may need to move to a temporary and geographically limited state of emergency, as India has had to do frequently in the recent past. Beyond this there is the possibility of all-out civil war in which government-led military forces are pitted against large sections of the state's own people; indeed, in these circumstances, the nation's military forces are often themselves divided. However, I suggest that in fighting on one side in a civil war, the regular army (and navy and air force)—as distinct from other kinds of military force—is operating outside its institutional role.⁴² For in an all-out civil war, the moral and institutional legitimacy of the erstwhile state has itself been undermined, and the members of the armed forces are therefore simply taking sides in a politically based armed conflict being waged to decide who is to constitute the state, and perhaps what form it will take.

The second important different between the institutional role of regular soldier and that of police officer also pertains to the nature of their institutional ends. Unlike the police, the military do not have as their primary institutional purpose to enforce the law, even the international law (by analogy with the police as enforcers of domestic law). Rather, military forces are essentially instruments of the citizenry via their elected governments acting in the service of the national interest in external security (as outlined above in terms of protection of the moral rights of the citizenry from external threats).

Naturally, the military ought to comply with international law in their operations, as police officers ought to comply with the domestic law in their law enforcement activities, and, for that matter, citizens ought to comply with the domestic law in their day-to-day activities. However, it does not follow from the fact that an agent ought to comply with a law or rule that the agent has an institutional role as an enforcer of that law or rule; players have to abide by the rules of the game, but this does not make them umpires.

This point is not undermined by the fact that in recent times, as already mentioned, military forces have undertaken policing roles, such as United Nation peacekeeping operations. For in undertaking such operations, the military forces of nation-states are undertaking a secondary role; this is not their primary institutional role. It might be argued that it would be a very good thing if the military forces of nation-states

^{42.} In saying this, I am not denying that in some circumstances it might not be morally permissible, even morally obligatory, for it to do so.

abandoned their primary role in national defense or, at least, reduced it to the status of a secondary role, and did so in favor of international peace-keeping operations, international law enforcement, and the like. Maybe so, but this would be possible only if the international order ceased to be, at bottom, one of nation-states, and for example, there came to be some form of world government that deployed erstwhile military forces as police forces. This is, to say the least, highly unlikely in the foresee-able future. In the meantime we are stuck with a world in which the de facto highest authority is the nation-state, since no other putative higher authority, such as the United Nations, has the capacity to enforce its laws and policies in the event that one or other of the major powers, (e.g. the US or China) chooses to ignore them.

Since military forces (in the world order as it is currently constituted), unlike police forces, do not have as a primary institutional role to enforce the law, there is not the same requirement for them to have a substantial degree of independence of government; they do not have the quasi-judicial character of police organizations and their officers.

A third and final set of differences between the role of regular soldier and that of police officer pertains to their use of lethal force. In essence, soldiers use greater levels of lethal force, and they do so more frequently and with less legal and moral constraints. For example, soldiers are legally and morally allowed to ambush and kill enemy soldiers, whereas police officers are not allowed to ambush and kill offenders. Moreover, the individual soldier's use of lethal force is in large part determined by orders from above. More specifically, if a military combatant is given a lawful order from a superior officer to use lethal force against particular enemy combatants in a theater of war then he is institutionally and morally obligated to do so; likewise if he is ordered not to use lethal force against these combatants then he is institutionally and morally obliged not to do so. For having decided to occupy the institutional role of military combatant and having embarked on war, the individual military combatant has waived his or her discretionary right to use lethal force, and done so in favor of his or her superiors. In this respect military combatants differ from police officers. I return to this issue in Chapters 4, 5, and 6.

As mentioned above, regular soldiers' use of lethal force is constrained by the principles of military necessity, proportionality, and discrimination. As we will see in Chapter 4, it is morally (and, typically, legally) permissible for a police officer to use lethal force under the following far more restrictive conditions: (1) the threat is imminent; (2) it is necessary

for the officer to use lethal force to protect the life of the police officer (or third party), or, at least, to prevent the commission of some other serious crime; (3) the use of lethal force by the officer is proportionate to the threat posed by the offender, (e.g., there is a threat to life or the likelihood of grievous bodily harm).

What is the justification for this difference in respect of allowable lethal force between regular soldiers and police officers? Certainly in well-ordered, law-abiding, liberal democratic states, police interactions with offenders do not necessitate the use of lethal force other than on rare occasions; it is typically possible to arrest offenders without recourse to lethal force, and in these circumstances police are required by law, as well as by the dictates of morality, to eschew lethal force. By contrast, a soldier's encounters with enemy soldiers in a theater of war frequently necessitates a lethal response, if the soldier is to preserve his own life and that of his fellow combatants.

However, this does not fully explain the difference. For it omits the fact that individual soldiers are not only engaged in personal self-defense or defense of the lives of their fellow soldiers. Soldiers are also engaged in lethal attacks on enemy soldiers; they are trying to kill enemy soldiers and not simply avoid being killed themselves.

Police-citizen lethal encounters are typically one-off, self-contained interactions in the overall context of a legal framework that is enforced by a police organization enjoying a monopoly of coercive/lethal force. If the police are trying to arrest an offender using lethal force to resist arrest, the presumed illegality of the offender's actions will in due course be independently adjudicated, and the police organization's monopoly of coercive/lethal force is not at stake.

By contrast, the use of lethal force by a soldier against an enemy combatant on a particular occasion takes place in the context of an ongoing conflict between the armed forces of political entities and outside the framework of laws actually enforced by a police service, or other security agency, with a monopoly of coercive/lethal force. I say this notwithstanding the existence of international law. For the latter has no effective enforcement mechanism; this is, in large part because there is no enforcement agency with a monopoly of coercive/lethal force.

More specifically, the lethal action of a regular soldier on a specific occasion is (1) performed jointly with the actions of other soldiers at various levels (e.g., members of the mortar squad and of the battalion); (2) performed as one element of a causally and means/end connected, dynamic,

and unpredictable unfolding series of lethal actions directed at short-term, mid-term, and long-term collective ends (e.g., winning this skirmish, this battle, the war); and (3) done in the context of a *standing* joint lethal threat from enemy combatants. In relation to point 2, it is important to note that soldiers are often engaged in lethal attacks on enemy soldiers in order to degrade the enemy force and, thereby, win the war; they are trying to kill enemy soldiers in order to reduce their number, and not simply to avoid being killed themselves. Even if, as I have argued, the *ultimate* moral justification for the use of military force is to protect the moral rights of the citizenry, the *proximate* purpose of the use of lethal force by soldiers is to win wars. Crucially for our concerns here, this proximate purpose is in large part definitive of the institutional role of the military, whereas it is not definitive of the police role. Rather the analogous role of the latter, to reiterate, is in essence to use coercive force to effect arrests.

In light of the above, there is a presumption in favor of killing enemy soldiers during armed conflict in a theater of war, and it is not necessary that the threat from an enemy soldier be imminent; nor is it a necessary condition for permissibly killing an enemy soldier that one is doing so to protect one's own life (personal self-defense) or that of one's fellow soldiers (defense of the lives of copresent others).

3.4 Conclusion

In this chapter I have provided a normative, comparative institutional analysis of police officers and regular soldiers in the setting of the contemporary liberal democratic nation-state. In doing so, I have relied on my normative teleological account of social institutions. I have defined the roles of police officer and regular soldier by recourse to normatively specified, empirically anchored, organizational roles—a procedure I refer to as institutional ascent. Two key theoretical notions employed are those of multilayered structures of joint action and collective goods. The moral rights and duties constitutive of institutional roles are derived in part from the collective goods that are the raison d'être of particular institutions, including police and military institutions. Moreover, these institutional moral rights and duties differ somewhat from institutionally prior natural moral rights and obligations. Indeed, they are special rights and duties: they are rights and duties that other natural persons may not have, and they are partialist in that they are rights and duties with respect to

the members of a given community, but not necessarily members of other communities.

The institutional roles of police officers and regular soldiers are similar in two fundamental respects, namely that: (1) they both involve the use of coercive, indeed lethal, force as a means; and (2) they are both performed in the service of the collective end, indeed collective good, of protecting the moral rights of fellow citizens, albeit in one case (police) from internal threats, and in the other (military) from external threats. However, these two roles are also importantly different in a number of respects. For example, military forces, unlike police forces, do not have as a primary role to enforce the law, and soldiers use lethal force with less legal and moral constraints than police officers. Moreover, military combatants, but not police officers, waive their right to use (or not to use) lethal force when given a lawful order by their superiors to do so (or not to do so).

Police Use of Lethal Force

IN CHAPTER 3 I defined the police role in terms of (1) the collective end of protecting the legally enshrined, justifiably enforceable, moral rights of citizens from violation by fellow citizens; and (2) the use of coercive, including lethal, force in pursuing this end. Moreover, in Chapter 1 the following properties of moral rights were identified. First, moral rights generate obligations on others; for example, A's right to life generates an obligation on the part of B not to kill A. Second, moral rights are justifiably enforceable.

As we saw in Chapter 2, justifiable enforceability implies the right to use lethal force to enforce respect for the right to life. Person A has a right not to be killed by B, and so B has an obligation not to kill A. But what if B ignores his obligation and attempts to kill A? In that event, A has a right that B be prevented by someone (either A or some other person, C) from killing A; A's right to life is justifiably enforceable. Here the means of prevention could include the use of lethal force, if it is necessary. Indeed, in the case of self-defense—as opposed to defense of others—it was argued that under certain conditions the defender might not be violating the right of his attacker not to be killed if she killed the attacker, even if it was not necessary to do so. Moreover, in the case of defense of the life of another—as opposed to self-defense—it was argued that the third party, C, may well have an obligation to kill B to protect A, given that it was necessary, and given that C could do so without any threat to C's own life. Consider, in this connection, a situation in which A is C's child or spouse who is being threatened by B. Arguably, C is under an obligation to A to kill B, if this is the only means of preventing B from killing A (i.e., C's child or spouse).

So there are justifiably enforceable moral rights, and it is the central and most important purpose of police to protect legally enshrined, justifiably enforceable, moral rights. However, there are laws that do not enshrine moral rights. Many of these laws are fair and reasonable, and the conformity to them enables collective goods to be provided, such as anti-litter laws, for example. But what is the justification for their enforcement by police? The fact that they provide collective benefits, or that they are fair and reasonable, does not of itself necessarily provide an adequate justification for their enforcement. Perhaps consent to the enforcement of just and reasonable laws that enable the provision of collective benefits provides an adequate moral justification for such enforcement. Here there is an issue with respect to the degree and type of enforcement that might be justified in this way. Lethal force might not be justified, even if it is consented to in relation to fair and reasonable laws that enable collective benefits to be provided. Certainly recourse to lethal force—as opposed to nonlethal coercive force—is not justified in the case of many unlawful actions. Specifically, unlawful actions not regarded as serious crimes. Indeed, the validity of this point is acknowledged in those jurisdictions that have made it unlawful for police to shoot at many categories of "fleeing felons." It is more often than not now unlawful, because it is immoral, to shoot at, say, a fleeing pickpocket.

At any rate, in this chapter I examine in some detail the moral justification for police use of lethal force and, as a consequence, the types of situations in which police use of lethal force is morally permissible. Of particular interest here is my claim that police officers have an institutional moral right and duty to use lethal force that ordinary citizens do not have. Police officers have, as we have seen, an institutional moral right and duty to uphold the law. This generates an institutional moral right and duty to use lethal force to uphold the law, or at least some laws under certain circumstances.

^{1.} Earlier versions of the material in this chapter appeared in Seumas Miller, *Issues in Police Ethics* (Wagga Wagga, Australia: Keon Publications, 1996), Chapter 3; Seumas Miller, John Blackler, and Andrew Alexandra, *Police Ethics* (Sydney: Allen and Unwin, 1997), Chapter 6; Miller, "Shootings by Police in Victoria"; Miller and Blackler, *Ethical Issues in Policing*, Chapter 3.

4.1 The Institutional Role of Police and Police Use of Lethal Force

My argument in relation to the special institutional moral right and duty of police to use lethal force to uphold the law relies both on my normative theory of the police role and on the claim argued for in Chapter 2 that, quite independently of the existence of police services, individual persons have a natural (i.e., noninstitutional) moral right to kill in self-defense and (relatedly) a natural moral obligation to kill in defense of others. This natural right and obligation derive from the more basic natural right to life.

Notwithstanding the existence of a natural right to self-defense and a natural obligation to defend the lives of others, with the establishment of police services in modern societies the responsibility for defending oneself, and especially for protecting others, has to a large extent devolved to the police. More specifically, as we saw in Chapter 3, there is a jointly held moral obligation on the part of all citizens to protect the moral rights of fellow citizens from their fellow citizens (i.e., to provide the collective good of internal security). This latter jointly held moral obligation could, at least in principle, be discharged by an all-citizen police service. However, in contemporary liberal democratic states, there is a division of labor such that it is discharged by establishing the institution of the police and its constitutive occupational role of police officer. As a consequence, if someone's life is threatened, whether my own or someone else's, the first step should be to call the police. However, to reiterate, this in no way entails that the natural rights of ordinary citizens to self-defense and to defend the lives of others have been alienated, but rather only that they have been curtailed.

My rights-based account of the moral justification of police use of deadly force is consistent with some versions of social contract theory. For, as I have argued elsewhere, in a liberal democracy the legally enshrined, moral rights justifiably enforced by the police are, and ought to be, consented to by the population at large by virtue of having been enacted by a democratically elected legislature.² However, this contractarian aspect of my theory stands in some contrast with *some* versions of contract theory.³

^{2.} Miller and Blackler, Ethical Issues in Policing, Chapter 1.

^{3.} While some contractarians would concede retention of the right to self-defense, they may well not do so in relation to the right to defend others. Thus, according to Hobbes, "A Covenant not to defend my self from force, by force, is alwayes voyd" (Thomas Hobbes,

On my conception, the rights to self-defense and, in particular, the obligation to defend the lives of others are logically prior to police services, and indeed to government itself. Moreover, objective moral principles governing the exercise of these rights—specifically, the principles of imminence, necessity, and proportionality—are also logically prior to police services and governments. Indeed, these rights and the moral principles governing their exercise constrain, or ought to constrain, the actions of police and the laws enacted by governments. So on this conception there isn't a Hobbesian state of nature in which there are no moral rights or obligations and in which everyone is entitled to use force in accordance with his or her own rational self-interest—indeed, at his or her own subjective discretion and in accordance with his or her own subjectively chosen rules. Accordingly, persons do not renounce this morally unrestricted freedom when they come to embrace the state and, more specifically, the liberal democratic nation-state. The reason for this is twofold. First, no one ever had, or could have had, a moral right to use force solely in their own personal interest or at their own subjective discretion (i.e., independently of objective reasons). Or at least no one could have had a moral right to use lethal force against others solely in their own personal interest or at their own subjective discretion. Second, whatever objective moral right to use lethal force individual persons have outside institutional settings (e.g., the natural right to kill in self-defense) they retain in some form in institutional settings, notwithstanding that the existence of governments and police services qualifies this right.

Note that my rights-based account in relation to the use of lethal force is consistent with citizens reasonably accepting that governments and, more specifically, the police, have a monopoly or near-monopoly in the use of coercive force within their communities, and that the police reasonably have *some additional* (institutional) moral rights and duties in relation to the use of lethal force that are not possessed by ordinary citizens. What precisely these rights and duties are is a matter discussed in some detail below. Here I simply note that citizens might reasonably grant special (institutional) moral rights to police on the basis of the need for a division of labor in relation to the protection of legally enshrined, justifiably enforceable, moral rights. However, such a division of labor is

Leviathan, Chapter 14, any edition). For one influential recent contractarian view, see Reiman, "The Social Contract and the Police Use of Deadly Force," 237–249. See also Kleinig, *The Ethics of Policing*, 109.

consistent with citizens retaining enforcement rights, such as the right to the defense of others albeit in a qualified form. Indeed, it is because citizens retain such rights that it is permissible, indeed obligatory, that they protect themselves and others, given the unavailability of police to do so on some occasions. Moreover, the retention of these rights in the context of a division of labor serves to explain why it is that citizens have a moral duty to assist the police in the enforcement of the moral rights in question, such as a duty to assist a police officer to arrest an escaping murderer, if it is required.

Accordingly, I do not accept some of the main arguments that might be thought to be available to some contractarian theories of police use of deadly force. Specifically, I do not accept the claim that an individual person, A, can somehow *transfer* to others the right to *kill* B in self-defense. Here we need to keep in mind the distinction between transferring a right and delegating the exercise of a right.⁴ I take it that if I transfer a right I no longer possess it, whereas this is not the case with delegating the exercise of a right that I continue to possess. Moreover, if I transfer a right then the right has not merely been suspended. For if my right has been suspended it has not, thereby, been transferred; if my right is suspended it remains *my* right, albeit it is not in force. Non-transferable rights are often referred to as inalienable human rights, and include the right to life and the right to autonomy.⁵ These fundamental natural human rights, in particular, cannot be transferred to or from others since they are possessed, and only possessed, by virtue of properties one has as a human being.⁶

Of course, it is often the case that others do have a right to kill some agent A for things that A has done or failed to do (e.g., the right

^{4.} One can, of course, transfer to others the right to such things as one's property, and one can transfer the right to enforce contracts one has entered into. Moreover, a third party may have an independent right to use lethal force to enforce a contract, e.g. if lives would be put a risk if the contract is not fulfilled. Further one can *delegate* the exercise of some rights, as opposed to transferring the rights themselves, including the exercise of rights to enforce by means of lethal force. But I am denying that one can transfer the right to use lethal force to enforce such contracts.

^{5.} Inalienable rights are not necessarily absolute rights; the right to life is inalienable, but it does not follow that it is absolute. The existence of a right to self-defense demonstrates that the right to life is not absolute.

^{6.} This is consistent with human rights underpinning various institutional rights, these institutional rights varying from one institutional setting to another, and with there being room for collective discretionary decision-making in relation to the precise character of such institutionalized human rights. For example, the human right to autonomy can underpin a variety of different voting arrangements.

to kill A in self-defense or in other defense) but in doing so they do not need to have that right transferred to them by A. Rather they possess the right independently or, in some cases, they might have the exercise of the right delegated to them.

Here we need to stress the role of natural rights, especially human rights, in relation to practical moral reasoning. The first point is that the institutional and, more broadly, social activities of entering into contracts, promise-making, and consenting take place against a background assumption of natural rights and, in particular, certain inalienable human rights, especially the rights to life and to autonomy.7 Thus contracts to enter into slavery or hand over one's right to life to another are self-nullifying. Secondly, while human rights are not absolute rights, human rights nevertheless normally "trump" other considerations, such as social utility; in general, a decision to infringe a human right can only be justified by recourse to other human rights considerations. So human rights ought not to be overridden for the sake of other benefits to the community, such as social order. It should be remembered that while social order is a necessary condition for human rights being respected, it is far from sufficient. Totalitarian states are characterized by high levels of social order, notwithstanding the massive human rights violations that they involve.

On my account, to reiterate, there is a justifiably enforceable natural right to life, and this right gives rise both to a natural right to use lethal force in self-defense and a natural obligation to use lethal force to defend the lives of others. It follows that police officers, like ordinary citizens, have a right to use lethal force in self-defense and in defense of others.

However, it is widely assumed that the *only* morally acceptable justifications for police use of lethal force are self-defense and the defense of others. For example, according to the Australian National Committee on Violence's Recommendation 85.1, "Uniform laws throughout Australia regarding the use of firearms and other lethal force by police," "These laws should reflect the principle that lethal force should only be used as a last resort, involving self-defence or the defence of others." However, I argue that the matter is more complex than this, and that there is an additional moral justification for police use of deadly force; namely, to

^{7.} Although an inalienable right cannot be *transferred* to another person, as already mentioned, its exercise might be able to be be *delegated* to another person.

^{8.} National Committee on Violence, *Violence: Directions for Australia* (Canberra: Australian Institute of Criminology, 1990).

uphold the law. But let us consider each of these moral justification for police use of lethal force in turn, beginning with police use of lethal force in self-defense.

4.2 Police Use of Lethal Force in Self-Defense

As we have just seen, killing in order to defend one's own life or the life of another is morally justified on the grounds that each of us has a right to life. Moreover, speaking generally,9 we are entitled to defend that right to life by killing an attacker under three conditions, if we do so in compliance with the three principles of imminence, necessity, and proportionality. First, there is the condition that the attacker is intentionally trying to kill someone—either oneself or another person—and will succeed if we do not intervene effectively. Moreover, in accordance with the principle of imminence, the deadly threat needs to be imminent. We are not entitled to shoot dead an attacker whom we know is threatening us with a replica of a gun, nor can we (speaking generally) preemptively kill someone who is planning to kill us in the distant future. Nor are we entitled to kill an attacker who is only engaged in a minor assault (principle of proportionality).

The second condition is that we have no way of preserving our own or the other person's life other than by killing the attacker (principle of necessity). For example, we are not able to flee to safety. This condition obtains notwithstanding my commitment to FIST (fault-based internalist suspended-rights theory), according to which an attacker's right not to be killed by a defender might be suspended, notwithstanding that it is not necessary in the circumstances for the defender to kill the attacker to preserve his or her life. For, as I argued in Chapter 2, there are other moral considerations underpinning the necessity condition in cases of self-defense. Moreover, FIST is not directly concerned with cases of killing in defense of others.

The third condition is the one requiring that our attacker does not have a morally justifiable reason for trying to kill us. This is

^{9.} There are, of course, exceptions, such as a standing and unavoidable lethal threat that might justify a preemptive strike. Moreover, I am here setting aside cases of ongoing collective violence such as wars. I address the matter of war in Chapter 6.

^{10.} As already noted, the principle of necessity operates in a different manner in cases of collective violence, such as war. See especially Chapter 6.

straightforward in many cases, as in the case of an armed robber who attempts to kill a defender in order to get her or his money. Other cases are less straightforward. Consider a legally appointed executioner and a serial killer sentenced to death. Suppose that the executioner has a good and decisive moral justification for carrying out the death penalty in the case of the convicted serial killer. If so, then arguably the serial killer is not morally justified in trying to kill the executioner in self-defense, supposing the opportunity arose. 11 On the other hand, if the executioner does not have a good and decisive moral justification in such cases, then arguably the serial killer is morally justified in trying to kill the executioner in self-defense.

The killing of Mark Militano by police officers in in Victoria, Australia, 1986 is evidently a case of justified killing in self-defense, and perhaps killing in defense of the lives of others. Police were following Militano and had evidence in the form of an overheard conversation, which was probably sufficient to charge him with conspiracy to commit armed robbery. Police cars converged on Militano, and one car swerved in front of Militano's vehicle, causing him to brake. Militano reached for his handgun and pointed it at one of the police officers. A number of officers then fired at Militano. Militano, apparently unharmed, ran from his car. A police officer fired a shot in the air, calling for him to stop. Militano turned, raised his pistol, and aimed at the police. Sergeant Ray Watson, the man who had overheard the conversation concerning the planned bank robbery, fired one shot from his .38 revolver. The bullet hit Militano in the head, and minutes later he died. 12 Clearly, at the point when Watson shot Militano, the above-mentioned three conditions for justifiable killing in self-defense—and defense of the lives of others—obtained. First, Militano was intentionally trying to kill someone—either Watson or another officer-and would have probably succeeded if Watson did not intervene. Second, Watson had no way of preserving his own or the other police officers' lives other than by killing Militano. Third, Militano did not have a morally justifiable reason for trying to kill Watson or the other police officers. More specifically, in terms of our theory of self-defense, FIST, Militano's natural right not to be killed by Watson was suspended.

^{11.} But see Teichman, "Self-Defence."

^{12.} Tom Noble, *Untold Violence: Crime in Melbourne Toda*y (Melbourne: John Kerr, 1989), 142–143.

Moreover, the other important moral condition, necessity—a condition which, as already noted, is not a requirement under FIST for suspension of one's right not to be killed by a defender—did obtain in the case of Watson's lethal shooting of Militano.

The case of Gary Abdallah illustrates the distinction between justified killing in self-defense and excusable killing in self-defense. Abdallah was suspected by Victorian police of involvement in the Walsh St. (Melbourne) killings of two police officers. However, there was insufficient evidence to prosecute him. There was, however, evidence of his attempted murder of a senior policeman's son. Detectives Clifton Lockwood and Dermot Avon were sent to arrest Abdallah. It was alleged that Abdallah produced a revolver, aimed it at Lockwood, was warned by Lockwood to put it down, and was shot dead by Lockwood when he failed to do so. The revolver turned out to be an imitation gun. The police officers were charged with murder, but found not guilty. While the gun was an imitation gun, it was reasonably believed to have been a real gun.¹³ Accordingly, the first of the above-mentioned conditions for justifiable self-defense—that the attacker will in fact kill the defender unless the defender intervenes—can be weakened to generate a set of conditions for morally excusable self-defense. The relevant new condition is that the defender reasonably believes the attacker will kill him unless he intervenes (by killing the attacker).

I note that, consistent with FIST, Abdallah retained his right not to be killed by Lockwood, since he was not in fact a deadly threat to Lockwood. On the other hand, Lockwood also retained his right not to be killed by Abdallah, supposing Abdallah had been able at the critical point to get his hands on another gun, a real gun this time, and shoot Lockwood dead in self-defense. For Lockwood did not meet the third condition for having his right not to be killed by Abdallah suspended—namely, that he did not reasonably believe that he had a good and decisive justification for killing Abdallah. For Lockwood did reasonably, even if wrongly, believe he had such a justification—the justification of self-defense—when he formed the intention to shoot Abdallah at the point in time when Abdallah aimed his replica gun at Lockwood.

^{13.} Hal Hallenstein, Investigation into the Death of Gary John Abdallah: Inquest Findings (Melbourne, Australia: State Coroner's Office, 1994).

4.3 Police Use of Lethal Force in Defense of the Rights of Others: An Institutional (Moral) Duty

Police have a natural moral right to use lethal force in self-defense and a natural moral obligation to use lethal force in defense of the lives of others. In these respects, they are no different from ordinary citizens. But police also have an *institutionally based moral duty* to use lethal force to protect innocent lives under certain circumstances. Indeed, they can be held legally liable if they fail to take the opportunity to shoot dead an armed and dangerous criminal who then goes on to, say, take the lives of innocent citizens.

What of ordinary citizens? Do they have a moral obligation to use lethal force to protect others, at least in cases where the threat to life is immediate, is certain, and there is no alternative? As we have already argued, the answer is a qualified affirmative. The qualifications are threefold. First, the obligation of ordinary citizens to use lethal force to protect others is a general natural moral obligation and not a special institutionally based moral duty, as is the case with the police. Second, in the context of a wellordered, contemporary, liberal democratic nation-state, this moral obligation of ordinary citizens is only triggered in the absence of police; in the first instance, it is the moral and institutional duty of police to protect threatened lives. Third, ordinary citizens ought not to be expected to go to the same lengths or take the same risks as police officers are obliged to, since they do not occupy the police role, and therefore do not have a special institutional responsibility to protect the lives of others. So the moral obligation of ordinary citizens to kill to protect others is much less stringent than the special institutionally based moral duty of police officers to do so.

In addition to the justification for using lethal force to protect the right to life (whether in self-defense or in defense of the lives of others), there is the question of a wider justification in terms of the protection of rights other than the right to life. As was argued in Chapter 1, evidently the use of lethal force can be justified to protect moral rights other than the right to life. However, in speaking of using lethal force in defense of rights, one would obviously not want to include *all* moral rights, or at least *all violations* of all moral rights. For example, property rights are arguably moral rights, but for a police officer to shoot someone dead to prevent them stealing a handbag would be morally unacceptable. So the question becomes: Are there any moral rights, apart from the right to life,

the protection of which would justify police use of deadly force? As we saw in Chapter 1, candidates for such rights might include a right not to be severely physically or psychologically damaged. Perhaps rape, serious child molestation, and grievous bodily harm are actions the prevention of which might justify the use of deadly force. Maybe police, in particular, are justified in shooting a fleeing serial rapist if that is the only way to ensure his arrest.

A key distinction in this regard was introduced in Chapter 1; namely, the distinction between rights to things constitutive of the self and rights to things not constitutive of the self. Such latter rights include many institutional rights, such as property rights. I suggest that, at least in the first instance, police are justified in using lethal force to protect rights to things constitutive of selfhood, including life and autonomy. Indeed, these rights are typically enshrined in the criminal law. However, they are also justified in using lethal force to protect certain other rights, which are rights to things not constitutive of selfhood. Let us consider some putative cases.

What do we want to say of the policy of the shooting on sight of cattle rustlers in the old American Wild West, in circumstances under which the property crime of cattle rustling threatened ranchers' livelihoods? Again, what are we to say about shooting looters? The shooting of looters in disaster zones or in conditions of civil unrest has been an accepted policy in many parts of the world over a long period of time. And there are the (alleged) shootings on sight of armed robber-murderers in South Africa by police. There has been a frightening increase in the robbery of businesses in South Africa by heavily armed gunmen, who sometimes shoot dead unarmed shopkeepers and others in the process of the robbery. While robbery is a property crime, it is unlike cattle rustling or looting, in that it is one which involves the deliberate use, or threat of the use, of lethal force as a means.

In relation to these cases of violations of rights not constitutive of self-hood, we need to distinguish the question of the *types* of crime that might justify the use of lethal force from the question of the *extent* of crime that might justify it. So there might be a general breakdown of law and order in some part of an otherwise well-ordered and law-abiding community. This breakdown might consist in large-scale, serious violations of moral rights.

I suggest that the conception of the police use of force needs to be complicated, but not fundamentally altered, to accommodate public order policing, as in the case of riots or communal violence. As already noted, police use of force is justified by considerations of self-defense, defense of the lives and rights of others, and in order to uphold the law (of which, more

in the next section). Public order policing strategies can usefully be divided into two broad groups: (1) preemptive or proactive policing, and (2) reactive policing. An example of preemptive or proactive public order policing is that typically used in large, pre-organized election rallies addressed by the leaders of political parties. Such occasions involve planned public-order policing arrangements. Accordingly, they can and should involve appropriate preset logistical arrangements, clear lines of authority and communication, experienced supervisors, and a cohort of well-trained police officers to execute the arrangements on the ground.

Reactive public order policing is typically problematic in four respects: (1) police have little or no notice of impending events; (2) there is collective violence; (3) the capacity of the police to exercise control by means of nonviolent strategies is much less than would otherwise be the case; and (4) the use of force by the police is, correspondingly, both far more likely and (potentially) more justified. Naturally, even in reactive policing of collective violence situations, coercive force needs to be used judiciously and in tandem with nonviolent strategies. Moreover, the effectiveness of reactive policing strategies is heavily dependent on the skills, experience, and leadership of the police involved.

In some instances of reactive policing of collective violence the violence is primarily directed at the police themselves (e.g., antigovernment violence). In other instances, the violence is primarily directed at another group within the community (e.g., religious violence). In all instances of reactive policing of collective violence, a crucial factor is the attitude of the community being policed to the police. Are the police seen as an occupying force or as an impartial enforcer of the law and protector of the community from criminal elements? If the latter, then there is the potential to mobilize the community to restrain those elements engaged in violence, whether that violence is directed primarily at the police or at some other group within the community. If the former, then the police face an ongoing uphill battle, especially when one considers their relatively small numbers in contexts of large-scale collective violence. Race riots in Ferguson, Missouri, in 2014, in the aftermath of the shooting dead of an unarmed black youth, Michael Brown, by a police officer, indicated that the police in many US jurisdictions are not necessarily viewed by black communities as impartial enforcers of the law.¹⁴

^{14.} Jon Swain and Amanda Holpuch, "Ferguson Police: A Stark Illustration of Newly Militarised US Law Enforcement," *The Guardian*, August 15, 2014, http://www.theguardian.com/world/2014/aug/14/ferguson-police-military-restraints-violence-weaponry-missouri.

Notwithstanding that there is a breakdown in police-community relations or even that the rioters and insurgents are otherwise intent on violence, the police response ought to be driven by the requirements to uphold the law, preserve the peace, and protect the moral rights (including property rights) of the citizenry. Hence the aim of the police is to disperse violent crowds, and to do so with the minimum use of force and in a discriminating manner. Here the use of tear gas can be effective. Although tear gas is not discriminating it is also not particularly injurious. Additional more discriminating methods are available to target specific individuals, such as ringleaders or those engaged in violent acts, such as missile throwers. These methods include firing nonlethal rounds that, nevertheless, incapacitate (e.g., plastic bullets). In this context, the apparent militarization of US law enforcement agencies in terms of their deployment of armored vehicles, machine guns, and other military hardware is cause for concern. In

There are some instances of collective violence in which police use of lethal force may be required. For example, in Ahmedabad, Gujarat, India, in 2002, hundreds, if not thousands, of Muslims were killed by Hindus, and incited to do so by Hindu leaders; moreover, hundreds of Hindus were killed by Muslims.¹⁷ In these circumstances, police use of lethal force is justified both in terms of their own self-defense and in order to defend the lives of those being attacked. In such contexts, the distinction made in Chapter 2 between the police and the military use of force comes under some pressure. For example, effective use of lethal force by police in such circumstances might rely on a military-style authority relationship between police leaders and subordinate police officers, with the latter firing their weapons when instructed to do so by their superiors, rather than on the basis of their own individual judgments.¹⁸ On the other

^{15.} Plastic bullets can be lethal (e.g., if fired at very close range). However, they are, at least in principle, nonlethal weapons and, in any case, should not be used to disperse nonviolent crowds or against members of violent crowds not actually engaged in violent acts. See P. A. J. Waddington, *The Strong Arm of the Law: Armed and Public Order Policing* (Oxford: Clarendon, 1991), Chapter 6.

^{16.} Waddington, The Strong Arm of the Law, Chapter 6.

^{17.} Rafiq Zakaria, *Communal Rage in Secular India* (Mumbai, India: Popular Prakasham, 2002), 20–24. See also Seumas Miller, Sankar Sen, Prakash Mishra, and John Blackler, *Ethical Issues in Policing in India* (Hyderabad, India: National Police Academy, 2008).

^{18.} In fact, in India there is a sharp institutional division between ordinary police and the armed police used to quell community violence; the latter are a separate paramilitary force.

hand, as will become evident from the discussion on military combat in Chapter 6, the principle of military necessity is not in play; so even in these extreme cases of collective violence, the justification for police use of lethal force does not collapse into the justification for the use of lethal force in military combat.

Some instances of serous and ongoing collective violence undermine the legitimate political order and constitute a threat to national internal security. Perhaps the riots in Thailand in 2014 directed at the democratically elected government of the day are an instance of this. At any rate, to unjustifiably undermine the legitimate political order in this manner is—among other things—to indirectly violate the political rights (institutionally based moral rights) of the citizenry. It is at this point that the institutional roles of the police and that of the military meet or perhaps overlap. Nevertheless, even in these kinds of situation I suggest that the distinction between the police and the military role can be, and should be, maintained. The demarcation in question can be maintained by an institutional demarcation between granting emergency powers to police and imposing martial law. In effect, the latter, but not the former, removes operational authority from the police and places it in the hands of the military.

The various above-described collective violence scenarios involving a general breakdown in public order could conceivably justify the use, or at least the threatened use, of lethal force by police that would otherwise not be justified (e.g., a policy of shooting looters on sight). However, the typical response to such scenarios would be one in which there was a declaration of a state of emergency in a specified geographical area for a limited period of time, and the granting of special powers of enforcement to police by the government of the day, but only in that area for that period. Moreover, strict accountability measures would need to be introduced to ensure police did not abuse their new powers. However, the point to be stressed here is that the special powers in question are ones granted only to police, not to the citizenry in general. Accordingly, these special legal powers (institutional rights and duties) cannot be assimilated to natural moral rights and obligations to use lethal force.

The upshot of our discussion in this section is that the justification for the police use of lethal force in defense of the rights of others, while grounded in the natural right to use lethal force in defense of the rights of others, is nevertheless different from that right in some important respects. In the first place, individual police officers have, by virtue of

their institutional role, a special moral duty to use lethal force to defend the rights of others, and this duty is considerably more stringent than the natural obligation to do so. In the second place, the circumstances under which police officers are required to discharge this special institutional moral duty to use lethal force are considerably wider than those falling within the scope of the afore-mentioned natural moral obligation. For one thing, individual police officers are required at times to use lethal force to defend an array of institutional moral rights with respect to which there are no natural obligations to use lethal force, such as the right to hold political office. For another thing, the police as an institution can legitimately be granted special emergency powers of enforcement by governments in the name of national internal security, albeit for limited periods, and, as a consequence, they can justifiably use an extent of lethal force that would otherwise not be justified (e.g., a policy of shoot on sight).

Having explicitly discussed police use of lethal force in self-defense and in defense of rights, including a right to things not constitutive of selfhood, let us now turn to the question of whether the existence of such rights could provide a third justification for police use of deadly force—the first two justifications being self-defense and the defense of the moral rights of others. In point of fact, this justification—police use of lethal force to enforce the law—has been implicit, if not explicit, in a good deal of the discussion thus far. However, conceptually at least, we can separate police use of lethal force in self-defense and in defense of the lives (and other properties constitutive of selfhood) of others, on the one hand, from police use of lethal force to enforce the law.

4.4 Police Use of Lethal Force to Enforce the Law

In order to provide an initial focus for our discussion, let us consider the following two kinds of scenarios. Instances of our first kind of scenario include an unarmed pickpocket who is fleeing a police officer with a wallet with a ten-dollar note in it, and an unarmed burglar who is making off with a million dollars' worth of someone else's goods. In both cases, the only way to prevent escape is by shooting the offender dead. Obviously, the officer is not morally entitled to shoot and kill the pickpocket for such a minor offense. Moreover, the police officer is arguably not morally entitled to shoot and kill the unarmed burglar, notwithstanding that his is a serious crime. So there are some cases in which the police are not morally

or, for that matter, legally entitled to use lethal force to uphold the law, notwithstanding that it is the only available means to do so.

However, evidently there are some cases in which the police are morally and legally entitled—and perhaps morally and legally obliged—to use lethal force in order to uphold the law. Some of these putative cases might reasonably be argued to be cases of killing in self-defense or in defense of others, notwithstanding that the police are legally entitled to use lethal force to uphold the law. So let us set these aside. However, other cases involve property crimes, notwithstanding the existence of the above instances of property crimes with respect to which the use of lethal force by police is not morally (or legally) justified. Consider the case of someone who has successfully robbed a bank and gotten away with millions of dollars of other people's savings. Assume that this person is hiding out, and is armed and prepared to shoot in order to avoid capture, though if left alone with his money, he will not shoot anyone. There are two moral questions here. First, if an arrest attempt is to be made, how should it be done, and second, whether an arrest attempt should be made at all.

If an attempt is to be made, it will be a matter of deciding on the most effective method—ideally one that will minimize the risk to life. Perhaps the police should opt for a policy of containment and negotiation. Alternatively, the best option might be a surprise attack using forced entry. It may well be that in situations of this kind, police have often pursued the wrong options, and the nature of their training may come into this. Moreover, if the methods of police in some jurisdiction are not best practice, and if they should have known this, then they may well have been professionally negligent. Obviously, the negligence of a professional group in relation to situations where lives are at risk is morally unacceptable.

Further, professional negligence may be a byproduct of the ethos or culture of an organization. Perhaps members of a particular police service have developed an ethos of individual physical courage at the expense of reflection, and of "machismo" rather than concern for the consequences, and this ethos has led to a tendency for early recourse to force rather than more considered methods such as negotiation. If so, then there would be cause for concern, as well as a reason to reconsider the organizational structure and the education and training of the police service in question, including, in particular, education in the ethical principles underlying the legitimate and illegitimate use of force by police officers.

The Victorian coroner Hal Hallenstein has taken the view that in some of the police shootings and killings in Victoria in the 1980s and 1990s, the wrong options were pursued. For example, Joshua Yap ended up in a wheelchair after being shot by a police officer, Constable Steven Tynan, when Yap—armed with a hunting knife—attempted to rob a TAB agency with an accomplice, Chee Ming Tsen—who was "armed" with an imitation revolver. Tynan had fired only after (a) he had called upon Yap and Tsen to surrender, and (b) Yap had lunged at Tynan with the knife. However, Hallenstein concluded that Tynan and fellow officer Constable Bodsworth ought not to have entered the TAB in the first place, but should have waited for assistance and opted for containment and negotiation. He said their actions were "arguably unnecessary, tactically unsound and in circumstances considered as acceptable breach of police force policy. A more satisfactory basis of acknowledgment would have been nonexposure by police members, an active seeking of non-firearms resolution of the situation and taking into account the foreseeable risks."19

An example where forced entry was used when containment and negotiation were arguably the best option was the shooting by Victorian police of Gerhard Alfred Sader. Four police officers, led by Sergeant Watson, raided Sader's Melbourne bungalow at dawn. Sader was wrongly suspected of illegal possession of arms and drugs. The police had been issued with search warrants on the basis of false information from an informer known to be unreliable. As it turned out, the police used a sledgehammer to break open an external gate prior to even getting to the door of the house. This would certainly have alerted Sader. When they finally broke open Sader's door, shouting "Police. Open up!," they stared at a figure in the darkness who later turned out to be Sader. Watson shot three times at the figure in the dark, on the grounds that he believed the person to be armed and about to shoot him. Sader was at most armed with a baseball bat.²⁰

In light of these kinds of cases, let us assume that the method most likely to minimize the risk to life is containment and negotiation. Let us also assume that this is, in fact, the method chosen. It remains true that the police are committed to apprehending the perpetrator. The police are

^{19.} Hal Hallenstein, Investigation into the Death of Hai Foong Yap: Coroner's Findings (Melbourne, Australia: State Coroner's Office, 1994), 164.

^{20.} Hal Hallenstein, *Investigation into the Death of Gerhard Alfred Paul Sader* (Melbourne, Australia: State Coroner's Office, 1994).

typically institutionally required—whether or not they ought to be—not to simply let a suspect go, and even in a situation of containment and negotiation, the use of lethal force may turn out to be necessary, albeit as a last resort.

Consider, in this connection, a gunman who, having killed his wife in their home, refuses to give himself up to police negotiators, and is preparing to escape, notwithstanding the presence of police snipers. Should he be allowed to escape, given that he is no longer a threat to anyone and the only reason not to leave him alone is that his crime will go unpunished? Martin Bryant—the man who went on a shooting spree in Port Arthur, Tasmania, on April 28, 1996, killing thirty-five innocent people with a semiautomatic rifle—should not have been allowed to escape. The abovementioned armed professional burglar is quite different from both the wife killer and Martin Bryant. The burglar is guilty of property crimes and of seeking to avoid punishment for these crimes. In addition, he is prepared to use lethal force to prevent his arrest, but is not otherwise dangerous; if the police allow him to go free, no lives will be lost. Nor is it a matter of arresting him without loss of life at a later stage; perhaps he always carries his gun, or perhaps he is about to leave the country never to return (since extradition is not possible). In short, what is the moral justification for the use of deadly force in cases in which police confront a choice of either letting an offender go free or shooting that offender?

It might be argued that the police officer who comes upon the professional burglar should allow him to go scot-free. The police officer should do so on the grounds that by doing so his or her own life and that of the burglar will not be put at risk; and ensuring that no life is lost is more important than protecting property²¹ and seeing to it that justice is done by imprisoning the burglar for his crimes. Moreover, in a similar vein It might also be argued that the police officer should allow the wife-killer in our other scenario to go scot-free. The police officer should do so on the grounds that by doing so his or her own life and that of the wife-killer will not be put at risk; and ensuring that no additional life is lost is more important than ensuring justice is done by imprisoning the wife-killer for his crime of murder.

The arguments in favour of the police officers allowing the burglar and the wife-killer (respectively), to escape are not in my view compelling,

^{21.} I am assuming the theft of the items in question will not lead to the death or near death of the property owners, e.g. by depriving them of the means to buy food.

but let us up the ante. Let us assume that in a certain police jurisdiction large numbers of offenders arm themselves and threaten to kill police officers who try to arrest them for their offences. The offences in question are serious property crimes (as in the burglar scenario) and one-off serious crimes of murder, grievous bodily harm and rape (as in the wife-killer scenario). Moreover, the armed offenders in question will kill or, at least, try to kill the police officers, if the latter try to arrest them, but not if these officers simply allow the offenders to escape.

One possible police response (let us assume) to this widespread law enforcement problem is to comply with the wishes of these offenders by allowing them to escape. However, such a police practice would surely be a gross dereliction of their institutional and moral duty; it would essentially consist of a failure to enforce the law on any occasion in which an offender was prepared to use lethal force to resist arrest (in circumstances in which allowing the offender to escape did not pose a risk to the lives or limbs of police officers or third parties). In the circumstances in question such a practice would render police officers impotent in relation to a very wide range of serious crimes; as such, it is not a sustainable law enforcement practice. Evidently, police officers need to retain as a last resort the use of lethal force to enforce the law, even in small-scale, police-offender confrontations in which their resort to lethal force is not necessary to prevent loss of life or limb (either their own or that of offenders or ordinary citizens).

In these sorts of case, the police are not necessarily engaged in self-defense. In many of these cases, the best thing for police officers—if they are simply acting in self-defense—would be for them to get back into their patrol cars and return to the police station. In this important respect, police are different from ordinary citizens. It is expected, indeed, legally required in many jurisdictions, that ordinary citizens take the option of fleeing if it is available; however, for the police to do so would be an abrogation of their legal and moral duty. Nor are these sorts of case necessarily cases of killing in defense of others. The lives of ordinary citizens might not be at risk. For example, an offender—such as our armed burglar—might simply want to be left alone to spend his ill-gotten gains. Or the above-described husband who has killed his wife might cease to be a threat to anyone once he has killed his wife.

Against this it might now be argued that although the police are morally and, presumably, legally obliged to use lethal force against offenders prepared to use lethal force to avoid arrest (assuming it is necessary to do so on pain of allowing the offenders to escape), the moral justification for such use of lethal force by the police is self-defense rather than, as I have suggested, to enforce the law.

Before proceeding to engage directly with this argument there are a couple of preliminary matters to be dealt with. Firstly, it is important not to conflate the type of scenario in question with a related type that is irrelevant to the argument. In these irrelevant scenarios the armed offenders will try to kill the police officers whose job it is to arrest them, *even if* these officers are prepared to allow the offenders to escape. In short, in this second type of scenario the officer's life is at risk, irrespective of whether he or she proceeds to try and effect an arrest of the offender. A moral justification for police use of lethal force in this second type of scenario may well be self-defense; but this type of scenario is *not* in question here. In the scenarios in question here the police officer has the option of allowing the offender to escape without putting his own life (or that of the offender or, for that matter, any third party) at risk.

More generally, it is important not to conflate the type of case of interest to us here with that of fleeing *dangerous* offenders (of which more below). Unlike the offenders of interest to us here, dangerous offenders in this sense are a threat to the life and limb of police officers and ordinary citizens, even if they are allowed to escape. So dangerous offenders are a *standing* threat to life and limb; the threat to life and limb that they pose cannot be removed by leaving them alone. Hence it is legally and, presumably, morally permissible to use lethal force against such dangerous offenders if they are trying to escape arrest; if they are so-called (dangerous) 'fleeing felons'.

A second preliminary point is that the argument under consideration here (that the law enforcement justification for police use of lethal force collapses into the self-defense justification) should not be confused with a related argument involving the other-defense justification. According to the latter argument, in the scenarios in question the police, even if they are not engaged in killing in self-defense are, nevertheless, necessarily killing in defense of others. As we saw above, this may well be true of *dangerous* fleeing offenders (e.g. serial killers) or offenders who will try to kill would-be arresting police officers, even if the latter would allow them to escape. However, as our burglar and wife-killing scenarios (again) illustrate, neither the lives of police officers nor those of ordinary citizens need be at risk. So with respect to the scenarios in question the other-defense justification is not relevant.

Let us now directly engage with the actual argument at issue; the argument that putative cases of police use of lethal force to enforce the law, such as our burglar and wife-killer scenarios, are simply cases of police using lethal force in self-defense. To reiterate: the type of case in question is that of fleeing offenders who only use lethal force, or threaten to use lethal force, to avoid arrest.

What if in these cases the police do their duty and choose not to allow such offenders to escape? So the police proceed to try to arrest these offenders, but in doing so they no longer have the option of using nonlethal means; so the police use lethal force. I have suggested that the police are now using lethal force to enforce the law. The alternative suggestion is that the police are using lethal force in self-defense. But at the point at which the police decide to enforce the law in the knowledge that the offender will use lethal force to resist arrest, the police are not engaged in an act of self-defense. After all, at this point the police have another option, if they are primarily interested in preserving their own lives and/ or that of the offender: get back into their patrol cars and return to the police station. Accordingly, at this point the self-defense justification is not available to the police officer. It is not available since it is not necessary for the police officer to use lethal force to protect his life (or that of his fellow officers or other third party); the option of flight is available to the officer(s). However, it is necessary for the police officer to use lethal force if the officer is to enforce the law. Therefore, in these scenarios the moral justification for the police officer using lethal force is that it is necessary to do so if the law is to be enforced.

Against this it might be argued as follows. It is agreed on all hands that the police officer in question is doing his legal and moral duty in trying to arrest the offender and that the offender ought not to resist arrest. However, so the argument goes, if the offender does resist arrest by (say) shooting at the officer then the officer's action of killing the offender is self defense. For at *that* point – the point at which the offender tries to kill the officer - the offender would have killed the officer if the officer had not killed the offender first.

This response is flawed in so far as the possibility of flight remains available to the police officer. Naturally, at *some* point in *some* scenarios the possibility of flight might not be available, e.g. the officer and the offender are exchanging fire and the officer is unable to flee because his leg is damaged (say) but is, nevertheless, blocking the offender's exit path. At this point in these scenarios it may well be that the officer is not aiming at arresting the

offender or otherwise enforcing the law but is simply trying to preserve his own life. However, this does not vitiate the claim made above that prior to such a point being reached the police officers may well be using lethal force to enforce the law and not in self-defense, given that during this (earlier) period the option of flight remains available to the officer. Moreover, the option of officer flight or of allowing the offender to escape may well remain even after the officer and/or the offender have fired their weapons. (See below for an actual instance of this.)

I have argued that in the kinds of case in question, the police are not simply engaged in self-defense or defense of others, either in the narrow sense of preservation of life, or the wider sense of preservation of self. Rather, there is some more complex set of moral considerations here. Let us pursue these further, initially by looking at the case of the police killing of Pavel Marinoff. Marinoff was a psychopathic Bulgarian army deserter who had shot and wounded a number of police officers before being confronted by Sergeant John Kapetanovski and Senior Constable Rod MacDonald on the Hume Highway outside Melbourne.²² They pulled a van over to the side of the road, rightly believing it to be driven by Marinoff. They ordered the driver to place his hands outside the car. The driver drew his pistol, fired several shots, and drove off. He wounded both officers. However, MacDonald fired two shots from his shotgun through the rear window of the escaping car, killing Marinoff. Perhaps this was a case of killing a fleeing offender, rather than of killing in self-defense or in defense of the lives of others. After all, presumably Marinoff was at this stage simply seeking to make good his escape. Accordingly, neither the lives of the police nor the lives of others were under immediate threat. Even if this were so, it was nevertheless a morally justifiable killing of a fleeing offender. Marinoff's offenses included attempted murder and grievous bodily harm. Further, Marinoff was armed and dangerous, and constituted a threat to the lives of others, and especially the lives of the police officers. Arguably, it was the *duty* of MacDonald to shoot Marinoff.

There are various other cases of shootings of dangerous fleeing felons that can be drawn from other police services and used for illustrative purposes. For example, there are the shootings of fleeing suspected terrorists in Northern Ireland. And police have been held liable for not shooting at fleeing gunmen known to be terrorists. Another case is that of Hussein

^{22.} See John Silvester, Andrew Rule, and Owen Davies, *The Silent War: Behind the Police Killings That Shook Australia* (Sydney: Floradale, 1995), 3.

Said, who attempted to assassinate the Israeli ambassador in England. He fired one shot, which missed, and then his gun jammed. He then took flight. He was pursued by a bodyguard, who fired a warning shot and called upon Said to give himself up. When he continued to flee, he was shot and wounded. In the ensuing court case, the bodyguard's action was held by the judge to have been illegal, since Said no longer constituted an immediate threat to the life of anyone. Evidently, bodyguards and police can find themselves between a rock and a hard place. They might be held liable for murder if they shoot, and for failure to discharge their duty if they do not.

In the United States, the fleeing felon rule under which lethal force could be used against a fleeing person suspected of a felony was curtailed by the US Supreme Court in 1985.23 Roughly speaking, under this ruling, lethal force is legally justified only if it is necessary to prevent the escape of someone who is reasonably believed to pose a significant threat to the life or limb of the pursuing police officer or to others. Consider the recent case mentioned in the Introduction of the unarmed black youth Michael Brown. After stealing from a shop in Ferguson, Brown fled from police, was shot at by a police officer (and hit in the hand) and was finally shot dead by the police officer. Perhaps this use of lethal force might have been lawful prior to 1985, but prima facie it was unlawful thereafter, given that Brown was unarmed. On the other hand, there remains the issue as to whether or not the police officer might be held to have had a reasonable belief that Brown constituted a threat, since, arguably, he was moving toward the officer rather than surrendering when he was shot.²⁴ In the recent case of Walter Scott, shot dead by a police officer in North Charleston, South Carolina, there could not have been any such reasonable belief. Scott was an unarmed black person stopped by the officer. The officer shot Scott in the back multiple times as he fled, and the incident was caught on video. The officer was charged with murder.

Let us now consider the killing of Ian William Turner by Constable Wayne Sherwell.²⁵ Sherwell stopped a car driven by Turner for speeding

^{23.} See US Supreme Court, "Tennessee v. Garner," in (eds.) Daryl Close and N. Meier Morality in Criminal Justice: An Introduction to Ethics (Boston: Wadsworth, 1995), 366–379.

^{24. &}quot;What happened in Ferguson?" International New York Times http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html?_r=0

^{25.} Silvester, Rule, and Davies, The Silent War, 125-130.

near St. Arnaud in Victoria. Turner had no identification, and in the course of conversation he aroused Sherwell's suspicions. Turner said he would look for ID in his bag, but instead pulled a sawed-off .22 rifle on Sherwell. He then took Sherwell's police revolver. Sherwell grabbed Turner's hand and a struggle ensued. During the struggle, Turner called on Sherwell to give up and simply let him go free. Sherwell disarmed Turner and, now in possession of both weapons, ordered Turner to lie on the ground and allow himself to be handcuffed. He refused to do so, calling on Sherwell to let him go. When Sherwell refused his request and tried to radio for assistance, Turner blocked his way, calling on Sherwell to shoot him. Sherwell fired his gun in the air. Turner ran to his car while Sherwell called on his radio for assistance. Turner ran back to his car and produced a sawed-off shotgun, which he pointed at Sherwell. Sherwell fired a couple of shots. Both men hid behind their respective cars. Further shots were fired by Sherwell. Turner did not fire any shots at any time. When other officers arrived at the scene, they found one of Sherwell's shots had killed Turner. Turner, it later emerged, was an armed robber.

At the point when Sherwell shot Turner, he was acting in self-defense, and his killing of Turner was justifiable on grounds of self-defense. However, I would like to consider a further issue that the case raises. It seems that throughout the whole episode, Turner had no desire to kill Sherwell, but rather acted in order to escape from Sherwell. Thus, Turner initially used the threat of deadly force preemptively in order to escape arrest, and subsequently he grabbed his shotgun because Sherwell was holding him prisoner and using the threat of deadly force to do so. So Turner essentially threatened, but never in fact used, deadly force in order to avoid arrest. For his part, Sherwell, while prepared to threaten to use deadly force to prevent Turner's escape, only in fact seemed prepared to use deadly force in self-defense. In other words, if Turner had simply got into his car and driven off, Sherwell would quite possibly not have shot him. Moreover, if Turner had known that Sherwell would not have shot him other than in self-defense, Turner would not have pulled a gun on Sherwell in the first place, but would simply have driven off.

The case is an example of an offender who uses the threat of deadly force to avoid arrest. It also illustrates the distinction between killing in self-defense and killing in order to prevent an offender escaping. Moreover, it illustrates this distinction notwithstanding the fact that the offender is armed and is prepared to use deadly force to escape arrest.

This distinction between killing in self-defense (or defense of others) and killing (or not killing) in order to prevent an offender escaping is further illustrated in the case of passive noncompliance. Consider the case involving the dangerous criminal David Martin in an underground subway in England in 1982. Cornered in the subway by armed police, Martin was persistently ordered by police to give himself up, but he refused to do so. However, he made no hostile movements against the police. The police were concerned that he might have a gun and might use it against them. Certainly his history indicated this might be so. Finally, the police decided not to shoot him, but to rush and disarm him. He was found to be unarmed.

Three points need to be noted here. First, the police risked their lives in rushing Martin. He might have been armed, and if so, he may well have shot dead one or more of the police officers. Second, if Martin had been shot dead by the police, then the police may well have been found guilty of culpable homicide. Third, if Martin had been allowed to escape, he might have harmed, even killed, innocent people, and if so, the police would have been held liable for these consequences of their action of allowing him to escape.

Let us now consider the police killing of Graeme Jensen. Victorian police sought to arrest Jensen for murder. In fact, he did not commit the murder. Nor did they have sufficient evidence to convict him of conspiring to rob a bank—the other matter for which he was under investigation. At most he could have been convicted of illegal possession of a firearm. Moreover, Jensen probably believed the police were out to kill him. At any rate, he tried to escape the police when they tried to arrest him. Jensen was armed and allegedly pointed his gun at officers, who first warned him and then shot at him. It later turned out that Jensen's gun was not loaded. Jensen was escaping by car when the second shot went through the rear window and killed him. By one account, Jensen was killed in self-defense. By a second account, it was not a case of self-defence but of shooting a fleeing offender, the offense being illegal possession of an (unloaded) weapon.²⁶ On a third account, it was unlawful for police to even try to arrest him. If so, Jensen was murdered.²⁷

^{26.} Silvester, Rule and Davies, The Silent War, 37.

^{27.} Police were in fact charged with his murder but were not convicted.

At any rate, the Jensen killing raises at least two issues. In the case of Jensen, unlike Turner, the police initiated the threat of deadly force, and Jensen at most threatened deadly force for the purposes of making his escape. Moreover, the police used an extent of force that was disproportionate to the offense committed.

Let us now summarize the moral considerations that the above-described cases illustrate. First, there is the seriousness of the offense committed by the person shot dead by the police. In the case of a burglar, the crime is a violation of the right to property. While this is not a violation of a right to something constitutive of selfhood, it is a serious crime, and certainly far more serious than the petty theft involved in picking someone's pocket. In the case of Marinoff, the offense is a violation of the right to life, and far more serious still. This raises the issue of the proportionality of police use of deadly force.

Second, there is the question as to whether the offender is armed and prepared to kill in order to avoid imprisonment. Here we must distinguish between being prepared to kill to avoid arrest and, ultimately, imprisonment and being prepared to kill for other reasons, such as self-defense, revenge, or to become rich.

The following two considerations are evidently held in many liberal democratic societies to be jointly sufficient to morally justify the police use of deadly force as a last resort. 28 First, the offense is serious in that it is a violation of a right to something constitutive of selfhood, or if not, it is a violation of some other right of an appropriately important kind. Second, the offender is prepared to use deadly force to avoid arrest and imprisonment. Some societies appear to take this view, while at the same time being opposed to capital punishment. There is no obvious inconsistency here. On the one hand, members of liberal democratic societies generally take the view that killing is not justified as a punishment for criminals who are imprisoned, and therefore no longer able to break its laws. On the other hand, members of these same societies generally hold that police use of deadly force is justified if this is the only way to ensure that the laws against serious crimes are upheld, and in particular, if the perpetrators of serious crimes are themselves prepared to kill in order to avoid imprisonment. This last point is in need of further elaboration.

^{28.} However, this view is evidently controversial. It appears to be inconsistent with that advanced, for example, by Jerome Skolnick and J. Fyfe in *Above the Law: Police and the Excessive Use of Force* (New York: Free Press, 1993).

In the kinds of cases under consideration, there are only two options confronting the police: letting the perpetrator escape, or shooting the perpetrator dead. However, what has been omitted from the argument thus far is that the fact that these are the only options is due to the perpetrator— he is responsible for this situation, because he is forcing the choice—in our above-mentioned (Chapter 2.2) thick sense—between two evils.²⁹ The armed burglar mentioned earlier refuses to surrender himself and his stolen goods. Thus he is intentionally ruling out the third option—the morally preferable option—namely, his peaceful surrender. In that case, the burglar is morally responsible for the choice between two evils confronting the police. That is, the burglar is not only responsible for violating people's property rights, but he is also morally responsible for attempting to prevent the police from performing their duty, and, indeed, he is morally responsible for forcing the police to choose between two evils. The two evils in question are allowing the perpetrator of a serious crime to escape, or shooting and killing that perpetrator.

This consideration may be enough to tip the scales in favor of police use of deadly force in this kind of case. If so, how would this tipping of the scales be achieved? Presumably the perpetrator would now be held to be *indirectly and in part* responsible for his own death. When a police officer shoots dead an armed bank robber who is prepared to kill in order to prevent apprehension, the police officer's choice situation has been knowingly chosen by the burglar. Accordingly, the armed bank robber is forcing the choice in the thick sense and, this being so, can be held indirectly and in part responsible for his own death.

While police use of deadly force in these kinds of cases may well be, in principle, morally justifiable, the justification is nevertheless problematic in a number of ways. First, it places an enormous responsibility—and a corresponding opportunity for abuse—on individual members of the police force. For as we have seen, if police are entitled to kill in order to ensure that the law is upheld, then police may kill an armed bank robber even though he will not fire his gun if left alone. Moreover, in doing so they will kill this (alleged) bank robber prior to any considered judgement by a court of law that he has in fact broken the law. In such cases, it is the responsibility of the individual police officer, initially, to make the judgement that the person is an armed burglar who will kill in order to avoid

^{29.} For discussion of the notion of forcing the choice, see Chapter 2.2.

apprehension, and then to go on to shoot this person dead in order that he not escape.

Second, it needs to be determined which crimes committed by *armed* perpetrators are sufficiently serious to warrant police use of deadly force. I have suggested that violations of rights to things constitutive of self-hood are sufficiently serious. It still remains to be determined what other rights violations are sufficiently serious. Here it is not simply a matter of determining which rights are sufficiently morally important to warrant protection by recourse to deadly force, but also the extent of the rights violations. Perhaps a single armed shoplifter is not a legitimate target, but what about an army of armed looters threatening the economic well-being of an impoverished community?

This latter problem raises perplexing questions concerning the moral balance to be struck between, on the one hand, the right to life of a suspect, and on the other, the rights of citizens to be protected by police from serious rights violations, which nevertheless stop short of threatening their lives or elements constitutive of selfhood. Here there are a number of considerations. How extensive are these rights violations? Are these rights violations likely—if they go unchecked—to result in the violations of citizens' rights to things which are constitutive of selfhood? What moral weight, if any, is to be attached to the threat posed by those who use arms to prevent their legitimate arrest, or to the possession by the state of overriding coercive power to uphold its morally legitimate laws?

Finally, these kind of "forcing the choice" situations raises the question as to whether or not the police—and not the offender—knowingly created a situation in which they would have to kill the offender in self-defense, or at least failed to act when they knew that their inaction would lead to a situation in which they had to kill the offender in self-defense. These latter sorts of cases need to be distinguished from the ones here under consideration, namely ones in which an offender is forcing the choice upon the police of either using deadly force or allowing the offender to escape. Consider, in this connection, the following type of scenario involving the Special Investigation Section (SIS) of the Los Angeles Police Department, which targeted armed robbers during the period 1965–1992: "The most controversial of the home-baked rules is the SIS practice of standing by and watching its surveillance subjects victimize innocent citizens, then confronting offenders as they leave the scene of their crime." Here the

^{30.} Skolnick and Fyfe, Above the Law, p. 146.

SIS provided known offenders with the opportunity to commit very serious crimes by failing to arrest them for the less serious crimes they had already committed. The SIS did so in order to enable the offenders to commit the more serious crimes, and thereby either receive longer prison sentences, or be shot by the police attempting to flee the crime scene or resisting arrest.³¹

4.5 Conclusion

Let me conclude this chapter by outlining the main general conditions under which police use of deadly force might be morally justified, or at least might be morally justified if adequate police accountability can be ensured so as to prevent abuse of police powers. Note that the first two conditions—self-defense and defense of others—are in essence the same conditions under which ordinary citizens are entitled to use deadly force. The use of deadly force under a and b of condition 3 below is particular to the police, and also problematic in various ways, some already mentioned. At any rate, the use of deadly force under conditions 3a and 3b make a number of implicit assumptions. One assumption is that the extent of reasonable suspicion is such as to justify making an arrest. However, killing an alleged offender to prevent his or her escape can presumably only be justified in situations in which there is certainty, or near certainty, that the alleged offender has in fact committed the offense. A standard of evidence higher than reasonable suspicion is required. Another assumption is that there really are no possible ways of preventing escape other than by using deadly force. So, for example, letting the suspected offender escape in the knowledge that there is a reasonable chance that he or she can be arrested at a later date is not an option.

1. *Self-Defense*: A police officer is morally entitled to kill another person if that person is trying to kill, maim, or otherwise threaten the life of the

^{31.} The police might argue that in some of these situations they would be unable to convict these offenders of any serious crimes, due to the difficulties of, for example, proving a conspiracy to commit an armed robbery, or even to prove attempted armed robbery. Accordingly—the argument might run—they had to choose between increasing the risk to life and limb (their chosen option), or allowing armed robbers to either get off scot-free (when they failed to be convicted of (say) conspiracy to conduct an armed robbery), or simply be convicted of minor offenses, such as, say, car theft.

- officer (or other constitutive features of his or her selfhood), and will succeed unless the officer kills the person first.
- 2. *Defense of Others*: A police officer is morally entitled—and may be morally obliged—to kill another person if that person is trying to kill, maim, or otherwise threaten the selfhood of some third person(s), and will succeed unless the officer kills the would-be offender first.
- 3. Uphold the Law: (a) Fleeing felons. A police officer is, or might be, morally entitled—and may be morally obliged—to kill another person if that person (whether armed or unarmed) is rightly and reasonably suspected of the crimes of killing, maiming, or otherwise threatening the selfhood of some third person(s), is attempting to avoid arrest, and if the only way to prevent the suspected offender escaping is to kill her or him. (b) Armed suspects. A police officer is, or might be, morally entitled—and may be morally obliged—to kill another person if that person is rightly and reasonably suspected of the crimes of serious rights violations, is attempting to avoid arrest, is armed and using those arms to avoid arrest, and if the only way to prevent the suspected offender from escaping is to kill him or her.
- 4. Deterrence in States of Emergency: A police officer is, or might be, morally entitled—and may be morally obliged—to kill another person if (a) that person is rightly and reasonably suspected of a type of crime that is so widespread in an existing state of emergency as to constitute a serious threat to fundamental rights of citizens; (b) deadly force is the only available deterrence in the circumstances of this particular state of emergency; (c) that person is attempting to avoid arrest; (d) the only way to prevent the suspected offender escaping is to kill her or him; (e) perpetrators of the type of crime in question have been warned that they will be shot dead under conditions a, c, and d; and (f) the policy specified in conditions a—e has been adopted under a state of emergency for a specified time-limited period and in a specified geographically limited area.

Police Use of Lethal Force and Suicide Bombers

AS WE SAW in the last chapter, the use of lethal force by police raises a wide range of moral problems. In this chapter the focus is on the use of lethal force by police in counterterrorism operations and, in particular, in relation to suicide bombers. Naturally, the range of permissible uses of lethal force by security agencies, such as police and military forces, in counterterrorist operations varies according to the nature and extent of the terrorist threat in the context in question. The concern in this chapter is restricted to police use of lethal force against terrorists in the context of well-ordered, liberal democratic states, as opposed to, for example, disorderly or failed states or theaters of war. I take it that the latter kinds of context imply a military or paramilitary response, even if it also involves the police. Accordingly, I deal with these contexts in later chapters concerned principally with the military use of lethal force.

The use of lethal force by police in many counterterrorism operations does not raise moral problems that are essentially different from those that arise in combating other kinds of violent crime. Nevertheless, there do seem to be some important differences when it comes to the use of lethal force against suicide bombers, in particular. In this chapter I focus on some of the moral problems arising from the use of lethal force against suspected suicide bombers operating in well-ordered, liberal democratic

^{1.} An earlier version of the material in this chapter appeared in Part 2 (written by Miller) of Gordon and Miller, "The Fatal Police Shooting of Jean Charles de Menezes."

states. I do so because these operations seem to require a less restrictive use of lethal force on the part of police than do other related and potentially murderous criminal actions, such as, for example, an armed bank robber who has taken hostages and with whom police have entered into negotiations.

In the case of suspected suicide bombers, police are not able to issue a warning, since this would alert the bomber to their presence, and he or she would immediately set off the bomb. Moreover, in the case of suicide bombers, the harm to be done is both potentially very great (e.g., dozens or even hundreds of innocent lives) and perpetrated by a single action—unlike, for example, in the case of serial murderers. Finally, there is typically the problem of uncertainty, which is an epistemic problem (to use the philosophical term for knowledge). There is often uncertainty, until it is too late, as to whether or not the suspect is in fact a suicide bomber about to set off a bomb. In this respect, suicide bombers are unlike, for example, lone gunmen shooting at passersby. Moreover, there is likely to be a potentially problematic division of labor in the case of police confronted by a suspected suicide bomber; the police firearms officer (the one who is to do the shooting) is heavily reliant on intelligence provided by other police officers that the person he is contemplating shooting is in fact a suicide bomber. The problem of mistaken identity leading to a fatal shooting by police of an innocent person wrongly suspected of being a suicide bomber was exemplified in the fatal shooting by police of an innocent Brazilian, Jean Charles de Menezes, in London in 2005—a case discussed in some detail below.

This particular conjunction of factors creates an especially acute set of moral problems for police contemplating whether or not to use lethal force against someone suspected to be a suicide bomber. Specifically, it raises the question of individual versus collective moral responsibility for police use of lethal force. If a police firearms officers shoots dead a suspected suicide bomber on the basis of intelligence provided by other police officers, and the suspect turns out not to be a suicide bomber, who, if anyone, is to be held morally responsible? Is it only the firearms officer who fired the fatal rounds? Is it the firearms officer as well as the members of the surveillance team who provided the incorrect intelligence with respect to the identity of the suspect? Or is no one morally responsible? Let us begin with an outline of the above-mentioned fatal shooting by police of the innocent Brazilian. Menezes.

5.1 The Fatal Shooting of Jean Charles de Menezes

In London in July 2005, a day after a failed bomb attack, police shot dead a terrorist suspect who turned out to be an innocent, defenseless Brazilian electrician, Jean Charles de Menezes, going about his day-to-day business. Menezes was an innocent person wrongly suspected by police of being a terrorist suicide bomber, and he was intentionally killed by police in the belief that he was a mortal threat to the passengers in the London underground station where he was shot dead. The ethical issue to be addressed in this chapter concerns the individual and/or collective *moral* responsibility, if any, for the killing of an innocent person.²

While the events that terminated in Menezes's death involved a number of mistakes or errors of judgement on the part of police, I will focus on just three: (1) the failure of the surveillance team located at Scotia Road in London from where Menezes emerged to determine whether or not he was the terrorist suspect Hussain Osman, and to clearly communicate their determination to their commanding officer, Commander Cressida Dick, that Menezes was or was not Osman, or that they did not know or were otherwise uncertain of their subject's identity; (2) the failure on the part of Commander Dick to see to it that Menezes was challenged and stopped at some point after leaving Scotia Road, but prior to his entering the underground railway station (i.e., at a location that would not have compromised the surveillance operation at Scotia Road), and in a manner that would not have required killing him (he being at most a threat to himself, the arresting officers, and, perhaps, one or two passersby); (3) the failure on the part of the two officers who shot Menezes to provide themselves with adequate grounds for believing that they were shooting dead a suicide bomber who was at the time in question, a mortal threat to the train passengers. In relation to error 3, I note that the person shot dead was merely a suspected suicide bomber, and that the firearms officers had no clear evidence that he was carrying a bomb—because the operation had not been declared by Commander Dick to be a Kratos operation. A Kratos operation is one involving someone known to be a suicide bomber, and therefore calling for the use of lethal force to prevent the would-be bomber

^{2.} See Independent Police Complaints Commission (IPCC), Stockwell One: Investigation into the Shooting of Jean Charlies de Menezes at Stockwell Underground Station (February 2007), http://webarchive.nationalarchives.gov.uk/20100908152737/http://www.ipcc.gov.uk/stockwell_one.pdf

detonating his or her bomb and killing innocent persons. The firearms officers did not at any point perceive a bomb, nor were they otherwise provided with good evidence that the suspect was carrying a bomb.

In referring to these failures as mistakes or—especially in the case of Commander Dick and the firearms officers—errors of judgement, I am not ipso facto ascribing moral culpability to the police; mistakes, even ones in respect of morally significant actions, do not necessarily entail moral culpability. Whether or not there was moral culpability is a matter to be determined. Certainly, as stated above, there was no intention to kill an innocent person; indeed, police actions were carried out with the intention to save innocent lives. Moreover, the police obviously did not foresee that an innocent life would be taken.

A related moral issue concerns Kratos as a mode of police operations. Is Kratos a morally sustainable operational policy? If not, then a question arises in relation to the moral responsibility of those who put the policy in place for any untoward consequences that might emanate from its application on the ground. In relation to the moral acceptability of Kratos, suppose that the police shot dead a person under the same circumstances as they shot Menezes, except that the person turned out to be Osman; would their actions have been justified if, for example, Osman was *not* carrying a bomb with him at the time? Osman was, after all, only a suspected suicide bomber; otherwise, why was the plan to "let him run" upon leaving Scotia Road? At no point was any good evidence provided that the person under surveillance was actually carrying a bomb.

Is it, therefore, morally justifiable for police to shoot dead a suspect without warning, when the suspect is in a crowded location and they have good evidence that he is a would-be suicide bomber, that he intends at some point *in the future* to denote a bomb killing himself and others, but they do not know whether he has a bomb on him *at this time*? In short, they do not know whether his intended suicidal and murderous act is imminent. Arguably, if the police did have a policy to shoot known suicide bombers under these conditions, then they would have a shoot to kill on sight policy of the sort, for example, that is used by military forces in relation to combatants. Naturally, the additional problem, both in this and in the military scenario, is the epistemic one. The police do not know whether the suicide bomb attack is imminent. However, as will be argued in later chapters, while this is not necessarily crucial in military contexts it is of the first importance in policing contexts.

If shooting dead a person under these circumstances is not permissible under Kratos, because it is not permissible under the relevant criminal laws, is it nevertheless not likely that under Kratos police will end up shooting suspect suicide bombers under these circumstances? Indeed, on one construal of events—a construal that is admittedly at odds with the testimony of the police and not found by the coroner to be correct by the standard of being beyond reasonable doubt—this is exactly what happened in the case of the shooting of Menezes. The firearms officers, rightly or wrongly, reasonably or unreasonably, believed the situation was a de facto Kratos operation and, therefore, did not give Menezes any warning, did not afford him the opportunity to be arrested without the use of force, and, for his part, Menezes did not fail to comply with any instruction from the police.

5.2 Moral Responsibility

We first need to distinguish some different senses of responsibility.3 Sometimes to say that someone is responsible for an action is to say that the person had a reason, or reasons, to perform some action, then formed an intention to perform that action (or not to perform it), and finally acted (or refrained from acting) on that intention—and did so on the basis of that reason(s). Note that an important category of reasons for actions comprises ends, goals, or purposes; an agent's reason for performing an action is often that the action realizes a person's goal. Moreover, it is assumed that, in the course of all this, the person brought about or caused the action, at least in the sense that the mental state or states that constituted the reason for performing the action was causally efficacious (in the right way), and that the resulting intention was causally efficacious (in the right way). I will dub this sense of being responsible for an action "natural responsibility." To say that someone had natural responsibility for an action is to say, in essence, that an action of theirs was under their control. This sense of being responsible is relevant to the actions of the firearms officers in shooting Menezes, in that they intentionally performed an action of shooting Menezes dead, and did so for the reason that they believed him to be a suicide bomber.

^{3.} See, for example, John Martin Fischer and Mark Ravizza, Responsibility and Control: A Theory of Moral Responsibility (Cambridge: Cambridge University Press, 1998).

On other occasions, what is meant by the term "being responsible for an action" is that the person in question occupies a certain institutional role, and that the occupant of that role is the person to decide what is to be done in relation to certain matters, and to see to it that what ought to be done is in fact done. Here what ought to be done comprises one's institutional duties. Moreover, a role occupant, A, has only discharged A's responsibility with respect to A's duties when A intentionally does A's duty. Note, however, that A's motive for doing A's duty is irrelevant (see Chapter 3, section 3.1). Thus the members of the surveillance team had the responsibility to identify Hussain Osman, video record anyone leaving the premises, and communicate information in a clear and precise manner to the control room, irrespective of whether or not they did so, or even contemplated doing so. This notion of institutional responsibility is prospective (as opposed to retrospective). Clearly, they failed in respect of their institutional responsibility in this regard. Accordingly, they might be held to be institutionally responsible for this failure; that is, institutionally responsible in the retrospective sense. If they had succeeded, then they would have discharged their (prospective) institutional responsibility and, therefore, could be said to be institutionally responsible in the retrospective sense—albeit, in this instance, responsible for a successful action.

A third sense of "being responsible" for an action is a species of our second sense. If the matters in respect of which the occupant of an institutional role has an institutionally determined duty to decide what is to be done include ordering other agents to perform, or not to perform, certain actions, then the occupant of the role is responsible for those actions performed by those other agents. We say of such a person that he is responsible for the actions of other persons in virtue of being the person in authority over them. Thus, as the person in authority, Commander Dick had a responsibility to see to it that the police on the ground interdicted Menezes before he entered the underground station. Her failure in this respect was a failure to discharge her institutional responsibility as the person in authority. However, even if a person in authority fails to discharge his or her institutional responsibility to see to it that others perform some set of individual actions or some joint action, it does not follow that the subordinates in question are not also institutionally responsible for their failure to do the action(s) in question. The person in authority and the subordinates might be jointly institutionally responsible (see Chapter 3, section 3.1).

The fourth sense of responsibility is in fact the sense that we are principally concerned with here; namely, moral responsibility. Roughly speaking, an agent is held to be morally responsible for an action or omission if the agent was responsible for that action or omission in one of our first three senses of responsibility, and if that action is morally significant. An action or omission can be morally significant in a number of ways. The action or omission could be morally permissible, morally impermissible, morally obligatory, and so on. It could be intrinsically morally wrong, as in the case of a rights violation. Or the action or omission might have moral significance by virtue of the end that it was performed to serve, or because of the foreseen or reasonably foreseeable outcome that it actually had, such as the killing of an innocent person, as in the case of Menezes. We can now make the following preliminary claim concerning moral responsibility:

If an agent is responsible for an action or omission (or foreseen or reasonably foreseeable outcome of that action or omission) in the first, second, or third sense of being responsible, and the action, omission, or outcome is morally significant, then—other things being equal—the agent is morally responsible for that action, omission or outcome, and—again, other things being equal—ought to attract moral praise or blame and (possibly) punishment or reward for it.

Here the "other things being equal" clauses are intended to be interpreted in terms of a capacity for morally responsible action. For example, suppose the agent was a psychopath, or there were exculpatory conditions, either by way of justification or excuse. Thus, other things might not be equal if, for example, the agent was coerced, or there was some overriding moral justification for performing what would otherwise have been a morally wrong action. Note also that, contra some accounts of moral responsibility, I am distinguishing this notion from that of blameworthiness or praiseworthiness.

Let us first consider Commander Cressida Dick. Given the moral stakes and the existence of a plan (namely, to stop any suspected suicide bomber before she or he got to an underground train station or similar locale) that she could reasonably have been expected to adhere to, she can be held morally responsible for failing to see to it that Menezes was interdicted prior to going into the underground. I say this notwithstanding the existence of

mitigating circumstances. Of course, in making this claim regarding her moral responsibility for the failure to interdict Menezes, I am not claiming that the Commander Dick is morally responsible for his death.

What of the firearms officers? I discuss their moral responsibility in more detail below. Suffice it to say here that if a firearms officer deliberately shoots a suspect dead then the officer is morally responsible for the killing. However, it is a further question whether the officer was morally culpable. The answer to this latter question turns on the moral justification the officer had for the killing.

Lethal Force and Individual Moral Responsibility

Police officers need to exercise authority on a daily basis; they have institutional responsibilities in the sense explained above. Historically, policing in the United Kingdom and Australia has made use of a distinctive notion of authority, so-called original authority. In relation to the concept of original authority, we need to distinguish compliance with laws from obedience to the directives of men and women, especially one's superiors. Thus, according to the law, an investigating officer must not prosecute a fellow police officer if the latter is self-evidently innocent. On the other hand, the investigator might be ordered to do so by a superior officer. Now, individual police officers are held to be responsible to the law as well as their superiors in the police service. However, their first responsibility is to the law. So, a police officer should disobey a directive from a superior officer that is clearly unlawful. And yet the admittedly controversial doctrine of original authority does not end here. It implies further that there are at least some situations in which a police officer has a right to disobey a superior's lawful command, if obeying it would prevent that officer from discharging the lawful obligation to uphold the law.4

^{4.} Relevant legal cases here are the "Blackburn cases," principally *Rv. Metropolitan Police Commissioner, ex parte Blackburn* (1968) 2 QB 118, cited in Keith Bryett, Arch Harrison, and John Shaw, *An Introduction to Policing: The Role and Function of Police in Australia*, Vol. 2 (Sydney: Butterworths, 1994), 43, in which Lord Denning considered the Commissioner of the London Metropolitan Police "to be answerable to the law and to the law alone" in response to a demand for *mandamus* from a plaintiff seeking to get the courts to require police intervention; and *Fisher v. Oldham Corporation* (1930) 2 KB 364, cited as above at 42, in which the court found the police service was not vicariously liable in virtue of the original authority of the office of constable. Concerning the exercise of original authority in decisions to arrest, in some jurisdictions, proceeding by summons has increased

According to the doctrine of original authority, there are at least some actions, including the decision to arrest or not arrest (at least in some contexts) or to shoot or not shoot, which are ultimately matters for the decision of the individual officer, and decisions for which the officer is, or might be, individually legally liable. The contexts in question are ones in which the lawful action of arresting a given person would, nevertheless, prevent the police officer from discharging his other lawful obligations to the law, such as his obligation to keep the peace. For example, arresting an unlawful protester might enrage an already volatile crowd and trigger a riot. If this is indeed the legal situation, then it reflects a commitment to something akin to professional autonomy. In the case of a surgeon, for example, it is up to the surgeon—and not the surgeon's employer—to decide whether or not she or he will operate on a patient who might suffer complications if operated on (assuming, of course, the patient has given consent).6 It is not that the surgeon has the right to decide whether the patient will be operated on (the patient decides that), or even the right to decide who will be the one (i.e., the particular surgeon) to have the right to operate on the patient (presumably, that is the joint decision of the patient, the employer of the surgeon, and the surgeon). Rather, the surgeon may not simply be ordered, either by the employer or by the patient, to perform the operation; the right to operate is conferred on the surgeon by the patient (and the employer of the surgeon, supposing there to be one); being a right to operate, the surgeon may choose not to operate.

By way of illustration, consider a situation in which a police officer is confronted with passive noncompliance on the part of a criminal known to be dangerous and likely to be carrying a weapon. (See, for example, the case of David Martin, discussed in Chapter 4, section 4.4). As we saw in Chapter 4, the criminal, in refusing to comply with the officer's directives, creates a trilemma. If the officer shoots the criminal and he turns

significantly and officers do not possess original authority in respect of any part of the summons process. To this extent, their original authority has diminished.

^{5.} A concept very close to original authority is sometimes referred to as a species of discretionary power, namely the concept of a discretionary decision that cannot be overridden or reversed by another official. See Dworkin, *Taking Rights Seriously*, 32. Here we need to distinguish a decision that cannot, as a matter of fact, be overridden, such as the use of deadly force by a lone officer in the field, and a decision that cannot be overridden as a matter of law. Only the latter can be referred to as a species of authority.

^{6.} Miller, Moral Foundations of Social Institutions, 186–188.

out to be unarmed, the officer might face a murder charge. Yet the officer puts his own life at risk if he approaches the criminal with a view to overpowering him. Nor is the third option preferable: the option to let him go free. For the officer has a moral and a legal duty to apprehend dangerous persons. Indeed, if the officer simply allowed the criminal to go free, and that criminal went on to murder an innocent person, this neglect of duty might be held by a court to be criminal negligence. Let us now assume that the officer's superior officer is present and issues a lawful directive to the officer to shoot the offender, on the grounds that the evidence indicated that he was probably concealing a dangerous weapon and was highly likely to use it. In light of the doctrine of original authority, the subordinate police officer might well be acting within his legal rights to refuse to do so. For he might reasonably disagree with the superior officer's judgement. In addition, he knows that he might find himself legally liable for wrongful killing if it turned out that the offender was unarmed.

The above-described individual civil and criminal liability of police officers, supposing it is correct, stands in some contrast with military combatants. A civilian would, in general, sue the military organization itself, rather than the soldier whose actions resulted in harm to the civilian. Moreover, presumably soldiers do not reserve a general institutional right to refuse to shoot to kill when (lawfully) ordered to do so by their commanding officers. My understanding is that in keeping with the absence of such a general right, criminal liability in relation to negligence and many categories of wrongful killing is generally applied to the military officer who issued the command, rather than his subordinates who were his instrument.

Whatever the legal situation a soldier has a natural discretionary right to use or not use lethal force, assuming it is morally permissible in the circumstances in question. In this respect soldiers are no different from police officers or ordinary civilians. Moreover, arguably, neither a soldier nor anyone else can transfer this natural right to others. Nevertheless, the possibility of waiver remains. Accordingly, I suggest that soldiers, but not ordinary civilians or police officers, waive their natural right to use lethal force in favor of their superiors. They do so when they accept the institutional role of a military combatant and embark on a war. I note that being a natural right it is not conferred (as in the case of the surgeon's right to operate). If this is correct, then it has two important implications. First, it entails an important difference between the basis for different elements of original authority (and, possibly, professional autonomy). One basis

derives from the nature of the relevant institution and its institutional purposes. If individual police officers have a right to refuse a lawful command by a superior to arrest someone in some circumstances, then this is because, speaking generally, their possession of this right makes for a more effective police service; so it is a conferred institutional and moral right derived from the collective good realized by the institutional role of police officers. Accordingly, matters might be different with regular soldiers, given the different institutional purposes of their role.

However, the second basis, as I have suggested above, is an inalienable natural moral right—it is a moral right with respect to *one's own lethal actions*, as opposed to the lethal actions of others. Moreover, being an inalienable right, it cannot be transferred to others, such as one's institutional superiors. This right that a person, A, has with respect to A's own lethal actions is logically consistent with A's lethal action, x, being either morally obligatory or morally impermissible. The latter concerns the objective properties of A's act or omission, whereas the former concerns the moral decision maker. It is one thing for a person to have the right to make a decision, and another for that person to make the right decision.

The second implication is that the above-mentioned contrast between the police and the military would be much less sharp. As we have seen, soldiers, like police, may well have a natural discretionary moral right with respect to the use of lethal force. However, a distinction between the military and the police might still be able to be drawn at the institutional level in terms of the notion of waiving one's right. Perhaps by virtue of their institutional role individual soldiers, but not police, waive their natural right to decide whether or not to use lethal force in certain circumstances; specifically, in circumstance in which they were (lawfully i.e. in accordance with ius in bello principles, let us assume) directed by their superiors to use lethal force or to refrain from using lethal force. So, in effect, soldiers waive this natural right in favor of their superior officers. Of course, these soldiers retain this natural right qua human beings; so they are not transferring the right to their superiors. Accordingly, an individual soldier would not be the one to decide whether or not to shoot to kill in cases where he or she was directed by a superior to do so (or not to do so); rather, the superior would be the one to decide. In the case of police officers, this would not be the case; an individual police officer has not waived his or her right to decide whether or not to use lethal force in favor of a superior officer. Instead, the individual police officer—the shooter—would be the one to decide. The situation is further muddied

by the existence of paramilitary police roles, such as police snipers. Let us now return to the firearms officers involved in the shooting death of Menezes.

The first point is that it was the moral responsibility of each of the firearms officers to decide whether or not to shoot Menezes, irrespective of whether he had been ordered to do so; and, evidently, this is reflected in the law. The second point is that he had not been ordered to do so; the situation had not been declared to be a Kratos operation. So, for better or worse, individual moral responsibility can in principle be assigned to a firearms officer who kills an innocent person, depending, of course, on the facts of the case.

What of exculpatory conditions? Each of the firearms officers said that they believed that Menezes was a suicide bomber. Even supposing this to be true—and the jury did not accept it on the balance of probabilities—there remains the question of the justification for that belief. Did each have sufficient evidence to warrant that belief? Arguably, neither did, especially given that good and decisive evidence is required in a case where the taking of another human life is concerned. Nevertheless, there is another important moral consideration in play here. Each of the firearms officers had a moral obligation to protect the lives of innocent train passengers. If the officers had failed to shoot the suspect dead, and he had turned out to be Osman carrying a bomb, then in all probability there would have been a far greater loss of life. This consideration has considerable moral weight, notwithstanding the inadequacy of the evidence for their individually held beliefs (or judgments) that Menezes was Osman and a mortal threat at the time.

So whatever the legal situation, and whatever any past failure to satisfy themselves with regard to the identity of Menezes, at the point of decision whether or not to shoot him, the firearms officers confronted what was in effect a moral dilemma: (1) shoot dead a person they believe is highly likely to be a suicide bomber about to detonate a bomb, though if he turns out not to have a bomb, they will have killed an innocent person; (2) refrain from shooting him, though if he turns out to be a suicide bomber about to detonate a bomb, numerous innocent passengers and the police officers themselves will be killed. In these circumstances it is difficult not to view the "other things being equal" as having application. Arguably, there was not a good and decisive reason in favor of either course of action. Rather,

^{7.} See Miller and Gordon, "The Fatal Police Shooting of Jean Charles de Menezes," Part 1.

at the point of decision, great risks were attached to each of the available options, there was a moral balancing act to be performed, and a split second decision had to be made. In these circumstances, each of the firearms officers might be held to be morally responsible for the death of an innocent person, but surely neither can be held to be morally *culpable* for what they did; they were morally responsible but not morally blameworthy.

5.4 Collective Moral Responsibility

Above we distinguished four senses of responsibility, including moral responsibility. Let us now consider collective moral responsibility. As is the case with individual responsibility, we can distinguish four senses of collective responsibility. In the first instance I will do so in relation to joint actions. Thus the first sense of responsibility for a joint action is natural responsibility. Accordingly, to say that some persons are collectively responsible in this sense for a joint action is just to say that they deliberately performed the joint action. That is, each person had a collective end, each intentionally performed their contributory action (and having this end and this intention was under the person's control, etc.) and each did so because each believed the others would perform their contributory action, and that therefore the collective end would be realized. So in the Menezes shooting scenario, the members of the surveillance team performed the joint action of surveilling Scotia Road.

It is important to note here that each agent is individually (naturally) responsible for performing his contributory action, and responsible by virtue of the fact that he intentionally performs this action, and the action is not intentionally performed by anyone else. Of course the other agents (or agent) *believe* that he is performing, or is going to perform, the contributory action in question. But mere possession of such a belief is not sufficient for the ascription of responsibility to *the believer* for performing the individual action in question. So what are the agents *collectively* (naturally) responsible for? The agents are collectively (naturally) responsible for the realization of the (collective) *end* that results from their

^{8.} Miller, "Collective Moral Responsibility." For a related analysis, see Gregory Mellema, *Individuals, Groups, and Shared Responsibility* (New York: Peter Lang, 1988). See also Larry May, "Vicarious Agency and Corporate Responsibility," *Philosophical Studies* 43 (1983): 69–82; and David Copp, "The Collective Moral Autonomy Thesis," *Journal of Social Philosophy* 38, no. 3 (2007): 369–388. For criticisms of Copp, see Miller, "Against the Moral Autonomy Thesis."

contributory actions. Consider two agents jointly killing someone in a crowded setting, one by grabbing him and holding him fast, the other by shooting him in the head. Each is individually (naturally) responsible for his own action, and the two agents are collectively (naturally) responsible for bringing it about that the person is dead, given that the actions of both were necessary.

Again, if the occupants of institutional roles have institutional responsibilities with respect to their performance of joint actions (or joint omissions) then these responsibilities are collective institutional responsibilities. This is the second sense of collective responsibility. Note that in some cases these collective institutional responsibilities will be prospective, such as in cases where there is a *joint* institutional duty to realize the collective end of some joint action. Here the individual duty of each to perform his or her contributory action is interdependent with the individual duty of each of the others to perform theirs. (See Chapter 1, subsection 1.2.2, for an account of joint obligations.) On the other hand, as we saw in the case of individual institutional responsibility, collective institutional responsibility can also be retrospective, such as in cases where the institutional actors have failed to do their joint duty.

There is a third sense of collective responsibility that might be thought to correspond to the third sense of individual responsibility. The third sense of individual responsibility concerns those in authority. Suppose the members of the cabinet of country A (consisting of the prime minister and his or her cabinet ministers), or the members of the relevant police authority, collectively decide to exercise their institutionally determined right to introduce a counterterrorism measure, such as Kratos. The cabinet and/or the relevant police authority (say, ACPO (Association of Chief Police Officers)) are then collectively responsible for this policy, and potentially for the untoward consequences of its implementation.

There are a couple of things to keep in mind here. First, the notion of responsibility in question is, at least in the first instance, institutional—as opposed to moral—responsibility. Second, the "decisions" of committees, as opposed to the individual decisions of the members of committees, need to be analyzed in terms of the notion of a joint institutional mechanism (introduced and analyzed in detail elsewhere⁹). So the "decision" of

^{9.} Miller, "Joint Action," 291–295; Miller, *Social Action*, 174–179; Miller, *Moral Foundations of Social Institutions*, 50–52; Seumas Miller, "Joint Epistemic Action: Some Applications," *Journal of Applied Philosophy* (online first, 2016).

the cabinet, and also perhaps of the ACPO, can be analyzed as follows: At one level each member of the cabinet or the ACPO voted for or against Kratos. Let us assume some voted in the affirmative and others in the negative. But at another level, each member of the cabinet or ACPO (or both) agreed to abide by the outcome of the vote; each voted having as a collective end that the outcome with a majority of the votes in its favor would be realized. Accordingly, the members of the cabinet and/or the ACPO were jointly institutionally responsible for the policy change; that is, the cabinet and/or ACPO were collectively institutionally responsible for the change.

What of the fourth sense of collective responsibility, collective *moral* responsibility? Collective moral responsibility is a species of joint responsibility. Accordingly, each agent is individually morally responsible, but this is conditional; it is based on the others being likewise individually morally responsible. (For more detail on this see Chapter 1.2.1.) There is interdependence in respect of moral responsibility. This account of collective moral responsibility arises naturally out of the account of joint actions. It also parallels the account given of individual moral responsibility.

Thus we can make our second preliminary claim about moral responsibility:

If agents are collectively responsible for a joint action or omission (or the realization of a foreseen or reasonably foreseeable outcome of that action or omission), in the first or second or third senses of collective responsibility, and if the joint action, omission, or outcome is morally significant, then—other things being equal—the agents are collectively morally responsible for that action, omission, or outcome, and—other things being equal—ought to attract moral praise or blame, and (possibly) punishment or reward for bringing about the collective end of the action and/or its outcome.

As is the case with the parallel account of individual moral responsibility, there are crucial "other things being equal" clauses to provide for the possibilities that the agents in question either lack the requisite moral capacities—and so cannot be held morally responsible—or are possessed of moral capacities but in the circumstances in question have an excuse or justification for their joint actions and omissions, and for the outcomes of such actions and omissions.

Notice that there can be cases where the morally significant collective end of a joint action is realized, yet one individual (or a minority)

fails to successfully perform his contributory individual action, and cases where the morally significant collective end of a joint action is not realized because most fail to perform their contributory actions, yet one individual (or a minority) successfully performs his contributory individual action.

Consider the cases in which one individual (or a minority¹⁰) fails to successfully perform his contributory action. Assuming the individual (or minority) had the collective end in question (and, therefore, tried, albeit unsuccessfully, to perform his individual contributory action), the individual shares in the collective moral responsibility for the realization of the collective end, notwithstanding his individual failure to perform his contributory action. For, as was the case with the other agents, the individual had the collective end in question. Moreover, as was also the case with the other agents, the individual (indirectly) causally contributed to the realization of the collective end, notwithstanding his failure to perform his contributory action. He made an indirect causal contribution since the other individuals acted in part on the basis of their beliefs that the individual in question would perform his contributory action. Nevertheless, the failure of such an individual to perform his individual contributory action reduces his share of the collective moral responsibility for the realization of the collective end.

Now consider cases in which the morally significant collective end is not realized due to the fact that most fail to perform contributory actions, yet one individual (or a minority) performs his. Once again, assuming all the individuals had the collective end in question (and, therefore, tried, albeit unsuccessfully, to perform their contributory actions), then the individual shares in the collective moral responsibility for the failure to realize the collective end, notwithstanding his individual success in performing his contributory action. For, as was the case with the other agents, the individual had the collective end in question, and that end was not realized; in short, each agent, including the individual in question, failed to realize an end each had (the collective end), and each failed to make a causal contribution to that end. Nevertheless, the success of such an individual in performing his own individual contributory action reduces his share of the collective moral responsibility for the failure to realize the collective end. In response to this it might be argued that the individual

^{10.} Note that the arguments below are also valid in the case of minorities, as opposed to individuals. However, in order to reduce verbal clutter, I won't refer to minorities on every occasion.

cannot have a share in the collective *moral* responsibility for the failure because, after all, he had the collective end in question and performed his contributory action; he did all that he could reasonably have been expected to do. Certainly, he is not morally culpable or blameworthy, but then neither are the others morally culpable or blameworthy, given they tried to perform their own contributory actions. The theoretical conclusion to be drawn at this point is twofold: (1) moral responsibility, including collective moral responsibility, should not be equated with culpability/nonculpability or blameworthiness/praiseworthiness; and (2) agents can be (individually or collectively) morally responsible for failing to realize an outcome, even if they did all that can be reasonably expected of them; responsibility is not simply a matter of possession of the relevant subjective states, such as intentions and ends.

It is consistent with this that if an individual (or minority) *culpably* failed to realize his or her individual end, yet knew that the collective end would nevertheless be realized, then that individual does *not* share in the collective moral responsibility for the successful outcome, since, for one thing, the individual did not, in fact, have the collective end. It is also consistent with the above that if an individual (or minority) *culpably* failed to realize his or her individual end in the knowledge that, as a consequence of this culpable failure, the collective end would not be realized, then the individual (a) does not have the collective end, and (b) is individually morally responsible for the collective failure (of the others) to realize the collective end. So there is no collective moral responsibility, let alone collective moral culpability, for the failure.

5.5 Distributing Moral Responsibility

In light of our account of collective moral responsibility, what sense can we now make of the police killing of Jean Charles de Menezes? Before doing so, I note that institutional arrangements such as the one in question—in which there is a separation of sequentially performed roles and associated responsibilities (e.g., between members of the surveillance team and the firearms officers), but nevertheless a common further end, or collective end (e.g., prevention of a suicide bombing)—involve what I have referred to elsewhere as a "chain of institutional and moral responsibility." In

^{11.} Seumas Miller, "Police Detectives, Criminal Investigations and Collective Moral Responsibility," *Criminal Justice Ethics* 33, no. 1 (2014): 21–39.

chains of institutional and moral responsibility: (1) each participant aims at the collective end constitutive and distinctive of their particular institutional role (e.g., that of member of the surveillance team); (2) the occupants of any given constitutive role (the links in the chain) perform their role-based actions sequentially with the actions of the occupants of the other roles (e.g., the actions of the surveillance team are performed prior to actions of the firearms officers), and; (3) in doing so, all the participants aim (or should be aiming) at a collective end (e.g., preventing the suicide bombing) that is an end further to those ends that are both constitutive and distinctive of their particular roles. Moreover, all the participants (at least, in principle) share in the *collective responsibility* for the realization of this end (or the failure to realize this end, as the case may be).

The first point is that, as noted already, collective moral responsibility for an outcome is consistent with individual moral responsibility for individual actions that are in part constitutive of some joint action, omission, or outcome. As we have seen, the individual members of the surveillance team were collectively (jointly) morally responsible for failing to clearly communicate to the control room whether or not Menezes was Osman—or that they were uncertain in this regard. Moreover, Commander Dick is morally responsible for failing to see to it that Menezes was stopped prior to his entering the underground station. Finally, the two firearms officers were collectively (jointly) morally responsible for failing to provide themselves with good and decisive evidence for the proposition that Menezes was a suicide bomber and a mortal threat to the train passengers. Here I stress that these failures all had mitigating factors.

The second point is that each of these failures was a necessary condition for the outcome; that is, the outcome that may be described as the killing of an innocent person. This second point gives rise to the question of whether the members of the surveillance team, Commander Dick, and the firearms officers are collectively morally responsible for that outcome, albeit none individually intended the outcome and none individually foresaw the outcome. I suggest that, notwithstanding that the failure of each might have been a necessary condition for the outcome, this causal chain was not accompanied by a collective end (so there was no joint action or intentional joint omission). Moreover, the members of the group did not, as a group, foresee the outcome; indeed, not even one of these individuals foresaw the outcome.

Could the members of the group reasonably have foreseen that the consequences of their actions would be the killing by police of an innocent

person, bearing in mind that they had, and ought to have had, as part of their collective end to avoid taking innocent life? Surely not all of them, or even most of them, could reasonably have foreseen this outcome. For example, the members of the surveillance team could not reasonably have foreseen that that an innocent person would be killed. Accordingly, the members of the team of police officers in question—members of the surveillance team, Commander Dick, and the two firearms officers—were not collectively morally responsible for the death of an innocent person, Jean Charles de Menezes. Were the members of some subset of the team of police officers collectively morally responsible for the death of Menezes? The most obvious candidates for members of such a subset are the two firearms officers, since they did the shooting. Presumably, they were collectively morally responsible for shooting Menezes dead, albeit, for the reasons given above, neither was morally culpable. However, the theoretical point to be made here is that they were only one link (the final link) in the chain of institutional and moral responsibility. So this collective moral responsibility of the two firearms officers does not embrace the other police involved in the death of Menezes.

Notwithstanding the conclusion that the members of the team of police officers were not collectively morally responsible for killing Menezes, it could still be argued that they were collectively morally responsible for failing to ensure that an innocent person was not killed. After all, the members of the team had—as they ought to have had—the morally significant collective end of avoiding or, at least, minimizing loss of innocent life. 12 Obviously, this collective end was achievable, but in fact it was not achieved. Moreover, each (or, at least most, of the police officers apparently failed in respect of some or other of his or her institutional and moral duties, and did so in a manner that contributed to the failure to realize this collective end—the avoidance of loss of innocent life. In this respect, the members of the surveillance team, Commander Dick, and the two firearms were collectively morally responsible, albeit not morally culpable. I further suggest that each had a share in this collective responsibility; that is, each was partially responsible jointly with the others, but none was fully morally responsible.

^{12.} They also had the collective end of killing a suicide bomber, if there was one and if it was necessary to do so. Given that, as it turned out, there was no suicide bomber, this collective end was otiose.

5.6 Conclusion

In this chapter I have analyzed the morality of the use of lethal force by police against a (potential) suicide bomber in a well-ordered jurisdiction in a liberal democratic state. Given that such operations involve a team or teams of police officers with different roles (e.g., surveillance officers and firearms officers), the question arises as to who is morally responsible for failures leading to loss of innocent life. Specifically, in the real-life scenario analyzed, the killing of Menezes by London police in 2005, the question arose as to who was responsible for this killing of an innocent person, mistakenly believed to be a suicide bomber. I have argued that such cases typically involve collective moral responsibility at various levels and in various respects. Three key theoretical claims relevant to this argument are: (1) the individual moral responsibility for deliberately killing or refraining from killing another human being cannot be alienated; (2) collective moral responsibility, properly understood, is a species of relational individual moral responsibility—namely, joint moral responsibility; (3) police scenarios of the kind in question involve chains of institutional and moral responsibility, and the individual participants in such a chain are collectively morally responsible for its foreseeable and avoidable endpoint; (4) an individual participant in a morally required joint action (omission) scenario that fails is not morally culpable if she or he did all that could be reasonably be expected, but might, nevertheless, have a (diminished) share in the collective moral responsibility for the failure to realize the collective end she or he was aiming at; (5) Arguably, in the Menezes shooting, the members of the surveillance team, Commander Dick, and the two firearms officers were collectively morally responsible, albeit not morally culpable, for failing to avoid the loss of innocent life.

Military Use of Lethal Force

AS WE SAW in Chapter 3, the institutional role of the regular soldier can be defined in terms of (1) its collective end, namely, the collective good of national (external) security, and (2) the means by which this collective end is realized, namely, lethal force. Moreover, while there is a jointly held obligation on the part of all citizens to provide the collective good of external security, in contemporary liberal democracies this obligation is typically discharged by establishing, in accordance with a division of labor, a standing professional armed force(s) (sometimes supplemented in wartime by citizen conscripts). Further, it was noted that, unlike police services, military forces do not have a quasi-judicial role, but instead are essentially instruments of governments in the service of national (external) security. In the case of democracies, both the government and the nation's military forces are accountable to the citizenry, albeit the military forces indirectly via the government. Finally, it was argued in Chapter 3 that the individual soldier, unlike a police officer (or, for that matter, an ordinary civilian), waives his natural right to decide whether or not he will use lethal force against enemy soldiers, and waives it in favour of his superior officers. Thus in circumstances in which a solder receives a lawful order from his superiors to use lethal force (or not to use lethal force), the soldier is institutionally (and morally, other things being equal) required to do so (or to refrain from doing so). I note that it does not follow from this, and nor do I accept, that an individual soldier waives his right to decide whether or not to wage war in the first instance. I discuss this issue in section 6.3 below.

In Chapter 3 I distinguished regular soldiers from irregular soldiers, such as mercenaries¹ and terrorist combatants.² I use the more general term "military combatant" to refer to both regular and irregular soldiers. Recall also that the term "regular soldier" refers to members of navies and air forces as well as land armies. Military combatants principally use lethal force in the context of ongoing armed conflicts between the armed forces of political entities, such as, but not restricted to, nation-states. Such armed conflicts between armed forces include wars between nation-states and wars involving nonstate actors. The latter include civil wars, wars of liberation, and nonconventional wars between state actors and terrorist groups. This is not to say that all insurrections or armed conflicts between state actors and nonstate actors, such as terrorists groups, are wars; perhaps most are not, but evidently some are.

Roughly speaking, an armed force in the sense in use here is an organization and, often, an institution (as defined in Chapter 3) comprising: (1) combatants with task-defined roles, notably the role of using lethal force against enemy combatants; (2) a command and control structure; and (3) a capacity to reproduce itself, (e.g., by means of recruitment and training processes), and, thereby, to continue to exist beyond the "life" (e.g., discontinued participation due to death) of the current membership.

Further, armed conflict in the sense in use here is a collective enterprise and, typically, a multilayered structure of joint action (as defined in Chapter 3), consisting of armed conflict on the part of an armed force against another armed force in order to realize some military purpose (a species of collective end), such as to incapacitate the enemy armed force, and ultimately to realize some political purpose (also a species of collective end), such as protecting the territorial integrity of the nation-state. In this latter respect military combatants are unlike, for example, Mafia "soldiers" and the like, who use lethal force ultimately to realize criminal purposes.

Given this organizational character of military combat, the use of lethal force by military combatants is importantly different from that of the

^{1.} Mercenaries are military combatants defined in terms of the institution of the market. See Miller, "Police, Citizen-Soldiers and Mercenaries."

^{2.} Terrorist-combatants are terrorists who are members of an armed force fighting a war, as distinct from members of a terrorist organization that, while performing terrorist acts, is not actually fighting a war (irrespective of its claims to the contrary). For the distinction see Miller, *Terrorism and Counter-Terrorism*, Chapter 5.

typically nonorganizational use of lethal force by individuals in personal self-defense or in defense of the lives of others (discussed in Chapters 1 and 2). Moreover, wars involving armed forces comprising regular soldiers, in particular, are institutional in character. For regular armies are institutions constituted by the institutional role of regular soldiers. Here I am invoking the distinction made in Chapter 3 between mere organizations and institutions, the latter being normatively understood in terms of organizations defined in terms of collective ends that are also collective goods.³

In this work I have been operating with a threefold distinction between the use of lethal force by individuals in personal self-defense (and noninstitutionally based defense of the lives of others), the use of lethal force by police officers, and the use of lethal force by regular soldiers. I have stressed that police officers and regular soldiers are institutional role occupants, and that this makes a difference to the morality of their use of lethal force. Accordingly, we need to distinguish between the morality of the use of lethal force by noninstitutional actors (as elaborated in Chapters 1 and 2), the use of lethal force by police (see Chapters 3, 4, and 5) and the use of lethal force by regular soldiers (see Chapters 3 and 6–10). Specifically, there are, I suggest, important differences in the application of the moral principles that govern the use of lethal force in these three different kinds of cases, notably the principles of imminence, necessity, proportionality, and discrimination. Moreover, these differences are not simply ones explicable in terms of the differential numbers of defenders and attackers typically involved in personal self-defense and other-person defense, policing, and military conflict (respectively); specifically, the very large numbers of attackers and defenders engaged in wars. My concern in this chapter is with military use of lethal force. However, where appropriate, I indicate some of the contrasts with the police use of lethal force and with the noninstitutional cases.

Normatively speaking, the conduct of war is regulated by so-called just war theory (JWT), or so I will assume here. JWT comprises *jus ad bellum* (JAB) and the *jus in bello* (JIB). JAB is a set of moral principles setting forth the conditions under which an armed force can go to war (e.g., in national self-defense). JIB is a set of principles under which an armed can prosecute a war (e.g., combatants ought only to use the quantum of lethal force that is militarily necessary). While, ideally, an armed force will wage war

^{3.} Miller, Moral Foundations of Social Institutions, Chapter 2.

in accordance with JWT, this does not provide a sufficient condition for the use of lethal force by combatants, at least in many contexts of war. What is required in addition is rules of engagement (ROE). A combatant's ROE provides further specification in relation to the use of lethal force. For example, an ROE might require that in a given area populated by civilians, combatants are not to fire their weapons unless first fired upon. In section 6.1 of this chapter I provide an outline of JWT and, in particular, JAB; in section 6.2 I discuss the controversial doctrine of the Moral Equality of Combatants and in section 6.3 I address JIB and ROE and their relationship.

6.1 Just War Theory

In recent years, JWT has been receiving considerable attention by philosophers both in respect of the question of its viability as a theory and as a means for determining the justifiability of particular armed conflicts.⁴ Traditionally, JWT principally concerns itself with wars between states, as opposed to armed conflicts involving nonstate actors, and has as a condition that the war be conducted under lawful authority, and therefore in effect under the authority of the state. Clearly such a condition would automatically rule out any internal war against the state (e.g., a revolutionary war) or other armed conflict involving a nonstate actor (e.g., armed conflicts against international terrorist groups), and for this reason ought not to be made a necessary condition of a *general* theory of just war. ⁵ This is not to say that wars waged by nonstate actors against nation-states may not, for a variety of reasons, be especially difficult to justify, nor is it to deny that some suitably adjusted notion of legitimate authority might not be required for (morally legitimate) armed conflicts involving nonstate actors. It is to say, however, that, in principle, armed conflict conducted by a nonstate actor could be morally justified (e.g., the armed struggle of the African National Congress [ANC]6), and that therefore it cannot be a

^{4.} A good deal of the impetus for this was initially provided by Walzer, Just and Unjust Wars. See also Hugo Grotius, The Rights of War and Peace (any edition); F. H. Russell, The Just War in the Middle Ages (Cambridge: Cambridge University Press, 1975); J. T. Johnson, Just War Tradition and the Restraint of War: A Moral and Historical Inquiry (Princeton, N.J.: Princeton University Press), 1981; Rodin, War and Self-Defense; McMahan, Killing in War; Frances Kamm, The Moral Target: Aiming at Right Conduct in War and Other Conflicts (Oxford: Oxford University Press, 2012).

^{5.} Miller, "On the Morality of Waging War against the State."

^{6.} Miller, "Just War Theory."

necessary condition for a just war that it be fought under the authority of the state. In fact, historically many just war theorists allowed for the possibility of a just rebellion and for the possibility of removing a tyrant. Indeed political theory in general, including liberalism, admits of the moral possibility of a just internal war, and this is because there are limits to the obligation to obey the state, and because the state itself has obligations the discharging of which is part of the ground of its legitimacy.

Before presenting a version of JWT appropriate to armed conflict between nation-states as well as between nation-states and nonstate actors, there are a number of preliminary definitions and distinctions that need to be introduced. First, let us assume that wars are large-scale, ongoing, armed conflicts involving the use of violence and waged between collective entities. The violence in question would consist of destroying and damaging property (as well as perhaps the physical environment) and the injuring and killing by members of one collective entity of members of the other collective entity or entities—normally by the use of arms, armaments, and so on. Hereafter I will simplify matters and refer to the use of lethal force rather than the wider notion of violence.⁷

Second, assume that the collective entities in question are organized political entities. More specifically, a collective entity is a group of individuals such that: (a) they have a structure of practices, including convention, social norm, and law-governed practices, and a network of *political* beliefs held in common; (b) there is a set of interlocking *political* collective ends to which these practices are directed; (c) the individuals see themselves as owing allegiance to the group and its political ends as a whole, and perhaps they actually belong to the group—or, if not, they at least view themselves as having to comply with the dictates of the leaders of the group.

Further, these political entities have armed forces, each of which consists of a differentiated and hierarchically ordered set of roles for the constitutive individual combatants and their leaders. These armed forces have been organized for the purpose of coordinated, ongoing, and (in principle) reciprocated acts of lethal force against the members of some other (at least notional) armed force of some political entity. Note that in the case of certain terrorist organizations with armed forces, the political and the military leadership may not be separate. Moreover, the organization of the armed force might be relatively loosely structured; indeed, it might be a network rather than an organization, as is the case with those terrorist

^{7.} Coady, Morality and Political Violence, Chapter 2.

organizations affiliated with al-Qaeda or ISIS, such as Boko Haram or al-Shabab. A network, in this sense, comprises individuals or organizations and is defined in part, as is the case with organizations and joint actions, by reference to collective ends. But in the case of a network, the individual elements including sub-groups of the network have their own individual or collective ends, and these are primary, whereas the collective ends of the network per se are secondary. Here primary ends override secondary ones, supposing they conflict. Moreover, these (secondary) collective ends of the network are somewhat unspecified relative to the (primary) ones of the elements of the network. Further, the individual persons who make up the network do not have task-defined organizational roles qua members of the network, and, unlike organizations, the network does not reproduce itself, such as by recruiting and training individuals qua members of the network (as opposed to qua members of one or other of the constitutive organizations).

Third, assume that for two (or more) collective political entities to be at war is for the armed forces of one collective entity to be actually performing acts of lethal force against the members of another collective entity; so war, in my sense, is de facto as opposed to being merely de jure. And in so acting these armed forces are (a) instruments of the leadership of the collective entity to which they belong, (b) performing their actions on behalf of this collective entity, and (c) using lethal force against members of the opposing collective entity qua members of that opposing collective entity (and, typically, using lethal force predominantly, even exclusively, against the members of the armed forces of the opposing collective entity). On this account, the mob violence perpetrated by soccer hooligans is not war, since such violence, even if organized and lethal, is not political in character; on the other hand, an armed revolution may well be war, notwithstanding that one of the protagonists is not a state.

Fourth, it seems that many wars are waged under a claim of legal right, and are fought in accordance with some (perhaps quite minimal) set of laws and conventions. But it is not necessary that conflict be conducted under such a claim of right for it to be war, in my sense, nor is it necessary that one or both protagonists accept that there be at least some laws and conventions governing the conflict. Armed conflict conducted by warriors who accepted that they were acting illegally and who refused to abide by any conventions governing the conduct of war (e.g.,

^{8.} Miller, "Joint Actions, Organisations and Networks."

the convention or law not intentionally to kill innocent civilians) could still be war on this account. Consider, for example, the manner in which ISIS has waged war in Iraq and Syria. As a matter of policy, ISIS combatants torture and kill (including by beheading) captured enemy combatants and innocent civilians (both Christian and Muslim). On this account of war, an internal armed conflict (e.g., the English Civil War) could be a war, as could a revolutionary war (e.g., the American Revolution). Again, on this account, an armed conflict between a liberal democratic state and an international terrorist group, such as Al Qaeda, could be a war, and against ISIS, undoubtedly is a war.⁹

Let us then turn to the matter of constructing our generic account of JWT suitable for application to wars between nation-states as well as those between nation-states and nonstate actors. I provide an account that consists of a set of conditions that are jointly (morally) sufficient for engaging in armed conflict; I do not offer a set that is jointly (morally) necessary. Moreover, my account only provides a set of conditions under which it is morally permissible for a collective entity to engage in armed conflict, as opposed to a set of conditions under which it is morally justified or morally obliged to do so.

The definition is as follows: ¹⁰ It is morally permissible for a collective political entity, A (a liberal democratic state, let us assume) to engage in war (and thus use lethal force) against another collective political entity, B (a nation state or nonstate actor) in a context C—if (though not necessarily, if and *only if*):

- 1. B is seriously violating the moral rights of citizens of A on a large scale and using lethal force or the credible threat thereof in so doing (e.g. by engaging in a war of aggression).
- 2. There is no alternative nonlethal method by which A could prevent this violation.
- 3. A has a reasonable chance of ending this violation by using lethal force.
- 4. It is probable that if A uses lethal force, the consequences, all things considered, will be better than if A does not.

^{9.} Jay Sekulow, Rise of ISIS (New York: Howard Books, 2014).

^{10.} Seumas Miller, "Just War Theory and Counter-Terrorism," in Fritz Allhoff, Nicholas Evans, and Adam Henschke, eds., *Routledge Handbook of Ethics and War* (London and New York: Routledge, 2013), 226–235.

- 5. A uses lethal force only to the end of bringing about the cessation of B's violation of the rights of citizens of A, meaning that A acts in collective self-defense (of the moral rights of citizens of A).
- 6. A only uses lethal force: (a) of a type that is morally legitimate, (b) that is necessary to the end in question, (c) that is proportionate, and (d) against members of B who are combatants or the leaders of combatants.

Note that collective self-defense, as I use the term, refers to using lethal force on the part of the members of some collective entity to protect the moral rights-including but not restricted to the rights to life-of the members of that collective entity. In the case of wars waged by collective political entities, we can discern three related levels of collective selfdefense. At the highest level, there is the collective self-defense of the collective political entity itself (e.g., the liberal democratic state). The members of the armed forces use lethal force to defense the moral rights (both natural and institutional) of the citizenry. Call this national self-defense. At a level below this there is the collective self-defense of the armed forces (e.g., the army, air force, and navy). Here the combatants of the armed forces and their leaders use lethal force to defend their own moral rights, notably their right to life, against the lethal force being deployed against them by enemy armed forces. Call this armed forces self-defense. At the lowest level there is the collective self-defense of the unit (e.g., a battalion or a platoon or a mortar squad). Here the members of some unit within the armed forces defend their own moral rights, notably their rights to life, against the lethal force being deployed against them by some unit of the enemy's armed forces. Call this unit self-defense.

Collective self-defense of the lives of an armed force as whole or of a unit is conceptually different from a one-off, individual self-contained act of personal self-defense or an aggregate thereof. This is so for the following reasons: Unlike a discrete, self-contained individual act of personal self-defense, the lethal action of a combatant on an occasion in the context of a war is typically performed jointly with the actions of other combatants at various levels (e.g., members of mortar squad, members of a platoon, members of a battalion). Taken in conjunction, these various joint actions constitute what I described above as a multilayered structure of joint actions. By virtue of consisting in interdependent layers of joint action, these macro joint lethal actions of, for example, fighting a battle, have a complex *synchronic* dimension.

Moreover, the lethal action of a combatant on an occasion in the context of a war is but one element of a causally and means/end-connected, dynamic, and unpredictable unfolding series, indeed set of series, of lethal joint actions—including, but obviously not restricted to, the series of lethal actions performed by the combatant in question—directed at short-term, mid-term and long-term collective ends (e.g., winning this firefight, this battle, the war). By virtue of being a causally and means/end-connected series of joint actions, these sets of lethal actions of, for example, fighting a battle, have a complex *diachronic* dimension, and each of these lethal action elements is a *phase-element* of the war.

Finally, the lethal action of a combatant on an occasion in the context of a war is performed qua organizational role occupant (i.e., qua combatant meeting organizational standards, serving organizational goals, etc.). Moreover, by the lights of my normative teleological account, military institutions have as their raison d'être the provision of the collective good of external security. Further, as argued in Chapter 3, the institutional role of the regular soldier can be defined in terms of (1) the collective end of protecting the moral (natural and institutional) rights of fellow citizens from violation by persons from external communities or nations, (2) by means of the use of lethal force, and (3) the prior jointly held obligation of all citizens to protect fellow citizens from external threats.¹¹ This institutional role is defined in terms of various institutional rights and duties that are also moral rights and duties, including ones that do not necessarily mirror prior natural moral rights and duties. I note that the natural rights in question are (at the very least) moral rights to properties constitutive of the selfhood of the citizens. The institutional moral rights in question are, at the very least, ones constitutive of the institutions that are necessary to ensure that the natural rights just mentioned are respected. For example, the exercise of basic subsistence rights requires viable economic institutions, and the exercise of various rights to freedom requires appropriate political institutions.

As a consequence of the above features of their institutional role, the lethal actions of combatants are performed in order to realize the defense of multiple members of their unit, their armed force, and, ultimately, their citizenry. As such, these lethal actions of combatants are not necessarily done in *personal* self-defense although, of course, they often are done in personal self-defense as well as in defense of their unit, armed

^{11.} Miller, "Police, Citizen-Soldiers and Mercenaries."

force and citizenry. Consider, for example, a drone operator firing missiles from somewhere in the United States that strike enemy combatants in Afghanistan; this lethal action was not performed in personal self-defense. Nor are these lethal actions necessarily in defense of an *imminent* threat to oneself or other individual person. For example, combatants in a war routinely ambush enemy combatants. Ambushes are allowable in war in part because the threat from enemy combatants is a standing threat. Accordingly, preemptive strikes, such as ambushes of unsuspecting, perhaps even unarmed, enemy combatants who do not pose an imminent threat, are morally permissible in war.¹²

The above described synchronic and diachronic features of war also have implications for the application of the principles of necessity and proportionality (of which more below.) For example, since threat from enemy combatants is typically a *joint* lethal threat (i.e., the action of any single enemy combatant, such as that of a single crew-member on a battleship might not be either necessary or sufficient for one's own death or the death of any single comrade in arms), it is morally permissible to kill an enemy combatant, notwithstanding that it is not necessary to do so to protect any lives (see chapter 1 sections 1.2.1 and 1.2.2).

Let us now distinguish between three different contexts (based on context C in the above definition): (C1) a theater of war; (C2) a liberal democracy under a state of emergency by virtue of an organized violent political threat, such as a terrorist group or a secessionist movement; (C3) a well-ordered liberal democracy enjoying peacetime conditions within its borders but confronting an organized violent political threat.¹³ I take it the JWT applies to C1 and perhaps C2, but not to C3. For the appropriate security response to C3 is that of the law enforcement framework; that is, it is a matter for the police. On the other hand, the appropriate security response to C1 is the application of the military framework; that is, it is a matter for the armed forces.

C2 is problematic in that while the application of a law enforcement framework is desirable, at a certain point it may not be sufficient to contain the security problem, in which case the use of the armed forces may

^{12.} I am assuming that the unarmed combatants in question are merely unnamed at the specific time in question (e.g., they are asleep or resting and their weapons are not immediately available to them). I am also assuming that the unarmed combatants in question have not surrendered.

^{13.} Miller, Terrorism and Counter-Terrorism Chapters 4 and 5

be justified. However, if the law enforcement framework does justifiably give way to the JWT-governed military framework in C2 then the military framework ought to be applied only to an extent (e.g., with respect to a specific de facto theater of war), and over a period of time that is necessary. Moreover, it is likely that even in such a theater of war, a highly restrictive ROE would be in place. These points are to a degree reflective of the intent of clause 2 in the above definition.

Further, the consequences mentioned in clause 4 are the overall consequences of waging war—as opposed to the consequences attached to the option(s) of not doing so—and would include the loss of life, restrictions on freedoms, economic impact, and institutional damage. Arguably, for example, in the light of the rise of ISIS, the overall consequences would have been better if Iraq had not been invaded by US-led forces in the second Iraq War, notwithstanding that it removed Saddam Hussein's murderous regime.

In addition, clause 6 refers to the standard conditions of the *jus in bello*, the principles of military necessity, proportionality, use of legitimate methods (e.g.' not biological warfare), and restriction of targets in war (e.g., not innocent children—the principle of discrimination.

Finally, notice that on the basis of clause 1, and the assumption that a political authority must enforce and not violate rights if it is to be legitimate, B is not a legitimate political authority. But we need to assume in respect of the above account that: (a) there is no additional corporate entity A1 which could count as the legitimate political authority of the citizens or other constituent members of A; and (b) A, or at least its political leadership, is not itself illegitimate, as it would be if, for instance, it consistently violated the rights of its constituency, or if its constituency did not (at least tacitly) consent to this leadership.

6.2 Jus ad Bellum

Consistent with JAB, there will presumably be wars in which one side is morally justified in waging war and the other is not; wars in which both sides have a good, but not decisive, moral justification for waging war; and wars in which neither side has any moral justification for waging war. Moreover, the notion of a just or unjust war admits of degrees, depending in part on how many of the JAB conditions it fails and the extent of its failure in respect of any given condition. Further, if a war is unjust by virtue

of failing one or more JAB conditions, then evidently this has implications for the morality of the actions of the combatants fighting this unjust war. Specifically, other things being equal, combatants fighting an unjust war of, say, aggression, morally ought not to be killing anyone.¹⁴ For example, there is a clear moral difference between combatants fighting a just war against aggressors and the aggressors that they are fighting. Combatants fighting a just war may well have a decisive moral justification for killing their unjust aggressors. The aggressors, by contrast, do not have a decisive moral justification for killing the combatants fighting a just war against them. This is so notwithstanding the fact that once a war is under way, even the aggressors may at times find themselves in a situation in which they are justifiably (at least according to some theories of self-defensesee Chapter 2, section 2.3, on the Hobbesian rights-based approach), or at least excusably, killing in self-defense. For example, they might be in a situation in which they have no option of surrender, and must either kill or be killed.

The above claim regarding the moral difference between combatants fighting a just war and those fighting an unjust war is consistent with it being the case that the lethal actions of the combatants fighting an unjust war might be excusable in the light of, say, their reasonable, albeit false, belief that they are in fact fighting a just war. That there is this important moral difference between soldiers fighting a just war and those on the other side fighting an unjust war is apparently inconsistent with the legalist paradigm associated with Michael Walzer and, specifically, the doctrine of the Moral Equality of Combatants.¹⁵ Here we need to distinguish between law and convention, on the one hand, and morality, on the other hand. Arguably, the laws and conventions governing the treatment of combatants in war are, and morally ought to be, such that combatants are treated *as if* they were morally equal, notwithstanding that they sometimes are not. Thus, as is the case with combatants who fight a just war, combatants who fight an unjust war, morally ought not to be criminally

^{14.} There is a longstanding tradition of argument on this issue which is often framed in terms of the doctrine of the Moral Equality of Combatants. See, for example, Igor Primoratz, "Michael Walzer's Just War Theory: Some Issues of Responsibility," *Ethical Theory and Moral Practice* 5 (2002): 221–243, and a variety of essays relevant to this issue in (eds.) D. Rodin and H. Shue *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, (Oxford: Oxford University Press, 2008) Chapter 10.

^{15.} Walzer, *Just and Unjust Wars*, Chapter 3. For criticisms see Coady, *Morality and Political Violence*, Chapter 9; and McMahan, *Killing in War*, Chapter 2.

charged for so fighting, and if captured, morally ought to be released upon the termination of hostilities.

We also need to invoke the distinction I introduced in Chapter 1 Section 1.2.1 between the individual and the collective levels. The collective level (or, in fact, levels) pertains to joint action, including organizational action. Thus, other things being equal, in so far as all (or most) of the soldiers in an army are jointly fighting a manifestly unjust war having as a collective to win that war, they are collectively i.e. jointly, morally responsible for so doing and (again, other things being equal) are collectively, i.e. jointly, blameworthy. (Other things might not be equal if, for example, some of the soldiers were threatened with death if they refused to fight in the war, or many were deceived in respect of the causes of, and justification for, the war.) At the collective level the ascription of moral responsibility and culpability may well be relatively unproblematic. (Note that on my account the collective level remains at the level of the joint actions, or in some cases aggregates of individual actions, of individual human actors; it does not refer to the 'doings' of collective entities per se¹⁶.) By contrast, the individual level pertains to the individual actions of single soldiers, e.g. the individual actions of Private Jones during the course of the war. We can assume that, as a typical soldier, Jones' individual actions while they may well have been literally life-changing in themselves were, nevertheless, a very small contribution to the overall successful (let us assume) joint enterprise of winning the war.¹⁷ Nevertheless, it is the fact that Jones made this contribution in the service of the collective end, however insignificant his contribution was in the scale of things, that is the primary determinant of Jones' moral responsibility in the war in question at the collective level. Thus the moral calibration of Jones' degree of moral responsibility based on his actions at the individual level is typically of limited importance in this context. Perhaps, for example, during the course of the war Jones only fired his weapon on one occasion and did so in personal self-defense, whereas by contrast Private Smith shot dead numerous enemy soldiers and did so in defense of the members of his platoon. This is, of course, not to suggest that Jones' actions at the individual level are not morally significant in themselves or in some other more limited collective context (e.g.

^{16.} Such collective entities include an aggregate of actions conceived as a single entity as opposed to a plurality of individual actions.

^{17.} In order to avoid unnecessary complications let us also assume that Jones was morally responsible for his actions and that he did not commit any war crimes.

at the level of Jones' platoon). Far from it. Rather it is simply to make the claim that at the collective level of the armed forces of a polity fighting a war there is a moral equality of sorts among all (or most) of the soldiers in those armed forces i.e. qua members of those armed forces fighting that war (whether it be a just or unjust war, or neither).

Moreover, there is another kind of moral equality among the soldiers fighting a war on one side by virtue of having waived their right to use lethal force in favor of their superior officers. Indeed, in this respect the soldiers on one side in a war are the moral equals of the soldiers fighting that war on the other side. However, the point remains that the soldiers fighting a manifestly just war are evidently not morally equal to the soldiers on the other side fighting a manifestly unjust war. That is, the doctrine of the Moral Equality of Combatants conceived as an inherently moral principle appears to be false. What of moral justification for the doctrine of the Moral Equality of Combatants conceived as a convention or law?

The moral justification for the Moral Equality of Combatants conceived as a convention or law is ultimately based, I suggest, on a number of considerations. The considerations in question are as follows:

1. Determining whether or not waging war is morally justified is often though by no means always—an inherently complex matter, even for those with access to the requisite information and possessed of a welldeveloped capacity to make morally informed judgments in relation to security policy, let alone for regular soldiers. Even if we assume that the principles of the jus ad bellum are both clear and correct—a highly controversial assumption—there remain prodigious difficulties in respect of their application, such as determining whether the consequences, all things considered, will be better if war is embarked on than if it is not. (For more on this point see below.) Accordingly, the situation of a regular soldier deciding to participate in a war of, say, self-defense is quite unlike that of an ordinary citizen deciding to kill an attacker in self-defense. For one thing, the principle of self-defense is often unclear as it applies to nation-states confronting terrorist groups, such as al-Qaeda, or aggressive nation-states making claims in respect of disputed territory occupied in large part by members of the aggressor nation (e.g., Ukraine confronting Russia in relation to Crimea). For another, an ordinary citizen confronting an attacker is typically epistemically well placed to determine the nature of the threat and the likely

- consequences of a lethal, as opposed to a nonlethal, response, which is not the case for an individual soldier deciding on whether or not to go to war.
- 2. Military combatants are members of organizations and, as such, engaged in multilayered structures of (morally significant) joint action. Therefore, as we have seen, they can (at least in principle), be held collectively, or jointly, morally responsible for engaging in the large-scale collective enterprise of waging war, and praised or blamed depending on whether it was a just or unjust war. Nevertheless, in such contexts, decision making is necessarily joint, 18 and therefore required to be binding on all or most if it is to be effective. For example, no single Australian citizen, whether that person be a prime minister, a chief of the armed forces, or merely a low-ranking regular soldier or civilian, can unilaterally decide whether Australia will wage war or refrain from doing so. Thus, a prime minister seeking to go to war can be thwarted by the other members of the government or by popular opposition.¹⁹ Likewise, disengaging from a war that is underway requires a joint decision. Accordingly, there is a presumption in favor of an individual citizen in a liberal democracy who disagrees with a generally accepted joint decision nevertheless going along with that decision. 20 In the case of a military combatant, going along with the joint decision typically implies participating in actual war-fighting (or, in the case of a joint decision not to wage war, refraining from doing so). Moreover, individual nonparticipation in a collective enterprise such as war in respect of which there is joint commitment on the part of most, may be extremely costly, (e.g., social ostracism), and exiting from the community in question may not be a realistic option.
- 3. Both regular and conscripted soldiers in liberal democracies are not only legally but also (*pro tanto*) morally required to obey a directive of their military commanders and, ultimately, their legitimate political leaders to wage war, unless doing so would be self-evidently a breach of

^{18.} Such a joint "decision" is both explicit and implicit. Moreover, in democracies it involves not simply the joint assent of members of the political and military leadership, but also of other influential members of the community, and probably of substantial sections of the general population (at least implicitly).

^{19.} I don't mean to imply that all the various individuals, individually or jointly, influencing the decision to go to war can be thought as participating in a joint decision. Nor am I disputing the existence in some cases of an *institutional* joint decision-making body.

^{20.} Miller, "Joint Epistemic Action."

their domestic law or of international law. As stated above, this is not to say that they have transferred their natural right to decide whether or not to use lethal force. Rather their decision to wage war by joining or remaining in the armed forces constitutes the waiving of that natural right. Moreover, any refusal to obey a lawful directive to go to war is likely to, and indeed should (other things being equal), lead to legal sanctions. So individual noncompliance with such a directive is likely to be extremely costly (e.g., result in incarceration).

- 4. The actions of nation-states and, specifically, the nationally (or more narrowly sectional) self-interested decisions of political leaders to wage war, are not effectively regulated by enforceable international law adjudicated by an authority with sufficient power and legitimacy to ensure that its adjudications are consistently adhered to by all, and especially by all of the powerful nation-states. The UN Security Council is an attempt to establish such an authority but, at least thus far, it is far from being an entirely successful attempt, given the willingness of powerful nation-states to ignore its determinations when it suits them. Thus whether or not waging a particular war is morally justified is not comprehensively specified and concretized in law in the manner in which, for example, commercial conflicts between rival firms engaged in attempted takeovers in a domestic economic setting or fights between rival street gangs are. Crucially, there is no independent supranational legal authority to which rival armies or individual military combatants might appeal in circumstances in which waging war is not obviously in breach of domestic or international law. Accordingly, there is no de facto higher authority than their national governments for citizens, including military personnel, to turn to in the decision-making in respect of waging war. Moreover, in these circumstances the potentially malign influence of narrow and partisan political interests is likely to be very much greater than it ought to be.
- 5. Once hostilities have commenced, it is morally problematic, absent defeat on the battlefield, for individual combatants engaged in an unjust war (let alone a morally ambiguous war or, obviously, a just war) to refuse to comply with lawful orders from their superiors to kill enemy combatants. For, as we have seen, in embarking on a war individual military combatants have waived their right to decide to use lethal force against enemy combatants and done so in favor of their superior officers and, ultimately, the political leadership of the polity on behalf of which they are waging war. This is, of course, not to say that

circumstances could not arise that would override their obligation to use lethal force as directed by their superiors. I know of no moral rights or obligations that are absolute and certainly obligations based on a waiver of this natural right are not absolute. Moreover, the waiver of this natural right is revocable; military combatants can and, under certain conditions, may abandon their armies even in wartime. However, there is a strong moral presumption against revoking one's waiver of a right. An additional consideration is that desertion is typically a very serious legal offence to which severe penalties are attached. In short, individual combatants fighting an unjust war are in a moral bind not typically encountered by individuals engaged in non-institutional, interpersonal, unjust conflict. For unlike the latter individuals, military combatants have, in effect, waived their moral right to stop fighting. Accordingly, if we assume, as in many cases we should, that the injustice of the war that they fighting overrides the (lawful) command of their superiors to continue fighting, nevertheless, military combatants typically have a moral excuse if they continue to fight.

6. Other things being equal, it is morally permissible for military combatants (say, members of A) to deliberately use lethal force against enemy combatants (members of B) in circumstances in which these enemy combatants are deliberately using lethal force against them. (For my purposes here, I take it that the military leaders of combatants can be understood to be combatants, even if they do not actually do any direct killing themselves.) Naturally, other things might not be equal. In particular, the enemy combatants (members of B) might be the ones fighting a just war, and the members of A may be fighting an unjust war. Nevertheless, there is a moral difference between these enemy combatants fighting a just war and innocent civilians. For innocent civilians are not a lethal threat to anyone, whereas the enemy combatants are an intentional lethal threat to members of A, even if justifiably so. In short, the fact that combatants are an intentional lethal threat and innocent civilians are not is grounds for granting immunity to the latter, but not the former. It does not follow from this that members of A are morally justified in killing members of B, for members of A are fighting an unjust war and members of B a just war; rather, only the lethal actions of members of B are morally justified. Nevertheless, members of A might be excused for killing members of B, since members of B are deliberately trying to kill members of A, and members of A, let us assume, believe—and have good reasons for believing—that they are fighting a just war (and thus may retain their right not to be killed).

In this context the doctrine of the Moral Equality of combatants is evidently morally justified. Considerations 1, 2, 3, and 4, taken jointly, create a presumption in favor of regular soldiers waging war, if directed to do so by their own (legitimate) political leaders, and if doing so is not manifestly unlawful (either in terms of domestic or international law). Considerations 5 and 6 demonstrate the moral difficulties confronting combatants already engaged in fighting an unjust war who might contemplate refraining from using lethal force against enemy combatants. Consideration 6 also restricts combatants' intentional use of lethal force to enemy combatants; noncombatants have immunity. In doing so, it eliminates a fundamental moral objection to combatants' use of lethal force. There remains the moral issue of the justification of waging a particular war. However, in light of the above four considerations, for the regular soldiers there is a moral and legal presumption to be overridden. Moreover, since the doctrine of the Moral Equality of Combatants is morally justified, albeit not as an inherent moral principle, the institutional role of a military combatant will comprise the institutional rights and duties constitutive of that doctrine, including the institutional right to use lethal force against an enemy combatant in a theater of war. But since these institutional rights and duties are morally significant and morally justified, they are also special moral rights and duties. However, these institutional rights and duties are only prima facie (special) moral rights and duties. A prima facie moral right or duty is only presumptively an actual moral right or duty. Thus prima facie moral rights and duties contrast with pro tanto moral rights and duties. The latter are actual moral rights and duties, albeit ones that can be overridden.

In short, regular soldiers have an institutionally based, prima facie (special) moral right to use lethal force against enemy combatants in a theater of war, and they have that prima facie moral right even if they are fighting an unjust war. I emphasize here, as elsewhere, that special moral rights and duties are to be distinguished from natural rights and duties. So the special right of a military combatant to use lethal force against an enemy combatant is not to be confused with the natural right of personal self-defense, the natural right to defend the lives of others or even the natural right to decide whether or not to use lethal force, although these

natural rights are implicated (in the manner described in this chapter and in Chapter 3).

The above (complex) argument is offered to morally justify the doctrine of the Moral Equality of Combatants and the associated prima facie (special) moral rights and duties of military combatants. However, I now need to present a number of caveats. First, the argument is offered in a particular historical and institutional context-namely, that of regular soldiers acting on behalf of nation-states in an international context in which there is no reliably enforceable international law. In a different institutional context, such as that in which there was a world government, these conventions and laws might not be justified and combatants might not have the associated prima facie (special) moral rights and duties. Rather, they might have special moral rights and duties akin to those currently attaching to the role of a police officer (see Chapter 4). Second, the argument does not remove the moral difference between combatants fighting a just war and those fighting an unjust one. Combatants fighting an unjust war have a prima facie (special) moral right to use lethal force against enemy combatants, but not an actual one; indeed, all things considered, they should not be fighting in an unjust war. Nevertheless, as argued above, they may well be morally excused for fighting an unjust war. On the other hand, it may well be that in the case of a manifestly, egregiously unjust war, combatants not only morally ought not to be fighting in it, but their doing so may also be morally blameworthy (i.e., they have no acceptable excuse). Third, as argued in Chapter 4, the moral right to use lethal force is an inalienable right, albeit one waived by regular soldiers in favor of their superiors in theatres of war. Accordingly, while there is a presumption in favor of military combatants using lethal force in a theater of war, if they are given a lawful command to do so by a superior officer in the context of a lawful (democratically supported) war, this presumption can be overridden if the war is unjust, and such a command does not absolve individual combatants from moral responsibility for their lethal actions. Nevertheless, if subordinate combatants comply with lawful commands to use lethal force in an unjust war, they may well have diminished moral responsibility for their actions.

The important moral difference between combatants fighting a just war and those fighting an unjust one is reflected in their respective collective moral responsibilities. As argued above, armed forces engaged in war are best understood as multilayered structures of morally significant joint action. Therefore, the individual members of these armed forces are

collectively (i.e., jointly), morally responsible for fighting, respectively, a just and an unjust war. As argued above, in such morally significant, layered structures of joint action, each individual organizational actor is morally responsibility for his or her own actions, yet each also has a share, jointly with the others, of the moral responsibility for the larger organizational goals (collective ends, in my parlance) and their outcomes. So if Corporal Jones shoots dead an enemy combatant, he is morally responsible for this, albeit, as noted above, he may have diminished responsibility. In addition, Jones has a share in the collective moral responsibility of the members of his unit for winning (or losing) the battle in the context of which he killed the enemy combatant, and, ultimately, in the collective moral responsibility of the members of his army for winning (or losing) the war (just or unjust) war. Naturally, the contributions of different military personnel will be variable. Perhaps the contribution, for better or worse, of military leaders will be greater than their subordinates, and therefore their share of collective moral responsibility will be correspondingly larger.

A further point is that the fundamental moral difference between combatants fighting a just war and those fighting an unjust war is consistent with important moral differences between combatants fighting one unjust war and combatants fighting a second unjust war. Clearly, combatants fighting an unjust war who, for instance, respect civilian immunity and do not torture enemy combatants are morally superior—other things being equal—than combatants fighting an unjust war who do not respect civilian immunity and who follow the practice of torturing enemy combatants. Consider in this connection the combatants fighting on behalf of ISIS in Iraq who regularly torture and kill, including by beheading, war prisoners and civilians alike. Clearly, the moral acceptability or unacceptability of actions within a war is not fully determined by the overall justice of the war (i.e., by JAB alone and without recourse to the JIB considerations). Indeed, it is appropriate simply to build the JIB requirement into the definition of JAB, as I have done.

As things stand in this definition, each condition must be met, and thus each condition is given, in effect, equal weight. To require that each condition be *more or less* met is a stringent, and perhaps ultimately problematic, requirement. But to require that each condition be *fully* met, generates immediate and obvious problems. What if, for example, there is the probability of enormous good following on waging a successful war, yet success hinges on torturing certain key personnel—actions

ruled out by clause 7? Would such a war be obviously less just than one that met all the conditions, but in which a marginal amount of good was the outcome? Or what of cases in which nonviolent strategies are completely ineffectual, but in which violent strategies are not likely to bring about cessation of rights violations, except in the very long term and with very considerable cost in terms of lives; and yet the rights violations taking place are massive? It is difficult to see how prior theoretical conditions could be articulated that would entirely and satisfactorily determine all such cases.

Such cases point to an area in which judgments that outrun prior theory will have to be made. In short, just war theory cannot settle all such cases one way or another, although it offers general guidelines. Moreover, they also point to the gradations of moral rightness and wrongness, the pervasive presence of lose-lose situations in war, and the consequent need to make judgments based on a balance of moral considerations. In these respects, war is no different from many other areas of human decision, save that the moral stakes in relation to war are typically higher than elsewhere. So much for JAB, let us now turn to JIB and ROE.

6.3 Jus in Bello and Rules of Engagement

As noted above, JIB pertains to the use of lethal force within a war and, most importantly, of three principles: military necessity, proportionality, and discrimination. The principle of discrimination provides for the immunity against lethal attack by combatants of noncombatant innocent civilians. I discuss this principle in the next chapter. Here my discussion of JIB will focus only on the principles of military necessity and, to a much lesser extent, the principle of proportionality (and in doing so I take the principle of discrimination as a given—and also as straightforward in its application—which, of course, in reality it is not). Moreover, I provide a moral rather than a legal rendering of these principles. My discussion will also focus on ROE and its relation to JIB.

I note that the principles of necessity and proportionality are part of JAB as well as JIB. A nation ought not to go to war unless it is necessary, and it ought not do so if doing so will involve engaging in a war in which the quantum of lives lost will be disproportionately large relative to the

^{21.} Walzer, Just and Unjust Wars, Chapters 8 and 9.

rights violations it is seeking to defend itself against. Thus my treatment of these principles will reflect this.

The principle of military necessity implicitly invokes a number of nested collective ends. Ultimately, the use of lethal force by a combatant or by a unit of the armed forces or by the armed forces as a whole is justified by whether or not it contributes to the realization of the collective end of winning the war. This military end is itself justified by recourse to the JAB collective end of the cessation of the rights violations of the citizenry (i.e., successful national self-defense). However, the collective end of winning the war depends on the realisation of various other middlelevel collective ends (e.g., winning various battles), and the latter in turn depend on the realization of various low level collective ends, e.g. winning various firefights. As we saw above, there is a multilayered structure of joint actions. Moreover, at each of these levels we can usefully distinguish between a military unit's collective self-defense and its realization of the collective end (notably so-called mission accomplishment) that ultimately contributes to winning the war. Thus the members of a platoon might successfully defend themselves against an enemy attack without necessarily achieving their military objective of (say) taking and holding a hilltop. Naturally, if the members of a unit of an armed force, or the entire armed force itself, fail to successfully defend themselves, then they will not be able to achieve their other military objectives. So the collective end of unit and force-wide self-defense is both an end in itself and typically, albeit not invariably in the case of units, a means to the ultimate collective end of winning the war.

As we also saw above, the realization of the lowest level collective ends (i.e., the successful performance of the lowest level joint actions) depends on the realization of various individual actions of individual combatants, albeit typically taken in aggregate, such as combatant Smith's lethal shooting of enemy combatant E1, combatant Jones's lethal shooting of enemy combatant E2, and so on. Moreover, whereas these single lethal acts of individual combatants are severely spatially and temporally circumscribed, (e.g., assume combatant John Smith of the US Marine Corps fired a round killing an enemy German combatant at 12 noon on June 6th, 1944, on the beach at Normandy in France), as we ascend the various levels of joint activity, the temporal and spatial parameters of the joint actions in question expand. Thus a firefight might take place over a couple of square kilometers and last for a number of hours; a battle might rage over an entire large sprawling city over many weeks; a war might have a

number of theaters in different countries and last for years. Accordingly, to determine whether or not the use of lethal force complies with the principle of military necessity a number of prior determinations must be made with respect to: (i) (nested) collective ends, (ii) lethal force as a means, and (iii) the costs of lethal force in terms of lives lost.

With respect to nested collective ends: In the overall context of the necessity to realise the collective end of winning the war and, therefore, of winning particular battles, the winning of which is necessary to win the war, and so on, it must be determined whether or not the collective end being contemplated (e.g., to destroy an enemy gun emplacement in order to win a firefight, to win the battle of Stalingrad in order to defeat the invading German army) is in fact a collective end that must be realized. In short, is realizing the collective end in question a military necessity? Here the notion of necessity in play is somewhat fluid; in probabilistic terms, there might be (say) a 60 or a 90 percent chance that if the enemy gun emplacement is not destroyed the firefight will be lost. I note that judgments regarding military necessity in the context of nested collective ends are not ones likely to be able to be competently made by individual lowerechelon combatants. Typically lower-echelon combatants do not have the necessary information or the tactical and strategic competence and, in any case, they are inevitably focused on their own highly localized encounters. This feature of military conflict provides an important justification for the requirement that military combatants waive their discretionary right to use lethal force. This is not to say that individual combatants do not at times have to make their own discretionary judgments based on the principle of necessity in, for instance, one-off, localized, actual or potential lethal encounters. This is perhaps especially the case in waging war against terrorist armed forces, such as ISIS. Is a woman in long robes approaching a military checkpoint without permission a suicide bomber or merely a confused, innocent civilian? There being no time to consult a superior, Private Jones must make the decision to shoot or not and take full responsibility for his decision.²²

With respect to the use of lethal force as a means: It must be determined whether or not the contemplated lethal force is an effective means, or part thereof, to achieve its proximate collective end and, thereby, its

^{22.} As discussed below, the ROE specify further the ius in bello principles. However, even quite specific rules cannot eliminate the requirement for discretionary judgments on some occasions.

further collective ends. Moreover, it must be determined whether or not there is some other more effective or more efficient lethal (or, preferably, nonlethal) means to achieve the collective end in question. For example, firing mortars at a small camouflaged enemy gun emplacement in order to destroy it might be the most effective and efficient means available; perhaps a bomber strike might miss the target and be hugely expensive both in terms of resources expended and in terms of the opportunity cost vis-a-vis some other more appropriate target. Further the rules of engagement or ROE are relevant here in so far as they are dictated by mission accomplishment considerations (collective ends, in my parlance). Under some circumstances, it may be judged efficacious to permit the use of certain weapons systems or tactics rather than alternatives in a given theater of war.

With respect to the costs of lethal force in terms of lives lost: It must be determined whether or not the use of lethal force being contemplated is *minimally* necessary to achieve the proximate end of, say, winning a battle in terms of overall costs as measured by lives lost on one's own side, civilian lives lost, and perhaps even enemy lives lost (supposing there to be, for instance, the possibility of capturing rather than killing enemy combatants). For example—and assuming it was a military necessity in terms of defeating the German army in the First World War that the British, French, and their allies win the Battle of the Somme—was the loss of most of the hundreds of thousands of lives lost in this battle minimally necessary to win it?

The principle of proportionality pertains to the relative quantum of harm done, and also to the relative seriousness of the wrong done. Here, as elsewhere, we need to distinguish between these two notions of harming someone and wronging them. For example, I might violate a billionaire's property rights by defrauding him of, say, \$1,000. Having violated his property right, I have wronged him; however, the amount in question might be too small to cause him any harm. Moreover, in war there are multiple forms of both harm and other wrongdoing, and multiple categories of persons harmed or wronged. To simplify, I shall restrict myself in what follows to intentional and unintentional killings by combatants of other combatants and of noncombatant civilians. Naturally, there will be a distinction in play between, for example, killing someone who has a moral right not to be killed (the person is both harmed and wronged) and killing someone in justified self-defense (the person is harmed but arguably not wronged).

As we have seen with the principle of necessity, the principle of proportionality operates at a number of levels; namely, national self-defense, defense of the armed forces, unit self-defense, and individual self-defense (and defense of the life of another). At the level of national self-defense, a central question to be asked is whether the cost in terms of the loss of human life among armed forces and civilian populations on both sides incurred by waging this war is disproportionately large relative to the cessation of rights violations winning the war will bring about. Here the value of some lives might be discounted relative to others, such as the lives of the rights violators (including the enemy combatants), relative to the lives of the noncombatant citizenry whose rights have been violated. I return to this issue in the next chapter.

At the level of armed forces self-defense, some central questions to be asked are: Is the cost in terms of the loss of human life of members of the defending armed forces in question disproportionately large relative to the cessation of rights violations winning the war will bring about? Is the killing by means of concentrated aerial bombing of most of the members of the attacking armed force—and thereby winning the battle—with no reciprocal loss of life among the defending armed forces disproportionate, given the alternative of winning the battle by using a mix of aerial bombing and ground troops, with the consequence that while most of the enemy troops will surrender and be captured, there will be a small number of casualties among the defending ground troops?

At the level of unit self-defense, some questions to be asked are: Is the cost in terms of the loss of human life of all members of the defending unit in question disproportionately large relative to the contribution the unit makes to the cessation of rights violations winning the war will bring about? Is it disproportionate for the unit to be denied aerial support in order to minimize civilian casualties, if it has the consequence that all or most of the members of the unit will likely be killed by enemy fire?

At the level of individual self-defense, and individual defense of the life of another, some questions are as follows: Is the cost in terms of the loss of my human life disproportionately large relative to the contribution I make to the cessation of rights violations winning the war will bring about? Is the cost in terms of the loss of my human life disproportionately large relative to saving the life of my comrade in arms? Is my firing of a rocket from a hand-held launcher at a large number of enemy combatants disproportionate, if there is a good chance a small number of nearby civilians will be killed by the blast?

In the light of these various different, but interdependent, levels (the synchronic structure of war), and of the unfolding, dynamic, and largely unpredictable series of causally and means/end connected lethal actions over an extended period of time (the diachronic structure of war)—as well as distinctions between combatants and noncombatants, and between defenders and rights violators—we can immediately see that the application of the principle of proportionality is a complex affair. Moreover, the principle of proportionality interacts with the principle of military necessity such that, at times, one cannot determine what is proportionate unless one knows what is necessary, and vice versa. Obviously, if it is not necessary to take out a gun emplacement and there will be a large loss of life—including among one's own ranks—if one does so, then one ought not to do so. On the other hand, if there is a high probability that destruction of the gun emplacement will cause the (unintended) deaths of a large number of civilians, then the destruction of the gun emplacement might be ruled out, notwithstanding that it would otherwise be necessary Perhaps it is necessary for the small unit to destroy the gun emplacement, if it is to avoid very high casualties, but not necessary for the unit to avoid high casualties for the battle to be won by the larger force of which the unit is a component.

This complexity of decision making in relation to the JIB (i.e., in respect of the application of the principles of military necessity and proportionality, not to mention discrimination) in the context of the synchronic and diachronic structure of war could not be managed in the absence of more specific, precise, and detailed rules: the rules of engagement. The ROE are, at least in theory, consistent with the more general principles of JIB. However, they relativize the JIB to specific contexts of war, and in so doing provide further specification of the IIB in those contexts. Accordingly, the ROE can be more restrictive in certain respects, and perhaps even more permissive in other respects (or other contexts), than a context-independent or pre-ROE interpretation of JIB might allow. For example, the ROE in a theater of war in which there are many civilians at risk might be very restrictive (e.g., "Do not shoot unless shot at." On the other hand, in a theater of war in which there is no capacity to hold prisoners of war, and enemy combatants pose an immediate and grave threat if released unarmed (perhaps other weaponry and their fellow combatants are near at hand), the ROE might be more permissive (e.g., "Use maximum firepower when engaging the enemy").

6.4 Conclusion

In this chapter I have outlined just war theory, including jus ad bellum and jus in bello, and offered a version of this theory—a version that accommodates wars fought by and against nonstate actors, as well as between state actors. I have framed the concept of war in terms of theoretical notions developed in earlier chapters, such as joint actions, multilayered structures of joint action, institutional roles, and so on. Some more specific claims argued for include the following: (1) Notwithstanding the moral difference between combatants fighting a just war and those fighting an unjust war, compliance with the doctrine of the Moral Equality of Combatants is morally justified and, as a consequence, military combatants not only have the institutional rights and duties constitutive of that doctrine, but these rights and duties are prima facie (special) moral rights and duties. (2) The principle of military necessity is to be understood in terms of nested collective ends; thus the collective end of winning the war depends on the realization of various other middle level collective ends (e.g., winning various battles), and the latter in turn depend on the realization of various low level collective ends (e.g., winning various firefights. (3) The application of the principles of military necessity (and proportionality and discrimination) involves in turn the application of more specific, precise, and detailed rules: the rules of engagement.

Civilian Immunity

IN THIS CHAPTER I explore the principle of discrimination and, in particular, the closely related notion of civilian immunity in war. 1 I do so in the context of (1) the rights-based just war theoretical account of the moral justification for waging war elaborated in Chapter 6, and (2) the contrasting moral duties to innocent bystanders that police officers contemplating the use of lethal force have. Of course, innocent bystanders have a natural right not to be killed. This right can be overridden under certain circumstances. However, as is the case with ordinary citizens, and as was argued in Chapters 2 and 3, a police officer's use of lethal force should not put the lives of innocent third parties at risk of serious harm other than in exceptional circumstances. In the case of police officers this requirement derives not only from the natural right of innocent third parties not to be killed but also in part from the primary institutional role of police officers to protect citizens from serious harm; and this latter (in part) institutional-based requirement typically trumps police officers' other primary institutional role of arresting offenders. By contrast with both ordinary citizens and police officers, military combatants can justifiably put the lives of innocent citizens at considerable risk; they can do so on grounds of military necessity. So the principle of discrimination in play is far more permissive. In section 7.1 I address the issue of moral differences between combatants and civilians and, in particular, engage with a

^{1.} Walzer, Just and Unjust Wars, Chapter 9; Igor Primoratz, ed., Civilian Immunity (Oxford: Oxford University Press, 2007); Larry May, War Crimes and Just War (New York: Cambridge University Press, 2007), Chapters 5 and 8; Coady, Morality and Political Violence, Chapters 6 and 7.

novel argument of Asa Kasher and Amos Yadlin that, contrary to the standard view, the lives of one's own combatants ought to be given priority over the lives of noncombatants of the enemy state or other collective political entity.²

In section 7.2 my focus is on the killing of innocent civilians in war. I discuss a number of putative moral justifications for the killing of innocent civilians by combatants who are fighting an otherwise just war. The most influential of these justifications relies on the moral difference between intentions and foreseen consequences, on the one hand, and the application of the principles of military necessity and proportionality, on the other. Roughly speaking, the idea is that it is morally permissible for combatants to kill innocent civilians, if: (1) these civilian deaths were foreseen, but not intended; (2) the collective end being pursued by the combatants was militarily necessary; and (3) the number of civilian deaths was not disproportionate.

In sections 7.3 and 7.4 I shift my focus to a moral issue that has received little attention to date: civilians (noncombatants) who are not innocent. I argue that there are two neglected categories of civilians that should not enjoy civilian immunity in war.3 The first category (discussed in 7.3) consists of the members of civilian groups who have a share in the collective moral responsibility for non-life-threatening rights violations, yet are not morally responsible for the enforcement of these rights violations. Such persons are neither combatants nor their leaders; nor do they necessarily assist combatants qua combatants, as do, for instance, munitions workers. The second category (discussed in 7.4) consists of the members of civilian groups who are collectively morally responsible for culpably refraining from assisting those who have a moral right to assistance from them. Once again, such persons are neither combatants nor their leaders; nor do they necessarily assist combatants qua combatants. Note that these two categories overlap insofar as they are members of civilian groups who are guilty of certain non-life-threatening rights violations by virtue of culpably refraining from assisting the rights bearers in question.

^{2.} An earlier version of the material in this section is in Miller, *Terrorism and Counter-Terrorism*, 142–145.

An earlier version of the material in this section is in Miller, "Civilian Immunity, Forcing the Choice and Collective Responsibility."

7.1 Prioritizing the Lives of One's Own Combatants over the Lives of Noncombatants of the Enemy

Asa Kasher and Amos Yadlin have put forward an argument that, if sound, would reduce the moral benefits of targeted (as opposed to nontargeted) killing of terrorists. Kasher and Yadlin argue as follows. Military acts and activities carried out in discharging the duty of the state to defend its citizens against terror acts or activities while at the same time protecting human dignity, should be carried out according to the following priorities, which reflect the order of duties the state has toward certain groups:

- 1. Minimum injury to the lives of members of the state who are not combatants during combat.
- 3. Minimum injury to the lives of the combatants of the state in the course of their combat operations.
- 4. Minimum injury to the lives of other persons (outside the state) who are not involved in terror, when they are not under the effective control of the state.
- 6. Injury as required to the liberties or lives of other persons (outside the state) who are directly involved in terror acts or activities.⁴

My concern here is only with Kasher and Yadlin's prioritization of priority 3 over 4. (Hence I have omitted a couple of categories that are irrelevant to this issue.) The group identified by priority 3 comprises the combatants targeting the terrorists (e.g., soldiers of the Israeli Defense Force (IDF) targeting Hamas terrorists). The group identified by priority 4 comprises noncombatant innocents who are not members of (or otherwise under the effective control of) the state whose combatants are targeting the terrorists (e.g., innocent Palestinians who happen to be in the vicinity of the terrorists).

In effect, this view of Kasher and Yadlin puts the moral value of the lives of innocent, noncombatant Palestinians at a discount, both vis-à-vis Israeli innocent noncombatants and vis-à-vis Israeli combatants. What is Kasher and Yadlin's argument for this prioritization? Essentially, their claim is that the state has a special moral duty to protect the rights of its

^{4.} Asa Kasher and Amos Yadlin, "Military Ethics of Fighting Terror: An Israeli Perspective," *Journal of Military Ethics* 4, no. 1 (2005): 14–15.

own citizens—including its citizens who are combatants—and it does not have this duty to noncitizens. This special duty, they argue, is compatible with the general moral obligation on the part of the state to respect the human dignity of all.

Bashshar Haydar claims that there is a flaw in Kasher and Yadlin's argument at this point. From the proposition that the state ought to give more weight to the interests of its citizens—and, specifically, the proposition that it has a special moral duty to prevent harm to its citizens—it does not follow that the state is morally permitted to cause harm to noncitizens for the sake of preventing harm to its citizens. This is correct; it does not follow. Presumably, what does follow is that if members of the armed forces have to choose between discharging their special duty to prevent harm to their fellow citizens and discharging their general moral obligation to prevent harm to noncitizens, they ought to choose the former (other things being equal). I have argued this, in effect, in Chapters 3 and 6. However, the question remains whether the special moral duty to prevent harm to its citizens overrides the duty not to harm noncitizens. Haydar disputes this, claiming that the moral permissibility of giving more weight to special ties (in this case the ties between a state and its own citizens) when it comes to helping or preventing injury does not apply when it comes to harming or causing injury. So the state might have a duty to rescue its own citizens that it does not have to the citizens of other states, so that the United States, for example, has a duty to rescue US citizens taken hostage by Hezbollah, but China, arguably, has no such duty to US citizens under any circumstances. (See Chapter 8 for further discussion of this general issue.) However, from this it would not follow that that US Special Forces personnel are morally entitled to throw grenades at gunmen positioned on the balcony of a Hezbollah safe house as a prelude to rescuing US hostages being held in the basement, if the exploding grenades would likely also kill Chinese tourists standing on the adjoining balcony of a hotel.

I find Haydar's argument compelling up to this point, though perhaps not beyond it. My main reason for accepting his argument is that, as argued in Chapter 1, refraining from assisting those one has a duty to assist is not morally equivalent to killing them⁶; other things being

^{5.} Bashshar Haydar, "The Ethics of Fighting Terror and the Priority of Citizens," *Journal of Military Ethics* 4, no. 1 (2005): 52–59.

^{6.} Kasher and Yadlin, "Military Ethics of Fighting Terror," 20.

equal, it is morally worse to kill someone than to fail to assist them, supposing one has a duty to assist. I return to this issue in the next section. Here, however, I want to press a somewhat different point. As already mentioned, an important respect in which Kasher and Yadlin's view is distinctive pertains to their putting of the lives of noncombatant (entirely innocent) noncitizens at a discount vis-à-vis the lives of combatant citizens. I want to argue against this claim.

Let us grant that combatants have a special duty to protect the lives of their fellow citizens, and that they do not have this duty in respect of noncitizens (or, at least, in respect of persons who are not under the effective control of the state). Moreover, let us assume that there is an important difference between combatants and noncombatants in relation to this duty. Specifically, combatants have an institutionally based moral duty to put themselves in harm's way—indeed, to risk their own lives—in order to protect the lives of their noncombatant fellow citizens. (I have argued for this proposition in Chapters 3 and 6.) Obviously, noncombatant noncitizens (of the state in question) do not have either of these duties. For example, noncombatant (innocent) Palestinians living outside Israeli-controlled areas in the Middle East do not have a moral duty to protect the lives of Israeli noncombatants; much less do they have a duty to put themselves in harm's way (indeed, risk their lives) in order to protect Israeli noncombatants.

Now consider the following two options confronting Israeli soldiers. They can intentionally fire a rocket into a building known to house Hamas terrorists, and thereby intentionally put the lives of noncombatant (innocent) Palestinians, including children who attend an adjoining kindergarten, in harm's way (i.e., there is a reasonable chance that some of these innocent Palestinian children will be killed). Alternatively, they can send in a group of soldiers to storm the building and kill the Hamas terrorists by using small arms at close range. The latter option puts the Israeli soldiers in harm's way, since there is a reasonable chance that some of them will be killed by the terrorists. On the other hand, the lives of the innocent children will not be put at risk. Kasher and Yadlin are

^{7.} No doubt the distinction collapses in certain extreme cases. But in this respect, it is no different from many morally significant distinctions. The distinction, for example, between intentions and foreseen consequences is morally significant. However, in some extreme cases, it collapses. I take it that firing a lethal missile into a school building in which one *knows* there to be children and, thereby, causing their deaths is in effect to *intentionally* kill those children.

committed to the first option, that of intentionally putting the lives of innocent children in harm's way in order to avoid putting Israeli soldiers in harm's way.

This conclusion is strongly counterintuitive. Let me explain why. The Israeli soldiers have a moral duty to put themselves in harm's way in order to protect the lives of noncombatant Israelis. The Palestinian children have no such moral duty. However, the Israeli soldiers are, in effect, intentionally bringing it about that the Palestinian children (unintentionally) discharge part of the Israeli soldiers' duty for them—the part that involves putting themselves in harm's way.

It might be argued against this that the Israeli soldiers' duty to put themselves in harm's way (in order to protect fellow Israeli citizens) is a duty that must be discharged only if it is necessary to do so; in this case it is not necessary to put themselves in harm's way, since the Palestinian children are available to (unintentionally) discharge this role for them. However, the necessity in play here is relativized to the institutional role (and attendant duties) of the Israeli soldiers. It would not be necessary for the Israeli soldiers to put themselves in harm's way if either one of two salient conditions obtained. The first condition is that it is not necessary for any person (other than the terrorists) to be to be put in harm's way in order for Israeli soldiers to protect the lives of the Israeli citizens. This condition does not obtain: either the Palestinian children or the Israeli soldiers themselves will have to be put in harm's way. The second condition is that someone else (other than the Israeli soldiers) has the duty to protect the Israeli citizens by putting him or herself in harm's way, or, at least, someone else is able and willing (has consented) to discharge the soldiers' duty for them. As we have seen, the Palestinian children have no duty to protect Israeli citizens, much less any duty to put themselves in harm's way to do so; moreover, the Palestinian children did not consent to be put in harm's way, thereby relieving the Israeli soldiers of their own duty.

Let us now assume, as has been claimed, that Palestinian noncombatants are given the opportunity by the IDF of evacuating an area in which the IDF is targeting Hamas terrorists by, for example, dropping leaflets warning of impending attacks. If there is a realistic option for the Palestinian noncombatants in question to evacuate the area, then this is a morally relevant consideration, for in this circumstance they have chosen to remain in harm's way. However, it is disputed by some commentators

that this is in fact a realistic option, at least in the case of Gaza, on the grounds that there is typically no safe and secure location for them to go to within a reasonable time frame. At any rate, let us assume that it is a realistic option for the Palestinians to evacuate. Naturally, if the IDF is going to engage in air strikes, irrespective of whether the Palestinian noncombatants remain in situ or evacuate, then it may well be in the self-interest of the Palestinians to evacuate. But arguably they are not morally required to do so; it is morally permissible for them to remain in occupation of their own homes, the danger notwithstanding. Supposing they do so remain, is it morally permissible for the Israelis to proceed with their air strikes, knowing that they will kill innocent Palestinians? Arguably, it is morally permissible for the Israelis to engage in air strikes on military targets notwithstanding the possibility of collateral damage, assuming these air strikes are a military necessity and the loss of innocent lives is not disproportionate.

However, the problem that arises at this point is that the buildings being bombed are frequently civilian dwellings; they are not military installations, as that term is conventionally understood. Rather, the proposition is that the dwellings are ones that are (a) occupied by noncombatant civilians who are not in a position to relocate because, for example, they are children; but also (b) used by terrorist combatants as safe havens, weapons stashes, and the like. Accordingly, any air strike on such a building will not only involve the foreseeable death of civilians, it will also involve the intentional killing of those civilians. If, for example as happened in Gaza, a one-ton bomb is dropped on a house full of children, as well as terrorist-combatants, it is difficult to see how the deaths of the children was not intended. If this is correct, then the Israeli air strike is evidently in breach of the principle of civilian immunity.

^{8.} Steven Erlanger and Fares Alkram "Israel warns Gaza targets by phone and leaflet" *International New York Times* July 8 2014 www.nytimes.com/2014/07/by-phone-and-leaflet-israeli-attackers-warn-gazans.htm

^{9.} Yuli Novak "When I served, the Israeli military was the most moral in the world. No more" *The Guardian* 28 July 2014 http://www.theguardian.com/commentisfree/2014/jul/28/israeli-military-most-moral-no-more-outrage-indifference Here the assumption would be that the military officers knew, or believed that there was a reasonable chance that there were children in the building.

7.2 Moral Justification for Killing Innocent Civilians

In this section I discuss the moral justifications for killing innocent civilians; in the two sections following this one, I consider moral justifications for killing culpable citizens (noncombatants). Here we need to keep in mind a number of moral considerations identified in the previous section and in previous chapters. In each case, the considerations are subject to the condition of other things being equal. The moral considerations are: (1) it is morally wrong to deliberately kill innocent persons; (2) it is morally worse to deliberately kill innocent persons than it is to unintentionally, but foreseeably, kill them; (3) it is a greater evil to kill n+1 innocent persons than to kill n innocent persons, and it is a greater evil to fail to preserve the lives of n+1 innocent persons that to fail to preserve the lives of n persons (supposing that in each case one has a moral obligation to preserve the lives in question); and (4) regular soldiers (including navy and air force personnel) have a special institutional and moral duty to protect the lives of their own citizens. Of these moral considerations, I take 1 and 3 to be self-evidently true, and 2 to be controversial. Accordingly, I discuss 2 in the last subsection of this section. In the meantime, I assume it to be true. What of consideration 4? I have argued for the truth of this consideration in Chapter 3. However, a brief discussion here for the purposes of clarification is in order.

As I argued in Chapter 3, regular soldiers have a jointly held special institutional and moral duty to protect the moral and institutional rights¹⁰ of their fellow citizens, but not necessarily the citizens of other countries. This joint special duty is in part based on a partialist joint moral obligation; namely, the joint moral obligation that all the members of a political community have to provide for the security of the members of that community. This partialism in respect of joint positive moral rights and obligations is an extension of three forms of more basic moral partialism; namely, to oneself, to one's family, and to one's friends. The extension derives in part from the fact that oneself and one's family and friends are typically part of one's political community, and in part from the fact that one's life typically consists in large part in participation in joint enterprises constitutive of one's community (e.g., educational, health,

^{10.} Or, at least, those moral rights to properties constitutive of their selfhood and those institutional rights derived therefrom.

economic, social, and political enterprises)—enterprises productive of collective goods enjoyed principally by members of one's community. Needless to say, this partialism is weakened in the context of globalization, since friends and relatives are increasingly globally dispersed, as are joint economic enterprises, in particular. Nevertheless, the continuing existence of an international order composed of nation-states underpins this particular partialist model, as well as the structure of joint special moral and institutional rights of military combatants that it gives rise to.

7.2.1 Justifiably Killing Innocent Civilians

To facilitate the discussion of the moral justifications for killing innocent civilians, let us consider a scenario in which the air force of a liberal democracy, A, might be ordered by its political authority to shoot down an airplane with 100 innocent civilians (citizens of A) aboard that is being piloted by enemy combatants of a political entity, B, who are intent on flying it into a building housing 1,000 innocent civilians (also citizens of A). Here the dilemma is whether intentionally to refrain from protecting the lives of the innocent many (office workers in the building) or intentionally to kill the innocent few (the passengers in the plane) to protect the lives of the innocent many (and given the passengers are almost certain to be killed in any case).

Here we first need to distinguish between institutional rights and duties, on the one hand, and moral ones, on the other. Elsewhere, I have argued that these may come apart; specifically, it may be morally permissible to perform actions that are, and ought to be, unlawful. At any rate, arguably, prime ministers, presidents, senior security personnel, and other government officials in liberal democracies ought never to have the legal power to authorize the deliberate killing of their own citizens in order to save the lives of other people (whether they be their own citizens or not)—or indeed for any other "larger" purpose. A reason for this might be that the moral legitimacy of governments—liberal democratic governments in particular—derives in large part from, and crucially depends on, respecting the fundamental natural rights of autonomous human persons considered individually, and not simply in aggregate. Put simply,

^{11.} For example, in relation to torture. Torture ought never to be legalized, but it may well be morally justified in some extreme circumstance. Seumas Miller, "Is Torture Ever Morally Justifiable," *International Journal of Applied Philosophy* 19, no. 2 (2005): 179–192.

individual citizens in liberal democratic polities, or in other polities for that matter, have not relinquished, and indeed cannot relinquish, their natural and inalienable right not to be killed, including their right not to be killed by governments. Rather the only general condition under which it is institutionally and morally permissible for governments intentionally to take the lives of their citizens are ones in which the right not to be killed of the citizens in question has been suspended by virtue of their own rights violations (e.g., these citizens are themselves unjustifiably attacking other citizens).12 It might be argued that citizens can at least waive their right not to be killed. However, this seems doubtful, given that waiving one's right not to be killed would be, in effect, to relinquish it; assuming the dead cannot return to life.¹³ At any rate, if this line of reasoning is correct, then military combatants who deliberately kill their own citizens, even for good moral reasons (of which more below), cannot be discharging their special institutional rights and, therefore, their moral right qua special institutional moral rights. Or, at least, these military combatants cannot be discharging their special rights in so far as these rights have been legitimately authorized by the citizenry, as is presumably required in a liberal democracy. It could, nevertheless, be argued that the intentional killing of a small number of innocent persons can sometimes be justified in order to save the lives of a much greater number. Perhaps so, but it would not follow from this that a special institutional and moral right should exist to enable this. In particular, such a special right would depend on appropriate authorization from the citizenry but, as already stated, such authorization would require the citizenry to do what they cannot do, i.e. relinquish or waive their right not to be killed.

Even if the government officials of liberal democracies—and perhaps of any morally legitimate system of government—are not, and could not be, justifiably authorized to intentionally take the lives of their own innocent citizens, scenarios like the one just described give rise to acute moral dilemmas for any human agent who has the opportunity to intervene; generally, such human agents will be, in fact, senior political, military,

^{12.} Perhaps the right to life of innocent citizens has been suspended if these citizens consent to their lives being taken in order to save the lives of a much larger number of fellow citizens.

^{13.} But see Joel Feinberg "Voluntary Euthanasia and the Inalienable Right to Life" *The Tanner Lecture on Human Values*, University of Michigan, April 11977.

or police personnel. Accordingly, let us proceed with the analysis on this basis, and in effect, therefore, bracket their institutional rights and duties.

Other things being equal, deliberately killing one innocent human being in order to save the life of another is morally wrong. However, in the plane scenario, the number of persons to be deliberately killed is small relative to the number of lives to be saved. No doubt, deliberately killing a few innocents in order to save the lives of many innocents is inherently morally problematic; it necessarily involves doing what is morally wrong, given the undiminished moral value that attaches to the life of an innocent person. For deliberately killing one or more innocent persons is morally wrong, irrespective of whether it is done in order to save the life of one or more innocent persons. On the other hand, arguably, deliberately refraining from saving the life of one or more innocent persons is also morally wrong, albeit a lesser wrong, irrespective of whether or not it is done in order to avoid the morally wrong action of deliberately killing some other innocent person or persons. So the dilemma resolves itself into a choice between a greater and a lesser evil.

At any rate, at some point in this kind of scenario, the choice will surely need to be made in favor of killing rather than refraining from saving. Suppose, for example, that the choice is between deliberately killing one person and refraining from saving 1,000? Arguably, to kill one and save 1,000 is the lesser evil, and thus morally preferable. As it happens, in the plane scenario, there is a further consideration in play that is, I suggest, decisive. In this scenario, the innocent persons to be deliberately killed will die whatever option is chosen, for they are in plane about to crash into the building housing the other innocent people. Accordingly, the morally preferable option is to shoot down the plane and, thereby, save the innocent people in the building, and to do so in the knowledge that the innocent people in the plane will die whatever one does, since they cannot be saved. This "solution" to the dilemma does not imply that deliberately killing the innocent persons in the plane is not a morally wrong act; it implies merely that the pro tanto wrongful act of deliberately killing them is overridden by other moral considerations. Nor does it imply that the proportionately larger number of innocent lives to be saved is the only moral consideration that could override or, at least, make a decisive moral difference to the moral wrongness of deliberate killing of the innocent. For it may be that partialist considerations could also make a moral difference.

Consider a scenario in which an agent, A, has to choose between killing a few innocent persons (say, n) in order to save a larger number of innocents (say, N) or doing nothing, in which case N innocents die because they are not saved, but n remain alive because they are not killed. On the basis of the argument made above, assume that it is morally required to kill n innocents in order to save N, but morally impermissible to kill $n + n^*$ innocents in order to save N (where n^* is less than n, and $n + n^*$ is less than N). Thus far, the two moral considerations discussed above are in play; namely, consideration 1, the lesser or greater evil consideration based purely on the number of innocent lives to be preserved or lost (lesser evil principle); and 2, the intention/fore-seen consequences principle. What of the third kind of moral consideration, the partialist ones? Can they make a moral difference? The partialist considerations in question are natural in character, as opposed to institutional.

Here there are two salient propositions: (A) Partialist considerations transform the impartialist moral obligation to kill n innocents in order to save N innocents into a moral permission (if not a requirement) not to kill n innocents in order to save N innocents, because the n innocents consist of oneself and one's close relatives (i.e., one's parents, siblings, and children), whereas the N innocents are all complete strangers. (B) Partialist considerations transform the impartialist moral requirement not to kill $n + n^*$ innocents in order to save N innocents into a moral permission (if not a requirement) to kill $n + n^*$ innocents in order to save N innocents, because the N innocents consist of oneself and one's close relatives (i.e., one's parents, siblings, and children) and the $n + n^*$ innocents are all complete strangers. I take proposition (A) to be self-evidently correct, but what of proposition (B)?

The argument for proposition B might go as follows: The truth of proposition A demonstrates that moral consideration 3 (natural partialist considerations) can, at least in principle, transform a moral requirement to kill into a permission not to kill (given the only other moral considerations in play are 1 (lesser evil principle) and 2 (intention/foreseen consequences principle). But if consideration 3 can transform a moral requirement to kill into a permission not to kill, why can it not transform a requirement not to kill into a permission to kill (given that in both cases, 1 and 2 are the only other moral considerations in play)?

Let us consider the matter further. The truth of proposition A seems to rest on the proposition (proposition C) that it is morally worse to deliberately kill (say) one's innocent mother than it is to deliberately kill an innocent stranger. If this is so, then it is surely morally worse not to save one's innocent mother than it is not to save an innocent stranger. Indeed,

the latter proposition (proposition D) seems to be independently true. But in that case, proposition B is evidently correct, since it can rest on the truth of proposition D. To see this, consider the following: We accepted above that it is morally permissible to kill n innocents in order to save N innocents, but that it is impermissible to kill $n + n^*$ innocents in order to save N innocents. For instance, it is morally permissible to kill two innocent persons in order to save four innocent persons, but not in order to save three innocent persons. Now assume that your mother is one of the latter three innocents in order to save the three innocents of which your mother is one.

I conclude that partialist considerations can, at least in principle, make a moral difference, in that they can add weight to other moral considerations in a manner that enables them to transform a moral obligation to kill innocents in order to save innocents into a moral permission not to kill innocents in order to save innocents, and to transform a moral obligation not to kill innocents in order to save innocents into a moral permission to kill innocents in order to save innocents.

Since the partialist considerations discussed above are natural rather than institutional in character, it does not necessarily follow that the special institutional (moral) duties of regular soldiers can likewise make a moral difference. On the other hand, these natural partialist considerations partly underpin the special duties of military combatants. This suggests that the special duties of regular soldiers may well make this kind of moral difference. Here much turns on the nature of the partialist considerations inherent in the joint enterprises that also partly underpin the special duties of military combatants.

7.2.2 The Moral Significance of the Intention/Foreseen Consequences Distinction

In the above discussion, I have assumed that the intended/foreseen consequences distinction is morally significant. Specifically, other things being equal, if the death of innocent victims is intended, then the action causing the deaths is morally impermissible, whereas if the deaths were merely foreseen, then the action may well be morally permissible. This has been disputed by some theorists, notably Frances Kamm.¹⁴ Kamm

^{14.} F. M. Kamm, Ethics for Enemies: Terror, Torture and War (Oxford: Oxford University Press, 2011).

argues that "when an act is otherwise morally permissible despite the harm and terror it produces, intending the harm and terror as a means or ends need not affect the permissibility of the act." ¹⁵

Kamm offers the example of Baby Killer Nation (BKN). 16 BKN intentionally kills and terrorizes children (innocent civilians) as an end in itself, and also as a means to protest pro-natalism. However, BKN only kills when it has a justified (moral and legal) pretext to do so in order to escape punishment. For example, BKN bombs a building housing Nazi combatants, with the consequence that the objectives of the just war against the Nazis are furthered, albeit at the cost of the lives of some children who reside nearby (they are collateral damage). However, these civilian deaths are a morally acceptable cost by the lights of just war theory (specifically, the principles of necessity and proportionality). Accordingly, the building would be a legitimate military target (in terms of international law and, presumably, morality) of some armed resistance group engaged in morally justified armed conflict against the Nazis. However, BKN bombs the building only as a means to kill the nearby children, whereas the resistance would do so without this intention (though the death of the children would be an unintended but foreseen consequence).

BKN is akin to a homicidal maniac who goes to war in order to kill people as an end in itself, but who conforms to the laws of war in order to escape punishment; the laws, therefore, constrain his killing. On Kamm's view, the homicidal-maniac-soldier would not be guilty of murder. Assuming murder is unlawful killing, and the law in question mirrors the relevant moral principles, this seems right.

Kamm goes on to make the normative theoretical claim that when an act is otherwise morally permissible (notwithstanding the harm it produces), intending the harm need not affect the permissibility of the act. However, I am not sure that Kamm succeeds in adequately justifying the claim that when an act is otherwise morally permissible (notwithstanding the harm it produces), intending the harm need not affect the permissibility of the act—at least insofar as she relies on BKN for this justification.¹⁷

^{15.} Kamm, Ethics for Enemies, 78.

^{16.} Kamm, Ethics for Enemies, 79.

^{17.} I do not have the space to deal with her interesting non-case-based justification (Kamm, Ethics for Enemies, 82–83).

For there is a further relevant feature of BKN that has thus far escaped her and others' notice; namely, a certain second-order, good intention.

The first point to be made here is that BKN intends to, or is otherwise aiming at, escaping punishment, and has as a means to this end its compliance with legally enshrined just war principles. The question is whether BKN complies intentionally or merely as a foreseen consequence of its action of bombing the building. It seems to me that compliance with the just war principles is not adequately described as a mere foreseen side effect of the bombing. (By the way, this [at least in theory, if not in practice] might be consistent with Kamm's claim that the death of the Nazi occupants of the building was foreseen but not intended). For these principles are accepted by BKN as a constraint on its activities, and BKN surely scrutinized its planned actions and their consequences, and, if necessary, would have adjusted its actions to ensure that they complied with these principles (albeit in order to escape punishment), by, for example, ensuring that the bomb would not kill more civilians than would be justified under the principles. Moreover, if the principles were more permissive, then BKN would no doubt have taken advantage of this to, say, explode a bigger bomb that would have killed even more civilians (assuming a bigger bomb was the only one available). Accordingly, it seems to me that BKN intentionally complies with the principles in order to escape punishment, or, at least, that if is far from clear that this is not so. If this is right, then the bad terroristic intention is constrained by this good, just war theoretic intention—the latter being a second-order intention with respect to the former. In this respect, BKN is akin to our homicidal-maniac-soldier.

This suggests that Kamm is right in thinking that the intention to kill (innocent) civilians does not, in her example, make a difference to the moral permissibility of the action of BKN. However, it also suggests that she is wrong about the reason for this. The intention to kill innocent civilians fails to make a difference to the (all things considered) moral permissibility of BKN's action, not for the reason that this bad intention does not *in itself* make any (*pro tanto*) moral difference, but rather for the reason that there is *another intention* in play that neutralizes its moral effect: the above-described second-order, good intention with respect to this bad intention. This second-order good intention acts as a constraint on the bad intention in question (and, therefore, on the bad intentional actions—acts of terrorism [or genocide]—that would otherwise be performed by BKN).

7.3 Civilian Immunity and Rights Violations

In this section I explore the moral notion of civilian immunity in relation to the category of civilians who are morally responsible for the rights violations that, in large part, justify the waging of war. Specifically, I want to focus on non-life-threatening rights violations. In the section following this one, I turn to a category of civilians who are culpable, but who are not morally responsible for *actions* that constitute rights violations; their sins are sins of omission rather than sins of commission. It will turn out that these two categories overlap insofar as there are members of civilian groups who are guilty of certain non-life-threatening rights violations by virtue of culpably refraining from assisting the rights bearers in question. However, for ease of exposition, my focus in this section will be on rights violations that are acts, as opposed to omissions.

In a just war, enemy combatants can be legitimate targets on at least two grounds. First, they might be a subset of the perpetrators of *rights violations* that provide the casus belli. This would be the case in a war of self-defense against an enemy hell-bent on genocide (e.g., the Allied forces fighting against the Nazi SS in the Second World War, or the largely Tutsi army fighting against the Hutu army and its militias in Rwanda in 1996),¹⁸ or on the imposition of a political arrangement characterized by egregious rights violations, such as enslavement (e.g., the Iraqi, US, and other armed forces fighting against ISIS in Iraq).

Second, enemy combatants are legitimate targets, if they are attempting to *enforce* a policy of rights violations. For example, the government in apartheid South Africa embarked on a policy of removal of so-called black spots; that is, moving black people out of designated white areas into impoverished black "homelands." This policy was a form of racial or ethnic "cleansing," and as such was a violation of human rights. However, the role of police and military personnel was one of enforcement of the policy; the policy *in itself* did not necessarily consist of the use of coercive, including lethal, force, for it is conceivable that such a policy could

^{18.} See Fergal Keane, Season of Blood: A Rwandan Journey (London: Viking, 1995).

^{19.} Francis Wilson and Mamphela Ramphele, *Uprooting Poverty: The South African Challenge* (Cape Town: University of Cape Town Press, 1988).

^{20.} The policy did not necessarily, or in fact, involve large-scale murder of the persons being removed, as happened in, for example, Bosnia in the days of Milosevic and his Bosnian Serb allies.

have been implemented by some means other than coercive force (e.g., by fraud) .

Accordingly, on the above outlined rights-based theoretical account of the just war (Chapter 6), civilians—as opposed to combatants—are legitimate targets, if (but not necessarily only if): (a) they are morally responsible for (natural and institutional) *moral rights violations*, or threatened rights violations, that justify the waging of war; and/or (b) they are morally responsible for the *enforcement* of such rights violations.

The civilians in question would include politicians, or other nonmilitary leaders, who are responsible for the rights violations, or the enforcement thereof, in the sense that in the context of a chain of command they were the relevant *authority* that directed that the human rights violations be carried out, or that they be enforced. 21 Such civilians would also include persons who, while not necessarily part of any formal chain of command, were nevertheless responsible for the rights violations (or the enforcement thereof), in that they planned them, and saw to it that other persons performed the rights violations (or the enforcement thereof). Here, the latter are instruments, but not necessarily subordinates, of the former. For while the former are the principal agents, they are not necessarily in a position of political or military authority. For example, a political leader might pay a group of foreign mercenaries to engage in ethnic cleansing without being in a relation of political or, indeed, military authority to the mercenaries. Rather, the relationship might be an essentially economic or commercial one, such as that of employer to employee or client to service provider.

Four categories of persons responsible for rights violators can now be derived; namely (1) direct rights violators; (2) direct enforcers of rights violations; (3) political or military authorities, or other principal agents, indirectly (via their directives, payments, etc., to others) responsible for rights violations; and (4) political or military authorities, or other principal agents, indirectly (via their directives, payments, etc., to others) responsible for the enforcement of rights violations. Moreover, I take it that civilians who belong to either of these four categories of persons (directly or indirectly) responsible for rights violations (or their enforcement) are, at least in principle, legitimate targets, meaning that lethal force can justifiably be used against them under certain circumstances.

^{21.} Jeffrie Murphy, "Killing of the Innocent," The Monist 57, no. 4 (1973): 532f.

Thus far I have distinguished between rights violations and the enforcement of rights violations. Moreover, we can distinguish between positive rights and negative rights, and between life-threatening rights violations and non-life-threatening rights violations. Some violations of negative rights, such as the right to freedom, might not be life threatening. And some violations of positive rights, such as the right to subsistence, might be life-threatening.

It is easy to see why the use of lethal force in response to life-threatening rights violations might be morally justified. However, the use of lethal force in response to non-life-threatening rights violations is more problematic—especially when such use of lethal force is on a scale properly describable as engaging in war. For it is typically assumed that life is more important than other goods to which people have rights. So it is harder to justify the use of lethal force in relation to nonlife-threatening rights violations than it is in relation to life-threatening rights violations. On the other hand, as argued in Chapters 1 and 3, we can distinguish between moral rights to properties constitutive of selfhood and rights to properties not so constitutive. Violations of the former category of rights (e.g., torture, enslavement), at least, are especially serious rights violations, and as such may well warrant a lethal response, if this is necessary to bring about their cessation. In speaking of non-life-threatening rights violations, I have in mind especially violations of rights to properties constitutive of selfhood other than the right to life. However, I will make it clear when the non-life-threatening rights violations under discussion are not of this kind (i.e., when they are not per se violations of rights to properties constitutive of selfhood). At any rate, I will now address the question of the legitimacy of directing lethal force at a particular class of civilians; namely, persons responsible for non-life-threatening rights violations. So I am not speaking of persons responsible for life-threatening rights violations. Nor am I speaking of persons responsible for enforcing non-lifethreatening rights violations (or for enforcing life-threatening rights violations).

The use of lethal force against persons responsible for life-threatening rights violations is typically self-defense or defense of the lives of others. (In the case of life-threatening rights violations that are violations of positive rights, it is self-preservation, or preservation of the lives of others.) But what of the use of lethal force in response to non-life-threatening rights violations?

The use of lethal force in response to those who are enforcing nonlife-threatening rights violations seems straightforward enough. For such enforcers are themselves using, or are threatening to use, lethal force in response to any attempt on the part of those whose rights are being violated to escape their fate. So the morally unjustified use of lethal force is being met with lethal force. This is not primarily or, at least, exclusively killing in self-defense in the sense of killing in defense of one's life; rather, it is killing in defense of rights other than the right to life.²² Nevertheless, it is the use of lethal force against combatants—combatants seeking to enforce non-life-threatening rights violations. And I take it that, historically, in wars of conquest, combatants fighting on behalf of the aggressor nation-state are seeking to enforce non-life-threatening rights violations, such as violations of the right to freedom (e.g., the right not to be enslaved). Accordingly, if the members of the state whose rights to freedom are under threat were to cease to resist, then their lives might well cease to be under threat.

At any rate, the use of lethal force against such combatants seems justified on the basis of the accumulated moral weight of three considerations: (1) the lethal force is used in order to bring about the cessation of non-life-threatening rights violations, or the removal of the threat thereof (e.g., rights of freedom); (2) the lethal force is used in response to the morally unjustified use of lethal force by the would-be enforcers of these non-life-threatening rights violations; (3) the lethal response is necessary in order to bring about the cessation of the (non-life-threatening) rights violations in question. Moreover, in the light of our earlier discussion, the use of lethal force against civilians who have authority over such combatants enforcing rights violations, or with respect to whom the combatants are otherwise instruments, also seems morally justifiable, at least in principle.

However, this does not settle the question of whether it would be morally justifiable to use lethal force against civilians who are responsible for non-life-threatening rights violations, and yet who are not responsible for the enforcement of these rights violations. Consider in this connection public officials who plan and administer a policy of forced removals (racial or ethnic "cleansing") or of enslavement, but who might not have any role

^{22.} Naturally, it may result in killing in defense of one's life if the person whose rights (other than right to life) are being violated resists the enforcer of these rights violations and the two parties engage in lethal combat.

or authority in relation to the enforcement of the policy. Are such officials legitimate targets?

Here it is important to distinguish types of cases. The typical situation involves the existence of some collective end, 23 such as the removal of people from their homes to an impoverished tract of land, or the occupancy of some other nation-state and the enslavement of its population. This is a collective end, since its realization requires a large number of different individual persons to perform distinct tasks in the service of a common end—indeed, it requires a number of different persons to occupy a variety of different institutional roles in the service of a common end. There are planners, administrators, enforcers (combatants), leaders, and so on, engaged in a collective project (e.g., to dispossess a people, or to win a war of conquest). Given that the collective end in question constitutes a violation of rights (albeit non-life-threatening rights), the participants in this collective project are morally culpable; they are collectively morally responsible for wrongdoing. More precisely, each individual person is individually morally responsible for his or her contributory action that is part of the means to the collective end, and each individual is jointly morally responsible with the other individuals for the realization of the collective end (or, at least, its joint pursuit).24

In many cases, enforcement is not only a means to the collective end—to the violation of non-life-threatening rights—it is integral to that end. This is obviously the case in wars of conquests, both past and present. Consider in this connection the war being fought by ISIS in Iraq. ISIS has enslaved thousands of Yazidis and Christians in Iraq, especially women (often provided to ISIS fighters as sex slaves) and children (and murdered many others, including many of their menfolk). But it is also the case in the South African forcible removal example mentioned above. The policy of the elimination of "black spots" in apartheid South Africa was a policy that in part consisted of enforcement (i.e., of use of force, or the threat thereof). Therefore, non-enforcers such as public officials who planned and administered this policy are not only morally responsible (jointly with others) for the non-life-threatening rights violations, they are also morally

^{23.} In Miller, "Joint Action," I offer an account of the notion of a collective end.

^{24.} So *collective* moral responsibility can be understood in these cases as *joint* moral responsibility. See Chapters 3 and 5 above, and also Miller, "Collective Moral Responsibility."

^{25.} Jessica Stern and J. M. Berger, ISIS: The State of Terror (London: HarperCollins, 2015), 215–217.

responsible (jointly with the enforcers) for the use of force. To this extent, they are analogous to military planners in respect of a war of conquest. Naturally, the degree of morally responsibility may differ. For example, combatants might have a greater share of the collective responsibility than those who merely assist combatants qua combatants (e.g., munitions workers).

However, arguably, there are cases in which enforcement is not integral to the collective end that consists of a violation of non-life-threatening rights. Consider a variation on our forcible removal example. In our new scenario, blacks in apartheid South Africa are falsely told that they are being transported to a land of freedom and material well-being, when in fact they are going to an impoverished "homeland." Assume further that when some groups of blacks disbelieve these claims, they are forcibly made to board the transport vehicles; indeed, lethal force is used on a number of occasions. However, enforcement is only used as a supplement to fraud. Now suppose the civilians who planned this policy of removal to "homelands" by fraud did not know-and could not reasonably have been expected to know—that lethal force would be used, and neither did the civilians who organized and time-tabled the transport. So in postapartheid South Africa, these civilians claim that whereas they have a share in the collective moral responsibility for violating the rights of the blacks, including their property rights, they are in no way responsible for the use of lethal force that took place from time to time to further this collective end. In short, they acknowledge their guilt in relation to perpetrating non-life-threatening rights violations, but deny that they were guilty of enforcing these violations (and deny, therefore, any guilt in relation to life-threatening rights violations). Their moral claim seems reasonable, assuming the facts are as they describe them.

The upshot of this discussion is that there may well be civilian groups who have a share in the collective moral responsibility for the violation of non-life-threatening rights violations without necessarily being morally responsible for the enforcement of these rights violations. Arguably, such civilians do not have a moral right to immunity in war. After all, they are not innocent civilians, but rather rights violators.

Notwithstanding their lack of a *moral right* to immunity, these civilians might justifiably expect an extent of protection not afforded to combatants. For the argument in favor of using lethal force against these civilians has less moral weight than it has in the case of those—especially combatants—who are not only collectively responsible for

the non-life-threatening rights violations, but also for the enforcement thereof. Accordingly, other things being equal, such civilians might justifiably be afforded civilian immunity in some wars, such as ones in which it was not necessary to target both combatants and civilian rights violators who were not enforcers.

In this section I have not considered a number of familiar arguments pertaining to civilian immunity. Let me simply note that there may be other grounds, such as consequentialist or contractarian grounds, for restricting the use of lethal force against civilians.²⁶ For example, conventions may have been set in place to prohibit the use of lethal force against civilian administrative personnel, and the abandonment of these conventions may bring about a situation that is morally worse, all things considered, than respecting them. Or the policy of violence may lead to counterviolence and a general escalation in violence that is morally less acceptable than the state of affairs in which legitimate targets were left unharmed. Nevertheless, there may be situations in which directing lethal force at combatants and their leaders alone is not sufficient to terminate the rights violations, and in which widening the set of targets so as to include civilian non-life-threatening rights violators is necessary to terminate the rights violations, and in which such widening is not overridden by consequentialist or contractarian considerations. In such situations, these categories of civilians may become legitimate targets, given that they lack a moral right to immunity.

7.4 Civilian Immunity and Culpable Omissions

Thus far we have mainly been concerned with civilians who are individually and collectively morally responsible for moral rights violations, implicitly understood as violations of negative rights, such as a war of conquest or an active and sustained policy of slavery or of forcible removal (ethnic or racial "cleansing"). We have not been concerned, at least explicitly, with positive rights and duties to assist as such. So our focus has not been on culpable omissions. That said, I have already acknowledged that the category of non-life-threatening rights violations includes violations of some positive rights. At any rate, in this section I will discuss the collective moral responsibility of certain categories of culpable non-attackers.

^{26.} George I. Mavrodes, "Conventions and the Morality of War," *Philosophy and Public Affairs* 4, no. 2 (1975): 117–131.

In Chapter 1 I suggested that deadly force may well in principle be used to enforce some positive rights, as well as to enforce negative rights. These positive rights include rights to goods other than life; they include rights that can be unrealized, even when the right to life is realized. Moreover, as is the case with negative rights, third parties—at least in principle—have moral rights, and indeed moral obligations, to use lethal force to ensure that some positive rights are respected, such as enforcement rights and obligations.

This point has clear implications for certain civilian members of governments who intentionally refrain from respecting the positive rights, including subsistence rights, of their citizens. For governments have a clear institutional responsibility to provide for the minimum material well-being of their citizens; or at least this is so if the governments in question have the capacity to do so. Accordingly, the moral responsibility based on need—and the fact that those in government could assist, if they chose to—is buttressed by this institutional responsibility that they have voluntarily taken on. Consider Saddam Hussein's refusal to distribute much-needed food and medicine to his own citizens, albeit in the context of UN-sponsored sanctions.²⁷ Citizens in such states may well be entitled to use lethal force against the government officials in question, notwithstanding the fact that these officials are neither combatants nor the leaders of combatants. Perhaps such use of lethal force, including assassination, is to be regarded as terrorism, on the grounds that the victims of terrorism are not themselves attackers.²⁸ If so, then terrorism can be morally justified in some circumstances. However, the civilian victims in this kind of scenario are not innocent; their intentional acts of omission constitute violations of the positive rights of their citizens.

Some of these rights or duties to use lethal force to enforce positive rights might be exercised against certain categories of people with diminished responsibility. Consider the following scenario: Suppose that there is a pharmaceutical company that has a policy of not providing cheap drugs to HIV/AIDS sufferers whose lives are at risk, notwithstanding

^{27.} Sandra Mackey, *The Reckoning: Iraq and the Legacy of Saddam Hussein* (London: Norton, 2002), 363. There was moral complexity here in that, given that Saddam was refusing to dispense food and medicines under the oil for food program—citing sanctions as his reason—then almost certainly sanctions should not have continued to be applied. But this does not relieve Saddam of culpability.

^{28.} This depends on the definition of a terrorist. See Miller, *Terrorism and Counter-Terrorism*, Chapter 2.

that it could do so and remain profitable. The company prefers to inflate its profits by selling its drugs far above cost; it refuses to sell the drugs cheaply, and is able to do this, let us assume, because of its monopolistic position in the market. Suppose that one of the employees of the company is not actually responsible for the company policy, but is nevertheless the person who is refusing to provide sufferers with the drug when they come to procure it.²⁹ Assume also that the AIDS sufferer is not in a position to credibly threaten the company managers who are responsible for the policy. Although the employee seems to have diminished responsibility for failing to respect the AIDS sufferer's right to the life-preserving drug, it is nevertheless, arguably, morally permissible for the AIDS sufferer to shoot the employee dead, if that is the only means by which he can preserve his own life.

By analogy, government employees, such as administrators who deliberately refrain from assisting those in need because they are instructed to do so by their government, might well be legitimate targets of "terrorists." Consider our above described example of blacks in apartheid South Africa who were forcibly removed into desolate "homelands," such as Qua Qua, and once there found they could not provide themselves with a basic level of subsistence, and malnutrition and disease were rampant. Now suppose South African politicians declare such homelands to be independent states—as in fact happened—and thereby try to absolve themselves and their administrators of their preexisting institutional responsibility for the minimum material needs of the "citizens" of these alleged new states. Since the "states" were not legitimate—and were not in fact internationally recognized as legitimate—these politicians and other officials did not succeed in absolving themselves of their institutional responsibility. Accordingly, the South African government officials who refrained from assisting the relocated people were conceivably legitimate targets, on the assumption that killing these officials was necessary in order to ensure that the subsistence rights of these people would be realized. This might be so, even if the officials in question were not the same officials who planned and implemented the policy of forcible removals. Perhaps by this time the latter officials had retired, and were replaced by a new cohort of politicians and administrators. If so, these new or succeeding officials

^{29.} Assume also that he does not have an adequate reason for refusing to provide the drug, (e.g., if he provides the drug he will be fired and unable to get another job, with the consequence that his young children will be brought up in abject poverty).

would simply have inherited the collective institutional and moral (prospective) responsibility to provide for the minimal material needs of the "citizens" of these alleged new states.

Let us focus on the collective responsibility of the members of a group who intentionally refrain from assisting their needy fellows. Here we need some theoretical account of collective responsibility for omissions (see Chapter 5, section 5.4). I offer the following account of collective moral responsibility for omissions, though it provides only a rough approximation³⁰ of a sufficient condition for such responsibility. Members of some group, A, are collectively morally responsible for failing to assist members of some group, B, who are in extreme need. (i.e., members of A are collectively morally responsible for a serious positive rights violation) if (1) the assistance was not provided and, as a consequence, the members of B died (or otherwise underwent extreme suffering); (2) the members of A deliberately refrained from so assisting; (3) each or most of the members of A intervening having as a collective end the (joint) provision of assistance would have saved the lives of members of B (or relieved their suffering); (4) each of the members of A would have deliberately refrained from intervening—and intervening having as a collective end the saving of the lives of members of B (or relief of their suffering)—even if the others, or most of the others, had intervened (in order to realize that end); and (5) each of the members of A had an institutional responsibility—jointly with the others—to intervene and, thereby, realize the collective end in question.

Complications arise when the intervention in question has to be performed on a very large scale, or indirectly via representatives of a community. Specifically, the nature and scale of the assistance might require appropriately authorized, organized assistance by members of trained occupational groups, such as medical personnel. Thus, in representative democracies, practically speaking, the members of the government may have to enact policies and authorize funding, and the membership of relevant organized groups may have to be mobilized, if the intervention is to efficiently and effectively relieve the large-scale deprivations in question. Here the notion of a multilayered structure of joint action and that of a joint institutional mechanism are relevant (see Chapter 2)—as argued above, the former notion enables collective institutional and moral

^{30.} For example, I have not bothered to spell out the conditions for moral responsibility, (e.g., that the agents were not under the influence of drugs).

responsibility to be ascribed to organizational actions and omissions, and the latter to the decision making of centralized bodies, such as the prime minister and his or her cabinet.

I note that large voting populations in contemporary democracies cannot be assimilated to organizational structures, such as an army, or to small-scale directly participatory bodies, such as the cabinet in a Westminster-type system of government. Therefore, notions of collective responsibility that might apply to such organizations, or to such small-structured groups, do not apply to large populations. Accordingly, the failure of the members of democratic government to discharge their collective institutional and moral responsibility and ensure appropriate humanitarian intervention does not generate a moral justification for the wholesale targeting of the civilian voting population by, say, terrorists, much less the targeting of a civilian population living in an authoritarian state that fails to do its duty in this regard.³¹

Nevertheless, in the light of this above definition, it might well be the case that civilian members of governments and their administrations—such as Iraqi politicians and administrators who failed to meet their responsibilities to distribute food and medicine to their own citizens, and South African politicians and administrators who failed to adequately assist destitute blacks in the "homelands"—are collectively morally responsible for omissions of a kind that might justify the use of lethal force on the part of their citizens to ensure that the rights to assistance in question are realized. In short, members of civilian groups who culpably refrain from assisting those who have a human right to assistance from them might thereby forfeit their right to immunity in the context of a conventional war or armed struggle.

7.5 Conclusion

My concern in this chapter has been with the principle of discrimination and, therefore, with civilian immunity in war. While I accept that military combatants have special moral duties to protect the members of their own citizenry—duties that they do not have in relation to the citizens of other communities—I deny that the lives of military combatants can be given priority over the lives of innocent civilians of an enemy state. This is

^{31.} But see Primoratz, "Michael Walzer's Just War Theory," 232f; and Michael Green, "War, Innocence, and Theories of Sovereignty," *Social Theory and Practice* 18, no. 1 (1992): 39–62.

congruent with the standard understanding of the principle of discrimination. However, I have argued that partialist considerations can make a moral difference in relation to the permissibility of the use of lethal force in war under some circumstances. Partialist considerations (e.g., between members of the same family or community) make a difference insofar as they underpin special moral rights and duties.

I have also argued that intentions—as opposed to foreseen consequences—make a moral difference, but the intentions in question are not necessarily first-order intentions; in some cases they are second-order intentions that constrain first-order intentions.

Finally, I have argued that the category of innocent civilians does not include rights violators, including non-life-threatening rights violators and those who culpably fail to discharge obligations to positive rights holders (culpable refrainers). Accordingly, some categories of noncombatants do not have the moral right to immunity in war.

Humanitarian Armed Intervention

IN RECENT DECADES there have been a number of humanitarian armed interventions¹ by nation-states in conflicts taking place within the borders of other nation-states.² One thinks of Bosnia, Kosovo, Sierra Leone, Somalia, Rwanda, East Timor, Libya, and, most recently, Iraq (against ISIS). In some instances, such as Rwanda, armed intervention was evidently morally justified; however, the armed forces deployed were inadequate and/or arrived far too late. In other instances, such as Kosovo, armed intervention might have been justified and timely, but the force deployed was arguably excessive, or at least of the wrong form.³ In still other cases, such as in response to the large-scale atrocities being committed by ISIS in Syria and Iraq, it

^{1.} The material in this chapter is based on two earlier published papers: Miller, "Collective Responsibility, Armed Intervention and the Rwandan Genocide"; and Seumas Miller, "Collective Responsibility and Armed Humanitarian Intervention," in Tony Coady and Michale O'Keefe, eds., *Righteous Violence* (Carlton, Australia: Melbourne University Press, 2005), 51–71.

^{2.} For useful discussions of these issues, see Fernando Teson, Humanitarian Intervention: An Inquiry into Law and Morality (New York: Transnational Publishers, 1988); Oliver Ramsbotham and Tom Woodhouse, Humanitarian Intervention in Contemporary Conflict (Cambridge: Polity Press, 1996); Nicholas J. Wheeler, Saving Strangers: Humanitarian Intervention in International Society (Oxford: Oxford University Press, 2000); and, more recently, James Pattison, Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene? (Oxford: Oxford University Press, 2010).

^{3.} See Tony Weymouth and Stanley Henig, *The Kosovo Crisis: The Last American War in Europe?* (London: Pearson Education, 2001).

is unclear what form humanitarian armed intervention should take and who should take it, but it is indisputable that humanitarian intervention is required, and that it needs to be an armed intervention if it is to succeed.

8.1 Justifiable Humanitarian Armed Intervention

The first general point to be made here is that at least *some* humanitarian armed interventions are morally justified. Consider the case of Rwanda. According to Fergal Keane, in Rwanda, after the deaths in a plane crash of the Rwandan and Burundian presidents on April 6, 1994, an orchestrated program of genocide took place: "In the ensuing 100 days up to one million people were hacked, straggled, clubbed and burned to death."4 The genocide in Rwanda—and like cases—constitutes a decisive objection to the claim that humanitarian armed intervention is *never* morally justified. Moreover, cases such as East Timor appear to demonstrate that humanitarian armed intervention can be successful. On the other hand, the experience of cases such as Bosnia shows that even if armed intervention is justified, the situation on the ground needs to be adequately understood if that intervention is to be successful. Evidently, the United Nations failed to understand that the war in Bosnia was in large part genocidal and directed at the civilian population. So interventionist methods aimed only at keeping groups of combatants from getting at one another were inadequate; such methods cannot and did not protect the civilian populations.⁵

The second general point concerns the nature of the justification. The fundamental justification for humanitarian armed intervention is that genocide, or other large-scale human rights violations, are taking place, and armed intervention is the only way to put an end to it. This is a moral justification. So also are the justifications offered by the United States and its allies in relation to the 2003 Iraqi invasion, namely the so-called "weapons of mass destruction" (WMD) and "regime change" arguments. The prevention of the use of nuclear, chemical, and biological weapons is self-evidently a moral imperative. But the "regime change" argument was

^{4.} Fergal Keane, Season of Blood: A Rwandan Journey (London: Viking Press, 1995), 29.

^{5.} See Mary Kaldor, New and Old Wars: Organised Violence in a Global Era (Oxford: Polity Press, 1999), 64.

^{6.} Kenneth M. Pollack, *The Threatening Storm: The Case for Invading Iraq* (New York: Random House, 2002).

presented principally in terms of the cessation of Saddam Hussein's ongoing violation of the moral rights of the Iraqi people.

Perhaps there can be decisive political or military justifications for armed interventions. Moreover, such nonmoral justifications are not necessarily inconsistent with moral justifications. Indeed, in some cases the political and military justifications are themselves ultimately underpinned by moral justifications. For example, arguably, the nature of the polity being put in place by ISIS in its so-called caliphate is in itself so morally repugnant in human rights terms as to warrant humanitarian armed intervention independent of considerations of the narrow political and purely self-defense interests (e.g., in respect of ISIS-inspired terrorism) of the extant Iraqi state, the United States, the Gulf states, and so on. In still other cases, armed intervention might be politically expedient as well as being morally justified. Some have argued as much in relation to the 2003 invasion of Iraq and overthrow of the Saddam Hussein regime.⁷ In practice, armed interventions are likely to be motivated by a complex mix of moral, political, military, economic, and other considerations. However, my point pertains to good and decisive justifications: I claim that the fundamental (good and decisive) justification for humanitarian armed interventions, in particular, is a moral justification.

Here, as elsewhere, moral justifications can be weakened or strengthened by legal considerations. Nevertheless, it is important to stress that an action can be morally justified, all things considered, notwithstanding that it is unlawful. Many types of unlawful activity aimed at undermining authoritarian states, such as peaceful demonstrations or supporting banned political organizations, illustrate this point. And I take it that humanitarian armed intervention in Rwanda, for example, was morally justified—if not morally obligatory—even if it would have been in breach of international law (as in fact was presumably not the case). As it happens, I take it that post-2001, the so-called doctrine of the Responsibility to Protect (R2P) has strengthened the legal hand of would-be interveners at the expense of state sovereignty, albeit the legal issues here are complex and outside the scope of this work.⁸

Granted the existence of an acceptable general moral justification for humanitarian armed intervention in terms of the prevention of large-scale

^{7.} Pollack, The Threatening Storm.

^{8.} Pattison, Humanitarian Intervention, Chapter 2.

violation of human rights (notably, genocide), at least four further questions arise. First, should the armed intervention be undertaken by any nation-state or states that happen to have the wherewithal to prosecute it successfully, or should it be undertaken only with the participation, or at least consent, of the international community? Second, should the notion of large-scale human rights violations be a very narrow notion, and therefore restricted to, say, genocide, or should it be relatively wide, and embrace, say, authoritarian rule? Third, should the intervention go only so far as to terminate the rights violations that triggered it, or should it involve taking preventative measures in relation to possible future rights violations by the perpetrators, or indeed by the erstwhile victims? Fourth, what form should the armed intervention take? For example, should aerial bombing—as opposed to, say, the use of ground troops—be the principal tactic?

My own view in relation to the first question is as follows: The moral responsibility to intervene is a collective moral responsibility. In particular, it is the collective responsibility of members of the international community, and therefore of the members of their governments and of other relevant individual human actors, to combat large-scale human rights violations taking place inside states whose governments are unwilling or unable to terminate those rights violations. Indeed, the internal government might be the one perpetrating the rights violations, as in the case of the Assad government in Syria at the time of this writing. Moreover, broad-based, multilateral interventions are less likely to serve the interests of any one nation-state, or small group of states, and are therefore more likely to be motivated by genuine humanitarian, rather than purely political, considerations. Nevertheless, since the moral priority is to bring about the cessation of the rights violations—rather than merely determine who ought to be the one or ones to terminate it—unilateral intervention might be justified in cases in which the international community is unwilling to act. Here I am setting aside the admittedly relevant issue of the legality of unilateral interventions, which is a central concern in relation to, for example, the invasion by US-led force of Iraq under Saddam Hussein.

In relation to the second question, I hold that the understanding of large-scale human rights violations should be narrow, in that it should

^{9.} Evidently in Kosovo the Albanians were the object of ethnic cleansing by the Serb armed forces, but the Serbs themselves became the object of ethnic cleansing by some of Albanian armed forces (KLA). See Weymouth and Henig, *The Kosovo Crisis*, 239.

involve only large-scale moral rights violations of the most morally egregious kind; specifically, large-scale violations of rights to properties constitutive of selfhood. Genocide, ethnic cleansing, and enslavement of populations are perhaps the most obvious examples of this. Here I distinguish, first, between rights violations and injustice. Injustice does not, I suggest, provide an adequate justification for armed intervention. Second, I distinguish—admittedly somewhat arbitrarily—between violations of rights to properties constitutive of selfhood (e.g., right to life) and violations of rights to properties not thus constitutive (e.g., voting rights). The former, but not necessarily the latter, justify armed intervention. Thus genocide, but not necessarily authoritarian governance, justifies armed intervention. ¹⁰

However, the appropriate notion of large-scale human rights violations is wide in the sense that it should not be restricted to violations of so-called negative rights, such as the right not to be killed, but also some positive rights, such as the right to a basic subsistence. Consider the case of an autocrat who, for political purposes, was deliberately refraining from the provision of basic medicine and foodstuffs to some needy element in his country. In such a case, there might be an in-principle justification for armed intervention. Why armed intervention? Because the nation-state in question is refraining from providing for the subsistence rights of its citizens.

In relation to the third question, I hold that interventions, where possible, should be preventative, and therefore should not necessarily be restricted to the termination of occurrent rights violations. I acknowledge the dangers attendant upon permitting intervention in relation to future, and therefore only potential, human rights violations. The 2003 US-led invasion of Iraq under Saddam Hussein proved to be a telling example of such dangers. For it turned out that Saddam Hussein did not have the arsenal of WMDs that the United States and United Kingdom leadership led the world to believe he had.

^{10.} For a contrary view, see Teson, Humanitarian Intervention.

^{11.} For an insight into Saddam Hussein's strategies and policies in this regard, see Richard Butler, *Saddam Defiant* (London: Phoenix, 2000). Of course, Saddam Hussein's policies took place as a response to, and in the context of, the sanctions imposed by the United States and its allies. Given Saddam's response, the continued imposition of sanctions was surely both ineffective and immoral.

Nevertheless, where a process of large-scale human rights violations has commenced, then intervention is justified, at least in principle. Moreover, where it is clear, post-intervention, that the process of rights violations would recommence, were the intervening armed forces to retire, then the continued presence of the intervening armed forces—jointly acting with civilians engaged in a program of reconciliation and reconstitution of civil society—might also be justified.

I cannot here give a definitive answer to the fourth question beyond endorsing in general terms the jus in bello principles of just war theory. These principles posit that the armed force used should be the minimum necessary force, that it should be proportionate, and that it should be effective.¹² It has been argued that if North Atlantic Treaty Organization (NATO) had used ground troops in Kosovo, then some of those ground troops would have been killed, but the extent of the death of civilians and the destruction of property would have been much less. If so, from the perspective of just war theory, NATO should have used ground troops assuming armed intervention in some form was justified, because the lives of one's own soldiers do not have a greater moral value than the lives of the innocent people one's armed forces have been deployed to protect.¹³ A similar point might be made in respect of the armed intervention by the United States and its allies in the war against ISIS in Iraq and in respect of the civil war in Syria. Here I am assuming that providing combat troops in large numbers, or "boots on the ground," would be effective, and that the prior question of the moral requirement to intervene militarily has been settled, bearing in mind that—as argued in Chapters 3 and 6—the institutional purpose, or at least the primary institutional purpose, of regular soldiers is to protect their own citizenry. I return to this issue below.

In this chapter I explore the notion of collective moral responsibility as it pertains to nation-states that are or ought to be engaged in humanitarian armed intervention in a variety of settings involving states or groups perpetrating large-scale human rights violations. I do so on the assumption that such interventions are the collective moral responsibility of the community of nation-states, and therefore of the members of their

^{12.} See Walzer, Just and Unjust Wars.

^{13.} On the other hand, it could be argued that the media spectacle of significant numbers of body bags containing dead NATO combatants might have created public pressure in the United States, in particular, not to continue with the intervention, and thereby left the Albanian Kosovars to the mercy of their murderous Serbian enemies.

governments and of other relevant individual human actors. I further assume that humanitarian armed intervention is a cross-border use of armed forces, or the threat of such use, by a state or states *primarily* for the purpose (though not necessarily the sole purpose) of protecting basic moral rights. So cross-border armed interventions undertaken primarily in order to, for example, expand one's territory or sphere of political influence are not humanitarian armed interventions. Russia's recent invasion of Crimea is a case of the latter, notwithstanding its claim to be protecting the rights of members of the Russian community therein.¹⁴

The current armed intervention against ISIS in support of Iraqi government forces on the part of the United States, Iran, and others is, or at least ought to be, a case of an humanitarian armed intervention, given that ISIS is intent on engaging in large-scale human rights violations, not only in the course of waging war, but also as an inherent feature of the form of governance it is seeking to impose in Iraq, Syria, and elsewhere.¹⁵

Humanitarian armed intervention can be undertaken with or without the consent of the government of the state whose border is to be crossed, and it can include direct attacks on the armed forces of that government, as well as the deployment of armed forces to protect safe havens, ensure that food or other aid is distributed properly, and so on.

8.2 Collective Moral Responsibility and Human Rights Violations

For my purposes here, I need to clarify the key notion of collective moral responsibility as it pertains to humanitarian armed intervention, building on the notion of collective moral responsibility introduced in earlier chapters. Let us remind ourselves what that or those notions were. ¹⁶ As argued in Chapter 5, the basic suggestion is that collective moral responsibility can be regarded as a species of joint responsibility for actions and omissions; specifically, it is joint (prospective or retrospective) moral

^{14.} Armed interventions that are *not humanitarian* armed interventions are not necessarily morally unjustified, albeit a good and decisive moral justification is likely to be hard to come by in such cases.

^{15.} Stern and Berger, ISIS: The State of Terror.

^{16.} For an earlier and more detailed application of this notion of collective responsibility to genocide, see Miller, "Collective Responsibility, Armed Intervention and the Rwandan Genocide."

responsibility for morally significant joint actions and omissions and their foreseeable and avoidable morally significant outcomes. In this connection I distinguished between natural, institutional, and moral responsibility. Moreover, the joint "actions" in question can operate at a number of individual and collective levels. Here the notion of a layered structure of joint actions introduced in Chapter 3 is salient. Let us work through some examples of humanitarian armed intervention, beginning with the collective (retrospective) moral responsibility of perpetrators of large-scale serious rights violations.

Consider the perpetrators of basic rights violations against the Tutsis in Rwanda, the so-called Interahamwe and the Rwandan army. According to Fergal Keane, the genocide in Rwanda was a premeditated collective enterprise. From 1990, thousands of ordinary Hutus were organized into citizen militias (Interahamwe) by the Rwandan army under the directions of Rwandan Hutu government leaders, including President Juvénal Habyarimana. (Rwanda was a one-party state governed by the MRND (National Revolutionary Movement for Development), led by the president. Lists of Hutus were compiled on the basis of identity cards; an identity card system having been put in place in 1926 during the Belgian colonial period. At a prearranged moment—the above-mentioned shooting down of the plane transporting the Rwandan and Burundian presidents in 1994—the Interahamwe went on their genocidal rampage against Tutsis.

Clearly, each individual who committed murder is individually morally responsible for that murder. However, there is an additional dimension of collective moral responsibility. This dimension arises in virtue of the overall (morally significant) collective end of the organized murder of Tutsis; namely, genocide. Evidently, many, if not most, of the individual murders were committed (at least in part) as a means to an overall collective end—the elimination of all Tutsis in Rwanda. Moreover, the genocide, or, at least, partially successful genocide, relied on the coordinated action of organized groups, each group realizing some proximate collective end in the service of the larger collective end of genocide, so that there was a layered structure of joint action. Accordingly, perpetrators were jointly, and therefore collectively, morally responsible for genocide (or near-genocide). The nature and extent of the contributions of individual members of the Interahamwe, and their leadership, to this collective end of genocide varied. For example, some assisted by identifying individuals

^{17.} Keane, Season of Blood.

as Tutsis, but without actually taking anyone's life. Perhaps those in subordinate positions have diminished moral responsibility relative to their superiors. Moreover, no single individual member of the Interahamwe, with the possible exception of the key members of the leadership, can be held *fully* morally responsible for the genocide. Nevertheless, none can escape some share and degree of moral responsibility for the realization of the collective end to which they intentionally contributed. As for the key members of the leadership, each might be held fully morally responsible (jointly with the others) for the genocide depending on the degree of control they exercised over the membership.

Again, consider the murder of 8,000 Muslim men by Serbian soldiers in the UN designated "safe area" of Srebrenica in Bosnia in July 1995. 18 The Serbian forces bombed and then took the town of Srebrenica, after NATO had failed to support the UN force "protecting" the town. The Serbian soldiers then hunted down and murdered any Muslim men that they could find. Here was planned and orchestrated ethnic cleansing and mass murder in the service of ethnically pure territorial units and Serbian nationalism. There was joint action at a number of levels; indeed, there was a layered structure of joint action. However, let us consider the alleged actions of the members of a group of soldiers on the ground, who were allegedly dressed as UN peacekeepers and driving stolen white UN vehicles. These Serbian soldiers guaranteed the Muslim's safety. They would then shoot them.¹⁹ This is joint action. Some soldiers are driving the vehicle, while others are looking for Muslims; then some of the Serbian soldiers are talking to the Muslims to convince them that they are safe. Finally, some of the Serbian soldiers shoot the Muslims dead. The soldiers coordinated their individual actions in the service of a collective end. Each performed a contributory action, or actions, in the service of the collective end of bringing about the death of the Muslim men.

Here again, it is important to note that each agent is individually (naturally) responsible for performing his contributory action, and responsible by virtue of the fact that he intentionally performed this action, and the action was not intentionally performed by anyone else.²⁰ Since the

^{18.} Laura Silber and Allan Little, Yugoslavia: Death of a Nation (London: Penguin, 1997), 345–350.

^{19.} Silber and Little, Yugoslavia: Death of a Nation, 350.

^{20.} For an earlier and more detailed application of this notion of collective responsibility to ethnic cleansing, see Miller, "Collective Responsibility and Armed Humanitarian Intervention."

individual actions in question were morally significant, each agent is morally responsible for his action. Moreover, on my account, to say that they are collectively (naturally) responsible for the realization of the collective end of a joint action is to say that they are *jointly* responsible for the realization of that end. Again, since the collective end in question was morally significant, the agents who realized it were collectively *morally* responsible for this outcome.

What of institutional responsibility (both individual and collective), as opposed to natural and moral responsibility? The members of military and police organizations do not have an institutional, let alone a moral, responsibility to engage in large-scale human rights violations, even if they are directed by those in authority to do so. It might be argued against this that that some large-scale human rights violations have been institutionalized, and are even lawful, and that therefore the relevant institutional actors had an institutional obligation to perpetrate them. For example, some of the large-scale human rights violations perpetrated by members of the apartheid regime in South Africa, and some of those perpetrated by the Nazis under Hitler, were lawful. The case of ISIS in Iraq and Syria is less clear-cut, notwithstanding the claim of members of ISIS to have established a legitimate state under Sharia law: the so-called caliphate. For, unlike South African under apartheid and Germany under the Nazis, ISIS is at this time essentially a nonstate actor, albeit one occupying territory and attempting to set up a new state (or quasi-state). However, there is no question that ISIS has organizationally embedded practices consisting of large-scale human rights violations (e.g., enslavement of women, murder of Christians).

Arguably, the various rights-violating laws enacted by the South African apartheid regime and by the Nazi regime in Germany were inconsistent with the underlying institutional purposes of, respectively, the South African and German military and police forces in question. If so, then arguably the institutional actors in question did not have an institutional responsibility or obligation to perpetrate these human rights violations. Or perhaps they simply had competing organizational responsibilities. Moreover, it is presumably the case that the egregious rights violating practices of ISIS are inconsistent with Islamic law (Sharia), 21 and, therefore, with the institutional purposes of military and police forces that are properly compliant with Islamic law.

^{21.} This is certainly the view of the majority of Islamic authorities worldwide.

At any rate, on the normative teleological theory of institutions (adumbrated in Chapter 3), there is a distinction between organizations and institutions.²² Organizations might have as a *de facto*, indeed defining, purpose to engage in human rights violations, but institutions, properly understood, do not have a *defining* institutional purpose to do so. This is because institutions, unlike organizations, are normatively defined in terms of collective ends, which are collective goods on my normative teleological account.

As was argued in earlier chapters, if the occupants of an institutional role (or roles) have an institutionally determined obligation to perform some joint action, then those individuals are collectively responsible for its performance, in the sense of bearing collective institutional responsibility. Moreover, as is the case with individual responsibility, collective responsibility has a prospective or forward-looking sense and a retrospective or backward-looking sense (see Chapter 5). Since collective institutional responsibility is a species of joint responsibility, it implies the existence of a joint institutional obligation—an institutional obligation each individual has jointly with the others. If each individual discharges his or her institutional obligation, then the joint institutional obligation will have been discharged and the corresponding joint action performed. Moreover, if this institutional determined joint action is morally significant, then those who performed the joint action are, at least in principle, collectively morally responsible for the action (and, for that matter, its foreseeable and avoidable morally significant outcomes).

As emphasized above, institutional responsibility sometimes exists in the context of a relation of authority. If the occupant of an institutional role has an institutionally determined right or obligation to command other agents to perform certain actions, and the actions in question are joint actions, then the occupant of the role may well be *individually* (institutionally) responsible for those joint actions performed by his or her subordinates, and the subordinates might not have any institutional responsibility. If so, this is not an instance of *collective* institutional responsibility per se. On the other hand, as we saw above (Chapter 3, section 3.1) the relationship between a superior and subordinates may involve a second-order joint action that consists in coordination of the first-order joint action of the subordinates. In such cases, the superior and the subordinates act jointly in order to realize a collective end (coordination of

^{22.} See Miller, Moral Foundations of Social Institutions, Chapter 2.

the subordinates' first-order joint action). Moreover, if the collective end is morally significant (e.g., by virtue of the coordinated first-level joint action being morally significant), then the superior and the subordinates may have collective moral responsibility for the realization of the collective end of the first-order joint action. Nevertheless, it does not follow that they have collective *institutional* responsibility for realizing this end.

Instances in which the institutional actions of those in authority are themselves joint actions belong to a somewhat different category. Consider the case of the members of NATO collectively deciding to exercise their institutionally determined right to direct NATO forces to bomb Kosovo and not to use ground troops. The British wanted to use ground troops, the Americans and others did not. The Greeks did not want the bombing of Serbian civilian targets. At any rate, "there was a clear and powerful majority in favor of air strikes." Moreover, NATO ordered this action in the absence of a positive ruling from the UN Security Council. Accordingly, NATO forces bombed Kosovo. Hence the members of NATO are collectively institutionally and morally—given the moral significance of this joint action—responsible for the bombing of Kosovo, and presumably, therefore, for untoward consequences in terms of loss of innocent civilian lives. They are also collectively (institutionally and morally) responsible for ignoring UN protocols.

There are a number of things to keep in mind here. First, the notion of responsibility in question is, at least in the first instance, institutional—as opposed to moral—responsibility. Second, the institutional responsibility in question is both prospective and retrospective. Third, the "decisions" of committees, as opposed to any given individual decision of a member of a committee considered on its own, need to be analyzed in terms of the notion of a joint institutional mechanism (see Chapter 5, section 5.4). So the "decision" of NATO can be analyzed as follows: At one level, each member of the relevant NATO committee voted for or against the bombing of Kosovo; let us assume that some voted in the affirmative and others in the negative. But at another level, each member of the NATO committee agreed to abide by the outcome of the vote; each voted having as a collective end that the outcome with a majority of the votes in its favor would be respected, and that the action voted for would be carried out. At still another level, if we presume that each member of the NATO committee had the institutional authority to bind the government

^{23.} Weymouth and Henig, The Kosovo Crisis, 192.

that each represented to a given course of action,²⁴ then the members of the NATO committee were acting as representatives of their respective governments, and these governments, in turn, acted as representatives of their respective nation-states. Accordingly, not only the members of the NATO committee, but also the members of their respective governments, were jointly institutionally responsible for the decision to order the NATO forces to bomb Kosovo. NATO was thus collectively institutionally responsible for bombing Kosovo, and the sense of collective responsibility in question is *joint* (institutional) responsibility.²⁵

This analysis reveals a number of layers of institutional responsibility: the institutional responsibility of the *human* members of the committee, of the various governments, and of the NATO armed forces who carried out the bombing operations. Moreover, since the bombing of Kosovo was manifestly morally significant, these various human members of NATO were collectively *morally* responsible for it. However, we need to be careful here, since moral responsibility, as we have seen in Chapter 3, does not precisely track institutional responsibility. In particular, institutional responsibility, including legal responsibility, can be properly ascribed to collective entities, such as governments, nationstates, and NATO per se; not so moral responsibility. As I have argued in detail elsewhere, ²⁶ the latter attaches only to human beings, whether merely individually or jointly.

At this point the notion of a layered structure of joint actions needs to be utilized again. Let us work with another military scenario involving NATO to illustrate this. Consider the Croat forces attacking the Serbs in Knin in Croatia in Operation Storm on August 4, 1995. This was the

^{24.} This is so whether or not the decision maker was a military leader, a senior government official (such as the minister of defense in the United Kingdom) or, in fact, the national leader (such as the president of the United States). For in each of these cases, institutionally speaking, the individual in question was acting on behalf of the government as a whole and, indeed, the nation-state per se.

^{25.} This mode of analysis is also available to handle examples in which an institutional entity has a representative who makes an individual decision, but it is an individual decision that has the joint backing of the members of the institutional entity (e.g., an industrial union's representative in relation to wage negotiations with a company). It can also handle examples such as the firing squad in which only one real bullet is used, and it is not known which member is firing the real bullet and which merely blanks. The soldier with the real bullet is individually directly causally responsible for shooting the person dead. The members of the firing squad are jointly institutionally and morally (and indirectly causally) responsible for its being the case that the person has been shot dead.

^{26.} Miller, "Collective Moral Responsibility."

turning point in the Croat-Serbian confrontation.²⁷ The Croat forces included artillery as well as ground troops. However, they were supported by the NATO air force that bombed Serbian communications systems, thereby greatly facilitating the progress of the Croat ground forces. So there was the Croat artillery, the Croat troops, and the NATO air force, and each performed a different joint action; namely, the actions of shelling the town (the artillery), overrunning and occupying the town (the ground forces), and destroying the communication systems (the air force). However, each of these joint actions is describable as an "individual" action that is a constitutive element of the larger joint action directed to the collective end of winning the battle against the Serbian forces. Moreover, winning this battle was a morally significant action by virtue of its collective end presumably being a moral good (even if not an unqualified good). Accordingly, we can, at least in principle, ascribe collective (joint) moral responsibility for winning the battle to the individual pilots of the NATO air force and to the individual members of the Croat army.²⁸

As we saw above, a similar analysis in terms of a multilayered structure of joint action is available in relation to the organized genocidal attack of the Interahamwe in Rwanda. However, unlike in the Croat-NATO scenario, the members of the Interahamwe were collectively morally responsible for evil rather than good.

The upshot of this discussion is that human agents involved in complex morally significant cooperative enterprises involving large numbers of agents, such as military campaigns or orchestrated programs of genocide and ethnic cleansing, can *at least in principle* be ascribed collective (i.e., joint) moral responsibility for the outcomes aimed at by those enterprises. This conclusion depends on the possibility of analyzing these enterprises in terms of the notion of multilayered structures of joint action and, in some cases, joint institutional mechanisms. Moreover, it follows

^{27.} Silber and Little, *Yugoslavia*, 360. Arguably—if somewhat implausibly—the NATO bombing was not *intentional* support for the Croats. If not, then the example was not a paradigmatic case of joint action.

^{28.} The cooperation between Croat land forces and NATO air power against Serbian forces is in sharp contrast to what happened in Kosovo. NATO forces were in some sense in alliance with the Kosovo Liberation Army (KLA), which was engaged in fighting Serbian forces. The KLA was supposedly operating on behalf of the Albanian majority in Kosovo in their conflict with the Serbian forces controlled from Belgrade, but supposedly acting on behalf of the Serbian minority in Kosovo. However, NATO relied more or less exclusively on its own air power to destroy, or seek the capitulation of, the Serbian forces.

that there is no need to ascribe *moral* responsibility to collective entities, such as institutions, per se. However, as already mentioned, institutional responsibility can be ascribed to collective entities per se, (e.g., the legal responsibilities of nation-states). Accordingly, I am not claiming that the notions of multilayered structures of joint action and joint institutional mechanisms ensure that all *institutional* responsibilities, as such, attach directly to individual human beings rather than collective entities.

8.3 Collective Moral Responsibility to Intervene

Let us now turn to the collective moral responsibility to intervene, and specifically to intervene in cases of egregious moral rights violations conducted on a large scale. As already noted (see Chapter 1), Shue has argued for the existence of what he terms basic moral rights.²⁹ These include the right to security, and certain so-called positive rights, such as the right to subsistence. Shue argues that these basic rights generate rights to protection and assistance. In essence, they are a subset of natural rights and closely align with what I have been referring to as rights to properties constitutive of selfhood, so I will refer to them in what follows as basic natural rights or just basic rights. At any rate, let us accept Shue's arguments.

As we saw in Chapter 3, with the establishment of the nation-state, and specifically of policing institutions, the responsibility for protecting the natural rights of citizens and others within a polity has to a large extent devolved to the police. When these natural rights are threatened on a large scale by organized armed forces external to the polity, it is principally the military institutions of the state that bear the responsibility. So the members of the relevant state agencies—governments, police organizations, and military forces—have a collective (special) institutional and moral responsibility to protect and assist their own citizens when there are either internal or external threats to their basic natural rights. So far, so good, but what are we to say about cases in which the state is no longer willing or able to protect the rights to security of its citizens. Indeed, in some of these cases, the state is itself the source of the threat. The Rwandan genocide is one such clear case, the Assad government in Syria at the time of writing is another, albeit it is somewhat less clear, given

^{29.} Shue, Basic Rights.

that the Assad government was responding to an insurrection demanding political rights primarily.

Shue has persuasively argued that the state has obligations other than the obligation to promote the interests of its citizens. 30 Specifically, the state has an obligation not to unduly harm citizens of other states. Examples of such obligations include the obligation not to attack other states purely for economic gain, the obligation not to deplete the ozone layer by destroying forests, and so on. Surely, this is correct. States or, at least, the human members of governments, security agencies, and, for that matter, ordinary citizens have qua human beings, individually and in aggregate, natural moral obligations not to unduly harm citizens of other states by virtue of the general natural obligation of all human beings not to unduly harm other human beings. However, I want to go further and suggest that the state or, at least, the members of its relevant security agencies not only have moral obligations (joint moral obligations) not to harm citizens of other states, but they also have collective (i.e., joint) moral responsibilities to protect the basic natural rights of citizens (and residents, etc.) of other states. These collective moral responsibilities give rise to particular joint moral obligations to assist when four general conditions are met: (1) the moral rights in question are rights to properties constitutive of selfhood, such as the right to life (i.e., they are basic natural rights); (2) the rights violations are occurring on a large scale; (3) the state in which rights violations are occurring is not willing or able to protect these rights and, indeed, in some cases may be the perpetrator of violations of these rights; (4) the members of the security agencies of the external state (or states) in question are able to protect these rights, whether by unilateral organizational intervention, or jointly with the security agencies of other states and/or local or international nongovernmental organizations (NGOs).31 Moreover, these joint moral obligations are, in the first instance, simply the natural obligations writ large of third parties to bring about the cessation of rights violations (see Chapter 1). That is, they are not, at least in the first instance, institutional obligations of these institutional actors. Nevertheless, these individual institutional actors are human beings and,

^{30.} Henry Shue, "Eroding Sovereignty: The Advance of Principle," in Robert McKim and Jeff McMahan, eds., *The Morality of Nationalism* (Oxford: Oxford University Press, 1997), 340–359.

^{31.} The intervention may require assistance other than military assistance, such as food and medical supplies.

as such, have natural moral obligations. Importantly, the security organizations to which these individuals belong are, in fact, the only available means by which the cessation of the rights violations in question can be brought about. Hence they are the ones obligated. Naturally, these joint natural obligations need to be institutionalized if they are to be discharged efficiently and effectively. I take it that the establishment of UN peacekeeping forces and the enactment of legislation, such as RP2, are attempts at institutionalization in this sense. Such processes of institutionalization can specify prior natural (moral) obligations and transform them into institutional (moral) obligations (see Chapters 1 and 3).

I suggest that when conditions 1 and 2 are met, the persons whose basic rights are being violated have a collective (i.e., joint) moral right to assistance.³² Moreover, if conditions 1–4 are met, then the persons in question may well have a collective moral right to cross-border intervention by the members of the security agencies of external states, and, in particular, to foreign military intervention, supposing unarmed intervention to be ineffective. Consider the Rwandan genocide. Each individual Tutsi had a basic moral right not to be killed. But the threat of the killing of a single Tutsi would not generate a right to foreign armed intervention to protect that right, even in the absence of adequate domestic police protection. There would need to be some reasonably large number of Tutsi lives at risk. Let us assume that that threshold is reached. But in that case it is the totality of the persons in question who jointly have a right to foreign military intervention. It is not as if each possesses that right independently of the others. So the moral right to foreign military intervention is, after all, a collective right, albeit one based on the individual moral right of each of those Tutsis not to be killed. Under certain conditions, therefore, the basic moral rights of the members of a given nation-state constitute collective moral rights that generate moral responsibilities—collective moral responsibilities—on the part of the relevant members of other nationstates to intervene in the affairs of the state in question. These collective moral responsibilities give rise to joint moral obligations to assist in particular ways, and, ideally, these collective (joint) moral responsibilities and obligations will become, in fact, the institutional responsibilities and duties of the members of relevant governments and security agencies.

^{32.} Elsewhere I have provided and defended an analysis of collective rights as joint rights. See Seumas Miller, "Collective Rights," *Public Affairs Quarterly* 1, no. 4 (1999): 331–346, and *Social Action*, Chapter 7.

In Chapter 1 I suggested that basic natural rights are not restricted to negative rights, for they include some positive rights, such as subsistence rights. Accordingly, humanitarian armed intervention might be morally justified in a case in which a state is refraining from providing for the basic material needs of its citizens, or more likely a substantial section of its citizenry. That is, lethal force can in principle be used to enforce positive rights, such as subsistence rights, as well as to enforce negative rights—or, at least, this is the case when the positive rights violations in question are egregious and on a large scale. Moreover, as is the case with negative rights, third parties—at least in principle—have moral rights, and indeed moral obligations, to use lethal force to ensure that positive rights are respected, depending on which positive rights are in question and the scale of the rights violations.

This point has implications for governments who intentionally refrain from respecting the positive rights, including subsistence rights, of their citizens. Governments have a clear institutional responsibility to provide for the well-being of their citizens. Accordingly, the moral responsibility based on need—and the fact that those in government could assist if they chose to—is buttressed by this institutional responsibility that these officials have voluntarily taken on. Consider the example discussed in Chapter 7 of hundreds of thousands of blacks in apartheid South Africa who were forcibly removed into desolate "homelands," which were then declared by South African politicians to be independent nation-states. These politicians did not, thereby, succeed in absolving themselves of their institutional responsibility for the resulting poverty, deaths from malnutrition, rights violations on the part of the surrogate authoritarian "governments" established by the South African state, and so on. Accordingly, other things being equal, humanitarian armed intervention might well have been justified, presumably in cooperation with the local resistance movement, the ANC. This is, of course, not to say that it was in fact morally justified; in particular, it might not have been justified because it was not necessary.

Notwithstanding some important moral differences, the in-principle justification for armed intervention in the South African case and the in-principle justification for armed intervention to prevent genocidal slaughter in Rwanda were similar in at least one respect. In both cases the in-principle justification for armed intervention was to bring about the cessation of large-scale human rights violations orchestrated by those wielding political power, if not political authority. Evidently, in the case

of Rwanda, the violations were predominantly of negative rights (e.g., the right not to be killed), whereas in South Africa the violations were predominantly of positive rights (e.g., subsistence rights). And, doubtless, other things being equal, the violation of negative rights is a greater evil than the violation of positive rights. However, this difference in moral weight is not of an order of magnitude such that armed intervention can be morally justified in many of the former kinds of cases, but never in the latter kinds of cases.

The situation in the civil war in Syria presents a number of somewhat different kinds of case. For instance, according to Medecins Sans Frontieres, "For the past two years, the bulk of international humanitarian aid—provided by the UN and the International Committee of the Red Cross (ICRC)—has been channelled through Damascus and distributed according to the whim of the government. This same government prohibits the provision of medical assistance to people living in oppositionheld areas. These areas are subject to intense bombing, targeting health centers as well as all those people—from bakers to doctors—who are trying to help the population. Just a few days ago, a field hospital in al Bab, northern Syria, was bombed by the Syrian air force, killing nine patients and two medical staff."33 The people being deprived of this aid have a positive right to it. Moreover, members of the Assad government have both a collective institutional responsibility and a collective moral responsibility to see to it that the aid is provided. Nevertheless, the Assad government is preventing others from providing this aid. That is, members of the Assad government and its armed forces are collectively morally responsible for the negative rights violation of using lethal force to prevent others from discharging their collective institutional and moral responsibility to provide assistance to the people in question.³⁴ The members of the Assad government are thus doubly morally culpable. Evidently, lethal force against relevant members of the Assad government and its armed forces to bring about the cessation of these large-scale serious violations of positive rights is morally justified, at least in principle, including by external states.

^{33.} Robin Meldrum, "Syria: Lift the Humanitarian Blockade," *Medecins Sans Frontieres*, September 19, 2013, http://www.doctorswithoutborders.org/news-stories/op-ed/syria-lift-humanitarian-blockade.

^{34.} I assume the relevant members of international organizations have this collective institutional and moral responsibility, given the relevant members of the Assad government and its welfare organizations are not discharging their prior collective institutional and moral responsibilities to assist the people in question.

In the light of this discussion, let us assume that, under certain conditions, large-scale violations of basic rights, including violations of some positive rights, generate a moral responsibility—and perhaps an institutional responsibility—on the part of relevant members of external states to intervene militarily to terminate those rights violations. Why is this moral responsibility a *collective* moral responsibility? It is a collective moral responsibility because, first, a state that engages in armed intervention is simply an organization composed of individual government officials and individual members of a military force. Thus, its "action" of armed intervention can be understood as a multilayered structure of joint actions (as discussed above). Second, such armed intervention—or, more to the point, failure to intervene—is morally significant. Accordingly, the members of the government and of the military force in question can, at least in principle, be held collectively morally responsible for their failure to intervene.

At this point a further question arises: Does the community of nationstates have a collective moral responsibility to intervene in cases of genocide and the like? In light of our above analysis of collective responsibility, at the initial level of analysis, this question amounts to asking whether or not each member of the community of nation-states has an in-principle moral responsibility to intervene militarily in cases of largescale basic rights violations, and this responsibility is possessed jointly with the other nation-states. As we have already seen, at the next level of analysis—the level of a single nation-state's military organization35—our above-described account of such organizations as composed of individual members of a military force, including its political and military leaders, applies; that is, our account in terms of a layered structure of joint action applies. As argued above, that account enables us to ascribe collective moral responsibility to the individual members of the organization in question, albeit jointly. However, the notion of a layered structure of joint action is now applicable to the community of nation-states, construed as a set of jointly acting organizations engaged in a multistate humanitarian armed intervention. That is, by the lights of our account, the required actions of the community of nation-states, or at least of their governments and security agencies, are simply the required actions of an organization of organizations and, as such, simply constitute an additional layer to

^{35.} Or, at least, multiple organizations within the same nation-state (e.g., an army, an air force, a navy, and a government).

the preexisting layered structures of joint action at the level of the single organization. Accordingly, the individual members of the various organizations (i.e., the membership of the various military forces and their political leadership) can now be held collectively morally responsible for the military intervention—or rather, given our concerns at this juncture, for the failure to intervene militarily.

Let us now take a closer look at the collective moral responsibility to intervene to terminate, reduce, or prevent large-scale serious basic rights violations. The failure to discharge such a collective moral responsibility constitutes a morally culpable joint act of omission. This is because the following three conditions obtain: (1) the basic rights being violated and, therefore, the wrong being done, or about to be done, is such that some aggregate of persons can, and morally ought to, intervene, and those on whom the collective moral responsibility to intervene falls are in a position to successfully intervene; (2) those who have the collective moral responsibility to intervene have that responsibility by virtue of the nature and extent of the rights violations taking place, as well as, at least in some instances, by virtue of their collective institutional responsibility (e.g., in accordance with R2P); (3) the cost to be incurred by them as a consequence of their intervention is not prohibitively high.

Here we need some theoretical account of collective moral responsibility for joint omissions on the part of the members of large organizations and of organizations of organizations (meta-organizations). Elsewhere I have elaborated such an account.³⁶ Here, for reasons of space, I restrict myself to a few salient points, bearing in mind that my general account of collective moral responsibility is an individualist relational account based on the notion of a morally significant joint action (or multilayered structure of joint actions). On this account, participating agents intentionally perform a contributory action that makes a (possibly very small) causal contribution to the collective end at which they are aiming. Roughly speaking, in the case of a joint omission, the participating agents intentionally refrain from performing their contributory individual actions and, therefore, fail to contribute causally to the collective end that they have or, at least, ought to have had. (See also Chapter 5, section 5.4.)

^{36.} Seumas Miller, "Collective Responsibility, Epistemic Action and Climate Change," in Nicole Vincent, Ibo van de Poel, and Jeroen van den Hoven, eds., Moral Responsibility: Beyond Free Will and Determinism (Dordrecht, The Netherlands: Springer, 2011), 219–246.

I suggest that the conditions under which members of some organization (or organization of organizations) are collectively morally responsible for failing to perform a layered structure of joint actions to bring about the cessation of large-scale rights violations include the following: (1) the rights violations took place or are taking place; (2) all or most of the members of the organization, individually or jointly, intentionally refrained from performing the morally required layered structure of joint action; (3) if each or most of the members had performed their contributory individual actions having as a (collective) end the cessation of the rights violations, it is likely that the collective end would have been realized; (4) The cost of this joint intervention would not have been prohibitively high, either to the members of this organization or to third parties; (5) the members of the organization had a collective institutional responsibility to intervene; (6) with respect to some set comprising most members of the organization, each member of that set would have intentionally refrained from performing his or her contributory action (having as an end the cessation of the rights violations), even if the others, or most of the others, had performed theirs (with that collective end); (7) If a member of the organization would have performed his or her contributory action had the others performed theirs, but done so only because the others did, (i.e., not because she or he had as an end the cessation of the rights violations), then the member would still be morally responsible, jointly with the others, for failing to intervene (given conditions 1-5).

There are a couple of things to note in relation to this account of collective moral responsibility for omissions. First, the collective moral responsibility for the unrealized collective end might be distributed in a manner such that the degree of moral responsibility that attaches to any individual participant for the unrealized collective end might be very small indeed, given that their individual omission might have made little or no difference to the realization of the collective end. Second, the account presupposes an organization (or set of organizations), within an institutional framework, and therefore presupposes a structured, albeit large, group of persons who can act together, if they choose to do so, in order to realize the collective end of bringing about the cessation of large-scale basic rights violations.

Armed with this account of collective moral responsibility for joint omissions on the part of the members of large organizations, and of organizations of organizations, let me now briefly consider the collective moral responsibility of relevant members of national governments, security

forces, and international agencies (e.g., the UN) for the failure to conduct humanitarian armed interventions in order to bring about the cessation of large-scale serious basic rights violations. I suggest that the conditions under which the members in question can, at least in principle, be held collectively morally responsible for such failures do obtain.

First, there a high level of mutual awareness, including by way of the international mass media, and through the work of international groups, such as Amnesty International, that monitor large scale violations of basic rights violations. So the relevant persons in each nation-state are, or should be, aware of most episodes of large-scale violation of basic rights, and each set of members is aware that the members of every other set is aware, and so on. Thus there is mutual awareness among relevant government officials and members of security agencies.

Second, the relevant members of governments and of military forces (especially those in leadership positions) have the economic, military, and diplomatic wherewithal to engage in successful humanitarian armed interventions, at least in many instances. Rwanda is an obvious case in point. Moreover, various nation-states have cooperated in the past, including under the auspices of the UN. So the required cooperative action among the members of relevant governments and security agencies is entirely practically possible.

Third, a set of international institutions has been developed in relation to the collective action of nation-states, and therefore the joint action of the members of the relevant government and security organizations of those nation-states is entirely institutionally possible. These include the UN, the Security Council, and various pieces of international legislation (e.g., RP2) and associated international courts. Indeed, there are rules and international institutional mechanisms for armed intervention (e.g., in relation to genocide).

Let me now address the issue of unilateral humanitarian armed intervention. As argued above, there is a collective moral responsibility on the part of relevant government and military personnel across the international community to engage in humanitarian armed intervention in cases of large-scale serious basic rights violations in which there is no internal solution and intervention without arms cannot succeed. Humanitarian armed intervention by a UN-led multistate military force is one way in which this collective moral responsibility might be discharged. I have suggested above that in the contemporary world there are very few cases in which the collective moral responsibilities of the relevant government

and military personnel across the international community to engage in humanitarian armed intervention cannot be discharged. However, there are quite a few cases in which these collective moral responsibilities are not in fact discharged. In such cases, the responsibility to intervene may fall to the relevant political and military members of a single nation-state, or small group of states. Arguably, this is much less preferable. Given the costs of armed intervention to the party or parties intervening, broadbased, multilateral armed intervention is preferable to unilateral armed intervention. For one thing, the costs borne by a state intervening unilaterally are likely to be greater than if the burden is shared, so that the individual state needs a greater incentive, in terms of its self-interest, than it might if it were part of a broad-based group engaged in multilateral intervention. For another thing, if a state intervenes unilaterally it might feel entitled, and have a greater capacity, to make peace more in conformity with its own interests than in conformity with the needs of the victims it has rescued. This is precisely the charge that was made against the United States by its political enemies in relation to its invasion of Iraq. At any rate, broad-based, multilateral, humanitarian armed interventions are more likely than unilateral ones to be motivated by humanitarian, rather than purely political, considerations, if only because the self-interest of one state can often be kept in check by the self-interests of the others.

Finally, I have suggested that if the members of a group, A, are being subjected to large-scale positive rights violations at the hands of the members of another group, B, then (1) the members of A may well have a joint right to use lethal force to bring about the cessation of those rights violation, and (2) the members of some other third party, C, may well have a collective moral responsibility to engage in humanitarian armed intervention, supposing the members of A are unable to bring about the cessation. However, it would not follow from this that the members of A would have a joint moral right to use lethal force against the members of C to ensure that the members of C in fact discharged their collective moral responsibility to engage in humanitarian armed intervention. Not all those who fail to discharge their collective moral responsibilities in relation to large-scale rights violations are themselves rights violators. This is especially the case in relation to third parties. It would not have been morally justified for the ANC to conduct its armed struggle against, say, the Reagan administration when the administration decided to pursue a policy of "constructive engagement" in relation to the apartheid government of the day. Similarly, it would not have been morally justified for Bosnian Muslims to use deadly force against UN personnel or officials of the European Community when the latter groups failed to discharge their collective moral responsibility to intervene and protect the Bosnian Muslims—indeed to arm them—in the face of the genocidal "ethnic cleansing" operations being conducted by the Serbian forces.

8.4 Conclusion

In this chapter I have argued that humanitarian armed intervention in relation to large-scale human rights violations is in some cases morally justified (e.g., in the case of the Rwanda genocide), and that, if so, intervention is best understood as a collective moral responsibility. Moreover, collective moral responsibility is to be understood as the joint moral responsibility of individual human actors. Here I utilized two notions described in earlier chapters; namely, multilayered structures of joint actions and joint institutional mechanisms. I have further argued that humanitarian armed intervention can, at least in principle, be morally justified in cases where there is large-scale violation of (basic) *positive* rights, such as subsistence rights. This is the case, even if it is held that a single individual would not be morally justified in using lethal force against someone violating his or her (basic) positive rights. The critical difference lies in the scale of the rights violations.

Targeted Killing

TARGETED KILLING IS a controversial practice. Indeed, it is sometimes referred to as extrajudicial killing, thereby implying it is unlawful. Moreover, targeted killing needs to be distinguished from assassination, a practice that is typically unlawful. Further, the contexts in which targeted killing takes place need to be distinguished, as do the nature of the targets. For example, targeted killing of civilians by police officers is both unlawful and morally impermissible. But what of targeted killing of combatants by combatants in a theater of war? Surely this is both lawful and morally permissible. This chapter seeks to provide answers to these and related questions.

Two relatively recent events have placed the ethics of assassination and targeted killing at the fore: the killing of Osama bin Laden in Pakistan and the bombing by NATO forces of Colonel Gaddafi's compound in Tripoli in the context of the civil war in Libya. In May 2011, Osama bin Laden was killed by US Special Forces in Abbottabad, Pakistan. US officials said bin Laden resisted and was shot in the head; it has also emerged that he was unarmed. US officials also said that three other men were killed during the raid, one believed to be bin Laden's son and the other two his couriers; in addition, a woman was killed when she was used as a shield by a male combatant. There were no American casualties. Bin Laden's death came nearly ten years after al-Qaeda terrorists hijacked and crashed American passenger airplanes into the World Trade Center in New York and the Pentagon outside Washington, killing some three thousand people. Since Abbotabad is a medium-sized city, fairly close to Pakistan's capital, Islamabad, and home to a large

Pakistani military base, questions have been raised as to how bin Laden could have lived there undiscovered for so many years without alerting the Pakistan security agencies. Significantly, the US operation to kill bin Laden was evidently carried out without the knowledge of the Pakistani government.

What of the bombing of Colonel Gaddafi's compound in Tripoli? In February 2011, major political protests broke out in Libya against Gaddafi's government. Subsequently, these turned into a civil war in which evidently Gaddafi was responsible for the killing of unarmed civilians by Libyan forces loyal to him. In March 2011 the United Nations declared a no-fly zone in Libya and authorized air strikes by NATO forces to be undertaken for the purpose of protecting the civilian population of Libya. A NATO air strike in April in Tripoli apparently killed the youngest son of Gaddafi and three of his grandsons. US Defense Secretary Robert Gates said that NATO was not targeting Gaddafi specifically, but rather his command-and-control facilities including a facility inside Gaddafi's sprawling Tripoli compound. However, it remains unclear whether or not NATO was attempting to kill Gaddafi; this is especially so given that Gaddafi was a key element of the Libyan government's armed forces command-and-control center. It is also unclear whether under UN resolution 1973 it is permissible for NATO forces to bomb command-and-control facilities in order to protect civilians; the wording of the resolution is vague, speaking as it does of using "all necessary measures to protect civilians." Certainly, it did not authorize Gaddafi's removal from power by military means. On the other hand, the destruction by NATO of Gaddafi's military forces in the course of NATO's efforts to protect the civilian population, if this is a correct account of what happened, did lead to Gaddafi's demise. I note that in addition to being responsible for civilian deaths in this conflict, Gaddafi had a long history of human rights violations to his name. Moreover, Gaddafi was responsible for the assassination of dozens of his "enemies" around the world. In May 2011 the International Criminal Court issued a request for an arrest warrant against Gaddafi for "crimes against humanity."

Having outlined the targeted killing of Osama bin Laden and the (possible) attempted targeted killing of Colonel Gaddafi by way of introducing my topic, I now turn directly to the ethics of assassination and targeted killing.

9.1 Assassination

Targeted killings and assassinations are closely related, but not identical, phenomena; moreover, neither has a precise and accepted definition. Further, both are to be distinguished from extrajudicial killings. Extrajudicial killing is a legal or quasi-legal notion. First, it implies that the killings in question were carried out by state operatives (or by persons acting on behalf of the state), and that these actions were authorized (or at least sanctioned) by the nation-state (or its security agencies). Second, it entails that these killings were in violation of appropriate judicial procedures and, specifically, the procedure of a fair trial conducted by a properly constituted court of law.

Other things being equal, the killing, and therefore the targeted killing, of another human being is morally wrong. (Naturally, other things might not be equal; the killing might be done in self-defense, for example.) However, extrajudicial killing has an additional, and morally problematic, feature: it is done in violation of appropriate judicial procedure. So targeted killing is not necessarily extrajudicial killing. Moreover, targeted killings are not necessarily unlawful in a more general sense. For example, targeted killing of the enemy's military commanders in wartime is lawful. To this extent, providing an acceptable justification for targeted killings is a less demanding undertaking than providing one for extrajudicial killings.

What of assassinations? Roughly speaking, assassination is "the deliberate killing, without trial, of a political figure," and, we might add, "for political reasons." So assassinations are freely performed, or uncoerced, intentional killings undertaken to serve a larger political purpose. Likewise, targeted killings (and, for that matter, extrajudicial killings) are freely performed, intentional killings undertaken in the service of a larger purpose. Moreover, assassinations can be conducted by nonstate

^{1.} An earlier version of this section appeared in Seumas Miller, "The Ethics of Assassination and Targeted Killing," *Annual Review of Law and Ethics* 19 (2011): 15–22.

^{2.} Douglas Lackey, "Assassination, Responsibility and Retribution," in Harold Zellner, ed., Assassination (Cambridge, Mass.: Schenkman, 1974), 57.

^{3.} Haig Khatchadourian, "Is Political Assassination ever Morally Justifed?," in Harold Zellner, ed., Assassination (Cambridge, Mass.: Schenkman, 1975), 41.

^{4.} So they are reflective or premeditated actions.

operatives who are not acting on behalf of any state⁵ (e.g., the assassination of John F. Kennedy by Lee Harvey Oswald). In this respect, as we have seen, assassinations are unlike extrajudicial killings. It is intuitively unclear whether the notion of a targeted killing is akin to the notion of assassination in this regard. Further, only particular uniquely identified individuals (so to speak) can be the objects of assassination. A homicidal maniac who is shooting at any and all government officials because he is opposed to the "system" is not engaged in a series of assassination attempts. This is because this shooter does not have any particular uniquely identified individual person in mind.

Here we can distinguish between a named individual, such as Barack Obama, and the individual who happens to meet a definite description, such as the Admiral of the Fleet. However, the notion of a uniquely identified individual in this context is in need of further elaboration. Roughly speaking, two conditions need to be met for there to be an attempted assassination or targeted killing of a uniquely identified individual in the sense in question. First, there is (or is believed to be) one, and only one, person who meets a prior, complex, description, which includes, crucially, a description of the person's military or political significance (e.g., the Taliban commander in Khost province in eastern Afghanistan who has ordered various specific terrorist attacks). Second, some individual has been identified as the person who meets the description in question (presumably on the basis of some credible evidence), and this individual is the subject of a tracking operation. Naturally, there is the possibility of error because of, for example, unreliable informants who are seeking to settle scores with their enemies rather than further the cause of US counterterrorism.

Evidently, there is not only the possibility, but the actuality, of error in Afghanistan. The US military has on a number of occasions admitted such error. There are other cases that are disputed by the US military but which, nevertheless, look to be cases in which innocents may well have been targeted and killed. Thus in September 2010 in Takhar Province in Afghanistan, Zabet Amanullah and various others were killed by a US unmanned drone because Amanullah was believed by the US military to be the terrorist Muhammad Amin. However, it is claimed by others, including the Afghan Intelligence Network, that Amanullah is not Amin, and that Amin is still alive. It is further claimed that the others killed in

^{5.} I am assuming that the relevant legally constituted, political entities in questions are nation-states, but in theory there are other possibilities (e.g., city-states).

the drone attack were innocent election workers. This raises the moral issue of collateral damage from targeted killings and assassinations. It has been estimated that 40 percent of targeted killings undertaken by the Israelis, for example, have involved collateral damages (i.e., the unintended death of innocent civilians, including children).⁶ On the other hand, it is presumably the case—and is typically maintained by its advocates—that assassinations and targeted killings involve much less loss of innocent life that many, if not most, conventional methods of war, such as aerial bombing, and are, to this extent, morally preferable.

Additional conditions definitional of assassination might include the use of treachery. And, as noted above, assassinations can be conducted by persons who are not state operatives and not acting on behalf of the state, as well as by state operatives acting on behalf of the state (e.g., the assassination of foreign heads of government).

Assassination has a very long history.7 It has been a practice of political leaders gaining and retaining political power within a polity, such as the assassination of political rivals by Cesare Borgia (famously described in Machiavelli's The Prince in 1532). Assassination has taken place in the context of wars, including guerilla wars, such as the assassination by the Vietcong of South Vietnamese officials during the Vietnam War. It has been a tool of terrorist groups in peacetime. For example, in the nineteenth century, Russian revolutionaries endorsed assassination as an instrument of political change, which included the assassination of Alexander II in 1881.8 And assassination has also been practiced by individuals acting alone (e.g., the assassination of US president John Kennedy). Assassination of one's political enemies in the context of a well-ordered, liberal democratic state is murder and, given the potentially destabilizing effects, a very serious political crime. Accordingly, it cannot be tolerated; it is both unlawful in such nation-states and generally regarded as morally unjustifiable. However, the legality, and certainly the morality, of assassination in other contexts is less clear.9

^{6.} Daniel Byman, "Taliban vs. Predator: Are Targeted Killings inside Pakistan a Good Idea?," Foreign Affairs, March 18, 2009.

^{7.} Franklin L. Ford, *Political Murders: From Tyrannicide to Terrorism* (Cambridge, Mass.: Harvard University Press, 1985).

^{8.} Georgi V. Plekhanov, *The Role of the Individual in History* (New York: International Publishers, 1940).

^{9.} Andrew Altman and Christopher Heath Wellman, "From Humanitarian Intervention to Assassination: Human Rights and Political Violence," *Ethics* 118, no. 2 (2008): 228–257.

During peacetime, the assassination of the political leaders of foreign states is unlawful under various treaties and conventions, such as the 1937 Convention for the Prevention and Punishment of Terrorism, the UN Charter, and the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. Moreover, it is a violation of the right to life enshrined in such documents as the International Covenant on Civil and Political Rights. The prohibition of assassination in international law was originally intended to protect heads of state—not leaders of terrorist movement. The point here is the possibly radically destabilizing political effects of killing a head of state, as opposed to (say) a senior military commander (assuming these to be two numerically different individuals). Thus George Bush Sr. refrained from killing or otherwise removing Saddam Hussein as the Iraqi head of state during the first Gulf War. At any rate, whereas in 1976 President Gerald Ford had signed an executive order banning assassination, the events of 9/11 led President George W. Bush in 2001 to authorize the CIA to carry out missions to kill Osama bin Laden. President Obama maintained that policy.

In theory at least, the targeted killing of bin Laden by the United States was not inconsistent with the prohibition on the assassination of heads of state; for bin Laden was not a head of state. For the same reason, it might be far more difficult to legally—as opposed to morally—justify killing Colonel Gaddafi, who was a head of state. From the fact that bin Laden was not a head of state it follows that he was not protected by those laws and treaties that prohibit the assassination of heads of state. But it does not follow from this that it was lawful to kill him. From a legal, and a widely held moral, perspective, the right to life is not an absolute right. Importantly for our discussion here, it is legally and morally permissible for combatants to use lethal force against enemy combatants in the context of war. This raises the question of whether assassination in the context of a war is legally justifiable.

Evidently, assassination in war is normally unlawful.¹⁰ Under the norms of international humanitarian law, for example, killings are only lawful if those killed are combatants—but political actors are not necessarily combatants. On the other hand, Steven David (quoting military lawyer

^{10.} David Kretzmer, "Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?" *European Journal of International Law* 16, no. 2 (2005): 171–212.

Charles Dunlap) argues that neither US nor international law prohibits the killing of those directing armed forces in war.¹¹ Moreover, it has been argued that the principle of reciprocity has application in international law and might provide a legal justification for countermeasures such as tit-for-tat assassination.¹² Arguably, bin Laden was leading a campaign of violence against the United States and its allies; so he was, or was akin to, a military leader, and since military leaders are not legally protected from being killed in time of war, perhaps the targeted killing of bin Laden was lawful.

Let me now turn to the morality of assassination? Arguably the assassination of Hitler by Colonel Claus Schenk Graf von Stauffenberg and his co-conspirators in 1944 during the course of Second World War would have been morally justifiable, even if not legally allowed. For one thing, military and political leaders who direct the combatants under their command to commit atrocities, such as genocide, are morally responsible for these actions of their subordinates; pacifism aside, these leaders do not have a moral right not to be killed in these circumstances, any more than the combatants they command have any such right. For another thing, pragmatic arguments based on, for example, the untoward outcomes of "leaderless" defeated nations do not necessarily apply, and certainly not in the case of totalitarian regimes such as that of Nazi Germany or the Soviet Union under Stalin. On the other hand, the argument might apply that it would make no difference because the leader will be replaced by someone equally as bad. This was probably not so in the case of Hitler, but it might have been so in the case of Stalin, since Beria might well have taken over (depending on when Stalin was to have been assassinated).¹³ Moreover, even if assassinating leader A would lead to equally bad replacement leader B, it would not follow that leader A should not be killed, given the possibility of killing leader A and then killing leader B. Naturally, if there is an indefinitely long series of equally bad replacement leaders (C, D etc.), then the argument against killing the incumbent leader will not have been met. Further, a policy of killing a large number of political leaders in a given polity in order to, for example, render the polity ungovernable,

^{11.} Steven R. David, "If Not Combatants, Certainly Not Civilians," *Ethics & International Affairs* 17, no. 1 (2003): 138–140.

^{12.} Mark Osiel, The End of Reciprocity: Terror, Torture, and the Law of War (New York: Cambridge University Press, 2009).

^{13.} Lackey, "Assassination, Responsibility and Retribution."

starts to look less like assassination and more like targeted killing (see below).¹⁴ This is because the notion of assassination seems more closely tied to fulfilling a political purpose by killing an individual person rather than by killing a set of individuals.

Here we need to be careful, since it is a standard military objective to inflict heavy casualties on an enemy force and, thereby, disable it. To do so is to achieve a military purpose (and, ultimately, a political purpose) by killing a set of individuals. However, this is not targeted killing; far from it. This raises the question of what conceptual space, if any, exists between assassination, on the one hand, and the killing of combatants in a theater of war, on the other. Specifically, what conceptual space is occupied by targeted killing of a long list of identified individuals—the sort of targeted killings being undertaken in the tribal areas of Pakistan (e.g., Quetta and North Waziristan) and in Afghanistan by US drone or UAV (unmanned aerial vehicles) attacks?

What of the morality of assassinating Colonel Gaddafi? From a retrospective moral perspective, killing the despot and human rights violator, Gaddafi, might be held to be an act of substantive justice. However, procedural justice, at least as it is conceived in criminal justice contexts, requires arrest based on prima facie evidence of wrongdoing and a fair trial. If so, procedural justice is likely to be denied at least until such time as Gaddafi is removed from power (and remains alive, as in fact did not happen). From a prospective moral perspective, were NATO forces to kill Gaddafi it would arguably be an act of killing in defense of others, since evidently he continued to constitute an immediate threat to the lives of unarmed Libyan civilians. Moreover, his removal from power might well have been thought to be likely to lead to a better state of affairs for the Libyan people. It was far from obvious that he would be replaced by someone equally as bad; indeed, the prospects for some form of democracy in a post-Gaddafi Libya might have seemed to be reasonably good. And perhaps the least costly way to achieve his removal—in terms of loss of human life—might have been by killing him. As it happens, Libya post-Gaddafi is in a state of civil war.

The upshot of this discussion is that although assassination is unlawful, it is, conceivably, at least in some extreme cases (e.g., that of Hitler, if not Gaddafi), morally justifiable (from the prospective, if not the retrospective, perspective). Does it follow from this that the law ought to reflect

^{14.} Or, for that matter, extrajudicial killing.

morality? That is, should the law be adjusted to admit of exceptions? If so, perhaps the law and morality should always be strictly in accord when it comes to the practice of assassination. Let us now consider the possibility that assassination might be morally justifiable (or at least morally excusable) in some extreme circumstances, but that, nevertheless, it ought not to be lawful. This kind of claim is sometimes made in the context of a discussion of the so-called problem of dirty hands. Here it is important to first note some conceptual differences between the concept of dirty hands and the concept of noble cause corruption. The idea of dirty hands is that political leaders, and perhaps the members of some other occupations, such as soldiers and police officers, necessarily perform actions that infringe central or important principles of common morality, and that this is because of some inherent feature of these occupations. Such dirty actions include lying, betrayal, and especially the use of violence, including assassination.

The first point to be made here is that it is far from clear that such acts are necessarily acts of corruption, and hence necessarily acts of noble cause corruption. (Noble cause corruption is corruption in the service of a good end, such as the police fabricating evidence against a known drug dealer in order to ensure his conviction.) In particular, it is not clear that all such acts undermine to any degree institutional processes, roles, or ends. (This is compatible with such acts having a corrupting effect on the moral character of the persons who perform them, albeit not on those traits of their moral character necessary for the discharging of their institutional role responsibilities as, say, politicians, police, or soldiers.)

The second and related point is that some putatively dirty actions are indeed definitive of political roles, as they are of police and military roles. For example, it is evidently a defining feature of police work that it uses harmful and normally immoral methods, such as deceit and violence, in the service of the protection of (among other things) human rights. ¹⁵ Clearly, a similar definition is required for the role of soldier. And since political leaders necessarily exercise power and—among other things—lead and direct police and soldiers, they too will participate in dirty actions in this sense. However, such use of deceit, violence, and so on, can be, and typically is, morally justified in terms of the publicly sanctioned, legally enshrined, ethical principles underlying police and military use of harmful and normally immoral methods, including the use of deadly

^{15.} Miller and Blackler, Ethical Issues in Policing, Chapter 1.

force. In short, some putatively dirty actions are publicly endorsed, morally legitimate, defining practices of what most people take to be morally legitimate institutions, such as government and police and military institutions. However, the advocates of dirty hands intend to draw attention to a phenomenon above and beyond such publicly endorsed, legally enshrined, and morally legitimate practices. But what is this alleged phenomenon? According to Michael Walzer,16 politicians necessarily get their hands dirty, and in his influential article on the topic, he offers examples such as the political leader who must order the torture of a high-ranking terrorist if he is to discover the whereabouts of bombs planted by the latter and set to go off, killing innocent people. These examples consist of scenarios in which politicians are not acting in accordance with publicly endorsed, legally enshrined, morally legitimate practices; indeed, they are infringing moral and legal requirements. However, the torture scenario is hardly an example of what politicians in liberal democracies routinely face; indeed, it is evident that even in the context of the "war on terrorism" such cases only arise very occasionally, if at all.

There might in fact be some political contexts in which central or important moral principles do need to be infringed on a routine basis, albeit for a limited time period. Such contexts might include ones in which fundamental political institutions had collapsed or were under threat of collapse. Consider the case of the Colombian drug baron Pablo Escobar.¹⁷ Escobar was apparently executed in 1993 by police after he was cornered at the end of a large-scale manhunt. However, Escobar was no ordinary criminal. He headed the largest cocaine cartel in Colombia, accounting for up to 80 percent of the multibillion-dollar export of Colombian cocaine to the United States. Such was the scale of Escobar's operation, and the ruthlessness by which he maintained it, that by the time of his death he was responsible for the deaths of literally hundreds of people, including many innocent civilians, foreign citizens, police officers, judges, lawyers, government ministers, presidential candidates, and newspaper editors. Indeed, the Colombian state, with the technical, military, and intelligence support of the United States, was fighting a de facto war against Escobar, and fighting for its very survival. Accordingly, it might be argued that

^{16.} Michael Walzer, "Political Action: The Problem of Dirty Hands," *Philosophy and Public Affairs* 2, no. 2 (1973): 164–167.

^{17.} Seumas Miller, Peter Roberts, and Edward Spence, Corruption and Anti-corruption: A Study in Applied Philosophy (Saddle River, N.J.: Prentice Hall, 2005), 27.

Escobar's execution was a politically motivated act, and that Escobar was both a criminal and, by virtue of his explicit attacks on the political system, a political figure. That is, Escobar's execution was an assassination on our definition of assassination.

Clearly, Escobar's execution was unlawful. Moreover, it is plausible that such executions should never be made lawful. What of the morality of the execution? The first point to be made here is that even if such dirty methods are morally justified, it is in the context of an argument to the effect that their use was necessary in order to re-establish political and other institutions in which the use of such dirty methods would presumably not be permitted. Accordingly, such scenarios do not demonstrate that the use of dirty methods is a necessary feature of political leadership, and certainly not in the context of a well-ordered liberal democracy at peace.

The above situation is one of emergency, however it is *institutional* emergency that is in question. It is not a one-off, terrorist attack that threatens lives but not institutions. Nor is it the kind of extreme emergency posed by totalitarian states such as Nazi Germany under Hitler and which (allegedly, but doubtfully, given their strategic ineffectiveness) justified the use of such "dirty hands" tactics as the aerial bombing during World War II by Allied forces of civilian areas in German cities such as Dresden.¹⁸

So even if one wanted to support all or some of the methods used by the Colombian authorities, one would not be entitled to generalize to other states of emergency in which there is no threat to institutions per se. Moreover, there are reasons to think that many relevant dirty methods, such as execution and the use of criminals to combat criminals, are in fact counterproductive. For example, the use of other criminal groups (such as competing drug lords) against Escobar tended to empower those groups. Further, such methods, although dirty, are not as dirty as can be. In particular, methods such as execution of drug lords are directed at morally culpable persons, as opposed to innocent persons. At the dirty end of the spectrum of dirty methods that might be used in politics are those methods that involve the intentional harming of innocent persons.

While the killing of Gaddafi should not be assimilated to the killing of Escobar, there are some similarities. For Gaddafi had been accused of

^{18.} See Igor Primoratz, ed., Terror from the Sky: The Bombing of German Cities in World War II (New York: Berghahn, 2010) for useful discussions of these issues.

"hollowing out" Libyan institutions, albeit from his position as head of state (unlike Escobar, who operated from outside the government). Accordingly, an additional justification for the targeted killing of Gaddafi—additional to the above-mentioned "justice" and "defense of others" justifications—might be the imperative to protect, or perhaps rebuild, Libyan institutions, notably institutions of governance.

9.2 Definitions: Terrorism, Targeted Killing

Roughly speaking, terrorism is a political and/or military strategy that

- consists in deliberately performing violent actions of killing, maining, torturing or otherwise seriously harming, or threatening to seriously harm innocent civilians;
- is a means of terrorizing, individually or collectively, the members of some social or political group in order to achieve political purposes (possibly indirectly via achieving a military purpose);
- 3. relies on the killings—or other serious harms inflicted—receiving a high degree of publicity, at least to the extent necessary to engender widespread fear in the target political or social group.

Elsewhere¹⁹ I have offered a more nuanced definition of terrorism that involved an indirect strategy for demarcating terrorist actions from other violent acts; namely, one that involves a list of well-established violent crimes (that are crimes and morally justifiably so) that (1) meet the above conditions for being acts of terrorism, notably that they are politically motivated (whereas most violent crimes are not); and (2) distinguish, as in law, between terrorism in civil society and terrorism in war. This strategy yields two sets of violent crimes describable as acts of terrorism; namely, terrorism-as-crime (ordinary violent crimes that are also acts of terrorism), and terrorism-as-war-crime (war crimes that are also acts of terrorism). More generally, this strategy comports with the familiar dual framework for categorizing terrorist actions and campaigns; namely, terrorism-as-crime and terrorism-as-war.²⁰ Naturally, we can distinguish

^{19.} Miller, Terrorism and Counter-Terrorism. See also Nathanson Terrorism and the Ethics of War Chapters 1 and 2.

^{20.} Kretzmer, "Targeted Killing of Suspected Terrorists"; Miller, Terrorism and Counter-Terrorism.

between a war fought against a terrorist group (terrorism-as-war) and ad hoc terrorist actions within a war that is not otherwise appropriately framed as terrorism-as-war because neither side is a terrorist organization per se.

I take it that the terrorism-as-crime model—as opposed to the terrorism-as-war model—is the preferred and, therefore, default framework for a liberal democratic state when it is suffering lethal attacks from a terrorist organization. More precisely, the terrorism-as-war framework should be applied only under the following general conditions²¹: (1) the terrorism-as-crime framework cannot adequately contain serious and ongoing terrorist attacks; (2) the application of the terrorism-as-war framework is likely to be able adequately to contain the terrorist attacks; (3) the application of the terrorism-as-war framework is proportionate to the terrorist threat; (4) the terrorism-as-war framework is applied only to an extent, (e.g., with respect to a specific theater of war, but not necessarily to all areas that have suffered, or might suffer, a terrorist attack), and over a period of time, that is necessary; (5) all things considered, the application of the terrorism-as-war framework will have good consequences in terms of security, and better overall consequences (e.g., in terms of lives lost, freedoms curtailed, economic impact, institutional damage) than the available alternatives.

Accordingly, it is only when the liberal democratic state cannot adequately contain the terrorist activity of a specific terrorist organization that the terrorism-as-war model might need to be applied, as in a theater of war involving ongoing, large-scale terrorist attacks and military counterstrikes by government security forces. The Israeli-Hezbollah conflict during 2006²² is arguably an instance of this.²³ Moreover, even if the terrorist-as-war model is to be applied in a given theater of war, it would not follow that it should be applied outside that theater of war. Thus, even if it is desirable and necessary to apply the terrorism-as-war model to the armed conflict between al-Qaeda combatants and US forces in Afghanistan seeking to destroy al-Qaeda military bases and personnel,

^{21.} Miller, Terrorism and Counter-Terrorism.

^{22.} Uzi Rubin, The Rocket Campaign against Israel during the 2006 Lebanon War (Ramat Gan: Begin-Sadat Center for Strategic Studies, Bar-Ilan University, 2007), 12.

^{23.} The Israeli aerial bombing response to rockets fired by Hamas from Gaza since 2005 might also be thought to be a candidate. However, this is doubtful, given the apparent inability of civilians in Gaza to vacate the areas being bombed, Israeli warnings notwithstanding.

it would not follow that it was desirable or necessary to apply it to al-Qaeda operatives functioning in the US homeland.

This way of proceeding presupposes that the distinction between wellordered civil societies and theaters of war can adequately be drawn. The concept of war is, of course, somewhat vague; the point at which a violent attack, or set or attacks, on one armed force by another armed force constitutes a war is indeterminate. Moreover, the concept of war is especially vague in its application to armed conflict between nation-states and nonstate actors. Nevertheless, I assume that a liberal democratic nation-state can engage in wars with nonstate actors (e.g., a civil war, a revolutionary war, or a war against an armed, organized, belligerent, external, nonstate entity). For example, I take it that the United States is at war with ISIS in Iraq and Syria.²⁴ On the other hand, as noted above, from the fact that two states (or a state and a nonstate actor) are at war, it does not follow that all or any of their respective territories are theaters of war (i.e., are battlefields).²⁵ Moreover, areas with a high density of civilian populations with no means of escape from those areas morally ought not to be turned into battlefields, as happened in the case of the bombing of civilian populations in German cities such as Dresden during World War II.²⁶ Here

^{24.} It goes without saying that in claiming that such and such liberal democratic state is waging an internal or an external war, I am not eo ipso claiming that the war is morally justified. Liberal democratic states can engage and have engaged in wars that, for example, fail to comply with the conditions of just war theory; the 2003 Iraq War is arguably a case in point.

^{25.} Carl von Clausewitz famously offered this definition in his book *On War* (1989): "Denotes properly such a portion of the space over which war prevails as has its boundaries protected, and thus possesses a kind of independence. This protection may consist in fortresses, or important natural obstacles presented by the country, or even in its being separated by a considerable distance from the rest of the space embraced in the war. Such a portion is not a mere piece of the whole, but a small whole complete in itself; and consequently it is more or less in such a condition that changes which take place at other points in the seat of war have only an indirect and no direct influence upon it. To give an adequate idea of this, we may suppose that on this portion an advance is made, whilst in another quarter a retreat is taking place, or that upon the one an army is acting defensively, whilst an offensive is being carried on upon the other. Such a clearly defined idea as this is not capable of universal application; it is here used merely to indicate the line of distinction."

^{26.} See Primoratz, *Terror from the Sky*, for useful discussions of these issues. The Israeli aerial bombing response to rockets fired by Hamas from Gaza mentioned at note 23 might be thought to be akin to the bombing of Dresden in so far as there is thought to be insufficient regard for the lives of civilians. However, the fact that Hamas is apparently deliberately using civilians as, in effect, human shields would serve to differentiate the Gaza scenario from the Dresden one.

there are analogies between the lethal use of drones in Afghanistan and Pakistan. Importantly, some of the areas in which there is a lethal use of drones are not theaters of war and ought not to be transformed into such. On the other hand, presumably in some of these areas that are not theaters of war, it is possible *on some occasions* to engage in targeted killing, whether by drones, snipers, or other means, in a manner that does not put the lives of innocent bystanders at serious risk. I assume that wars waged by liberal democratic states can be either external or internal wars. India, for example, has been fighting an internal war in Kashmir against a variety of terrorist and separatist groups. In this conflict, India has at times deployed hundreds of thousands of military and police personnel, and tens of thousands of civilians, soldiers, police, insurgents, and terrorists have lost their lives.²⁷

There are various problems posed by terrorism for the duality of the terrorism-as-crime framework and the terrorism-as-war framework that I have discussed in detail elsewhere. For our purposes here, it is important to invoke the following threefold distinction between contexts: (1) well-ordered jurisdictions, or jurisdictions in which there is law and order and, in particular, there is effective enforcement of the laws against terrorism; (2) disorderly jurisdictions, or jurisdictions in which there is a degree of law and order—they are not simply theaters of war—but the authorities are unable to enforce adequately laws against terrorists; (3) theaters of war (whether in the context of a declared or undeclared war between a state and a nonstate actor).

Finally, on this account, while a terrorist is not necessarily a combatant, the members of terrorist organizations that have armed forces engaged in armed conflicts may nevertheless be combatants (e.g., if they are members of such an armed force engaged in armed conflict and are currently deployed in a theater of war). If so, then these terrorists can

^{27.} Kirpal Dhillon, *Police and Politics in India: Colonial Concepts, Democratic Compulsions: Indian Police* 1947–2002 (New Delhi: Manohar, 2005), Chapter 13.

^{28.} Miller, Terrorism and Counter-Terrorism.

^{29.} In some cases these might be under a state of emergency (e.g., martial law), in other cases not.

^{30.} My concern in this work is only with de facto armed conflicts, whether they be declared or undeclared. De facto is, of course, to be contrasted with de jure. See note 254 for a definition of a theater of war.

reasonably be referred to as terrorist-combatants, problematic legal connotations notwithstanding.³¹

Targeted killing has been variously defined.³² Here I provide, in summarized form, a definition set forth and defended in detail elsewhere.³³ By definition, targeted killing is the premeditated, freely performed, intentional killing of a uniquely identified individual person.³⁴ Moreover, at the time of the killing the person in question does not pose an imminent threat to life or limb. Further, the killing takes place in the overall context of an armed conflict in which both the targeter and the person targeted are participants. The protagonists in the armed conflicts in question are the armed forces of political entities (see below).

In relation to this definition, I make the following points, which are made elsewhere but are also necessary to make here for purposes of clarification. First, unlike the shooting by combatants, including by snipers, of enemy combatants in a theater of war, the targets in targeted killing are uniquely identified; they are not simply anonymous enemy combatants identified by their uniform. A uniquely identified individual in this sense is someone about whom there is prior detailed information in respect of his or her role in the armed conflict, and someone who can be reliably identified as such at the time of their killing. Second, unlike in the standard cases of justified use of deadly force by police officers in law enforcement contexts, the targets in targeted killing do not pose an imminent threat at the time of their killing. For example, Osama bin Laden was killed in his domicile during the night, Mahmoud al-Mabhouh was killed in a hotel room in neutral Dubai, and so on.³⁵

^{31.} Miller, Terrorism and Counter-Terrorism.

^{32.} For recent articles on the ethics of targeted killing, see Finkelstein, Ohlin, and Altman, Targeted Killing. See also Anna Goppel, Killing Terrorists: A Moral and Legal Analysis (Berlin: De Gruyter, 2013), and Simon Bronitt, Miriam Gani, and Saskia Hufnagel, eds., Shooting to Kill: Socio-Legal Perspectives on the Use of Lethal Force (Oxford: Hart, 2012).

^{33.} Miller, "The Ethics of Assassination and Targeted Killing."

^{34.} Michael L. Gross emphasizes the idea of a legal prohibition on the killing of named individual in his "Assassination and Targeted Killing: Law Enforcement, Execution or Self-Defense?," *Journal of Applied Philosophy* 23, no. 3 (2006): 323–335.

^{35.} Contra my definition here, the US Department of Justice, in a recent white paper, "Lawfulness of a Lethal Operation Directed against a US Citizen Who Is a Senior Operational Leader of Al Qaeda or an Associated Force," has sought to characterize the targets of targeted killings as imminent threats if there is only a limited (and present) opportunity to eliminate it. However, this is either incorrect or at best a highly novel

Third, unlike assassinations,³⁶ such as that of President Kennedy, targeted killings take place in the overall context of armed conflict. Fourth, I note that armed conflicts include conventional wars, nonconventional (so-called) wars of liberation, and armed conflicts involving terrorist groups.³⁷ Fifth, the potentially large-scale killing of individuals who merely exhibit a pattern of suspicious behavior is not targeted killing in this sense. Thus the use of drones by the United States to inflict relatively heavy casualties on the Taliban and al-Qaeda in Afghanistan and FATA is not targeted killing, notwithstanding the US government's use of terms such as "targeted killing" and "surgical strike" in relation to their use of drones.³⁸ I return to this issue in detail below. Sixth, and finally, I note that my definitional restriction on targeted killings that they take place only in contexts of armed conflict is nonarbitrary. The killings that are of interest to us in this paper take place in the context of armed conflicts, such as that between the United States and al-Qaeda, and that between Israel and Hamas. Moreover, to remove this restriction would muddy the moral waters and bring into play phenomena that are importantly morally different, such as one-off assassinations of political leaders by malevolent "lone-wolf" individuals with idiosyncratic political motives.

rendering of the term "imminent," according to which a threat becomes imminent if there is only a limited window of opportunity to remove it. This novel rendering has the untoward consequence that a threat in the far distant future becomes imminent if there is unlikely to be an opportunity to remove it in the far distant future when the threat becomes active. This collapses the distinction between defense against an imminent threat and a preemptive strike against a future threat, and for this reason should be rejected.

^{36.} For definitions of assassination, see Harold Zellner, ed., Assassination (Cambridge, Mass.: Schenkman, 1974). The other term in use in relation to this issue is extrajudicial killings. I find this unhelpful for my purposes here, since my concerns are with the morality rather than the legality of targeted killing, and, in any case, the legality of targeted killings is hotly contested. The CIA has evidently carried out a number of assassinations over the years, although a number of these would not be assassinations but rather targeted killings on my account (see below). See the Church Committee's Report on Alleged Assassination Plots Involving Foreign Leaders (Washington D.C.: US Government Printing Office, 1975).

^{37.} I elaborate and defend this notion of armed conflicts in Miller, "On the Morality of Waging War against the State."

^{38.} Amnesty International, "Will I Be Next?": US Drone Strikes in Pakistan (London: Amnesty International, 2013), http://www.amnestyusa.org/research/reports/will-i-be-next-us-drone-strikes-in-pakistan.

As argued in earlier chapters, the principles of necessity and proportionality are far more permissive in military conflict than in law enforcement contexts. For example, the use of lethal force by a military combatant is not necessarily in defense of an *imminent* threat to that combatant, his fellow combatants in that encounter, or, for that matter, any other individual person present at that time and place. Thus it is morally permissible in military conflict, but not in law enforcement, to use the tactic of ambush, whereby enemy soldiers are attacked and killed without warning and notwithstanding the fact that they do not constitute an imminent threat to anyone at that time and place.³⁹ At the risk of overstating the point, in a theater of war there is a presumption in favor of using lethal force against enemy combatants, if it serves a military purpose, whereas, as we saw above, in law enforcement there is a presumption in favor of arresting offenders.

The implications of this for targeted killing are clear. If armed force A is acting in justified collective self-defense against armed force B, then it may well be morally permissible—in accordance with the principles of military necessity and proportionality—for members of A to engage in the targeted killing of members of B, such as the killing of B's commanders. Such action might well be morally justified self-defense at the collective level(s) in the context of ongoing armed conflict even though, at the individual level,

- 1. the aim is to kill (rather than capture or arrest);
- 2. there is no imminent deadly threat from the target to any individual (e.g., target is asleep or unarmed); and
- it is not necessary for personal self-defense or defense of other individual person in that place at that time to kill the target (e.g., an attempt to poison Hitler when he was eating his food).

Indeed, consistent with the above-mentioned description of military necessity, it may well be morally permissible to engage in such targeted killing, notwithstanding that even at the collective level it is not *strictly* necessary to do so in order to further the immediate, medium, or long-term military goals in question.

^{39.} This is not to say that there is never any imminence requirement at the collective level (e.g., since Germany's invasion of Poland is imminent, war is justified).

9.3 The Morality of Targeted Killing of Terrorists

Given this description of targeted killing in the context of armed conflict—and the earlier definitions of targeted killing and of terrorism—let me now turn to the moral considerations in play in the use of targeted killing by the security forces of liberal democratic states in counterterrorism operations. The targeted killing in question takes place in either (1) a theater of war, albeit war against a nonstate actor; (2) a jurisdictional setting in which there is not effective enforcement of the law in relation to terrorists perpetrating ongoing, serious terrorist attacks against the liberal democratic state in question; (3) a well-ordered, liberal democratic state in peacetime or, indeed, in wartime if the territory in question is enjoying effective law enforcement against terrorism.⁴⁰

In relation to type 2 jurisdictional settings, we can distinguish two kinds of cases. There are those settings that are more or less well-ordered, but in which the authorities are nevertheless unable or unwilling to successfully enforce the law against the terrorists in question. The killing of Osama bin Laden in Abbottabad in Pakistan by US Special Forces illustrates this kind of case. I discuss this issue in section 9.4 below. The other kind of type 2 jurisdictional setting is one that is not well-ordered. The FATA in Pakistan is a case in point. The FATA are nominally under the authority of Pakistan, but in fact Pakistani law enforcement agencies have not been able to effectively exercise their authority. Moreover, Pakistan security agencies have evidently engaged in military—as opposed to law enforcement—operations in these areas, creating at times de facto theaters of war.⁴¹ Of particular importance to us here, Pakistani security agencies have been unable to dislodge al-Qaeda from its bases in these areas. Hence the United States has resorted to military action—apparently with the tacit consent of the Pakistan government—and the extensive lethal use of drones in particular.⁴² I discuss the US drone attack in the FATA below.

Let us briefly consider type 3 settings. As I have argued elsewhere,⁴³ other things being equal, targeted killing cannot be morally justified in

^{40.} Miller, Terrorism and Counter-Terrorism.

^{41.} See Amnesty International, "Will I Be Next?", 15–16.

^{42.} Amnesty International, "Will I Be Next?", 53. This is a matter of dispute.

^{43.} Miller, Terrorism and Counter-Terrorism.

such contexts. For in these settings the law enforcement option is available, and, as argued above, the law enforcement option is the default option when it comes to combating terrorism. This is not to say that moral dilemmas in relation to the use of lethal force might not arise for police engaged in counterterrorist operations against suicide bombers in particular. As discussed in Chapter 5, for example, in 2005 Jean Charles de Menezes an innocent Brazilian student—was shot dead by members of a UK counterterrorism squad in a London underground station.⁴⁴ This was a case of mistaken identity in which the police falsely believed Menezes was a suicide bomber about to trigger a bomb. The dilemma arose because the normally available option of arresting Menezes was highly problematic. What if he triggered the bomb, killing dozens of innocent commuters, as soon as he realized he was about to be arrested? Importantly, this was not a case of targeted killing, since the threat or, at least, believed threat was imminent. The point to be stressed here is that police use of lethal force, even against suicide bombers, in well-ordered liberal democratic states is rightly constrained by the above-mentioned principles of necessity and imminent threat to life constitutive of the law enforcement model.⁴⁵

What, finally, of type 1 settings? It is surely apparent from the discussion in section 9.2 above that the targeted killing of known combatants or their leaders in theaters of war is morally permissible, at least in principle. Arguably, the armed conflict that provides the overall context in which such killings takes place needs to be morally justified—perhaps by recourse to some appropriately revised version of the *jus ad bellum* of just war theory applicable to such conflicts. Indeed, I have argued as much elsewhere.⁴⁶

Further, it may well be that the principles of *jus in bello* need to be complied with if such targeted killing is to be morally justified. But there does not seem to be any in-principle reason why the principles of necessity, proportionality, and discrimination could not be complied with. Indeed, it would be a good deal easier for targeted killings in theaters of war to comply with the principles of discrimination and proportionality than for nontargeted killings to do so—a point often made by supporters of targeted killing. Targeted killings, other things being equal, are more discriminating

^{44.} Gordon and Miller, "The Fatal Police Shooting of Jean Charles de Menezes."

^{45.} Whether or not the police complied with all the relevant legal and moral principles on this occasion is another matter.

^{46.} Miller "Just War Theory and Counter-Terrorism"

than nontargeted killings, and, for the same reason, they are less likely to require justification on the grounds of proportionality, there being less loss of innocent life. Naturally, it is important to ensure that lethal actions being called targeted killings by those performing them are *in fact* targeted killings. Israeli aerial bombing of buildings in Gaza known to house children as well as members of Hamas is not targeted killing. As for the principle of necessity, again compliance is eminently possible, at least in principle. Surely the killing of "high value" terrorist leaders in a theater of war might well be justified on grounds of military necessity.

Notwithstanding the above arguments of mine in favor, at least in principle, of the moral permissibility of targeted killings in theaters of war in the overall context of ongoing armed conflict between liberal democracies and nonstate terrorist groups, various other considerations have been offered against such targeted killings. Since I have dealt with these elsewhere,⁴⁷ I will be quite brief in my treatment of them here.

Targeted killings are sometimes referred to as extrajudicial killings. Here the assumption is not only that they are unlawful, but that, being unlawful, they are morally impermissible.⁴⁸ No doubt *some* targeted killings are unlawful in some jurisdictions and, moreover, morally ought to be unlawful, notably those that take place in well-ordered jurisdictions. Since I discuss such type 2 settings below, I set this possibility aside here. The question to be answered at this point is different; it is whether or not targeted killing in theaters of war morally ought to be lawful. The answer is evidently not only that targeted killing in theaters of war ought to be lawful, but that in fact it is.⁴⁹

That said, the killing of terrorists in theaters of war does give rise to moral problems not necessarily present in killing conventional combatants in such theaters. One important problem arises from the difficulty of distinguishing terrorist combatants from innocent civilians.⁵⁰ However,

^{47.} Miller, "Just War Theory and Counter-Terrorism."

^{48.} Relatedly, it is sometimes argued that since there is no arrest and trial in the case of targeted killing, it cannot be lawful. See, for example, Yael Stein, "By Any Name Illegal and Immoral," *Ethics & International Affairs* 17, no. 1 (2003): 127–137. See also Miller, *Terrorism and Counter-Terrorism*.

^{49.} Kretzmer, "Targeted Killing of Suspected Terrorists"

^{50.} Another possibility is that it takes place in a jurisdiction which is operating under martial law. This is a complication that I do not have the space to deal with here. See Miller, *Terrorism and Counter-Terrorism*.

in the case of targeted killing, as opposed to, say, combatants responding with lethal force to a current terrorist attack in a firefight in a civilian area, there has been a prior investigative process that has resulted in a description of the role of the target in the terrorist organization and a unique identifying description of the target. Moreover, the target is to be killed only if he or she can be reliably identified as such at the time of the killing. Further, the targeted killing is discriminating—only the target is to be killed. It follows, therefore, that, at least in principle, the problem of distinguishing terrorists from innocent civilians is substantially reduced by the tactic of targeted killing. This is, of course, not to say that some investigations are not sloppy, that mistaken identity does not happen, or that all targeted killings are as discriminating as they ought to be. Far from it. For example, there is evidence of faulty intelligence in relation to the targeted killing of Taliban leaders in Afghanistan by NATO forces.⁵¹ But it is to say that the tactic of targeted killing, insofar as it lives up to its own standards, is not morally impermissible—and, therefore, ought not to be legally impermissible—on the general grounds of the difficulty of distinguishing terrorists from innocent civilians.

Further arguments against targeted killing rely on appeals to various practical and essentially consequentialist considerations, such as ineffectiveness. For example, it can be argued that the targeted killing of some terrorists might not reduce terrorist attacks, since others take their place. However, these kinds of arguments rely on the truth of empirical claims that might turn out to be false under certain circumstances. Accordingly, they do not show that targeted killing is necessarily morally unjustified.

I conclude that the targeted killing of terrorists is, in principle, morally permissible. This is consistent, of course, with the actual policies and practices of targeted killing on the part of, for example, the United States and Israel in specific contexts being morally impermissible. Let me now turn to the two sorts of hard cases mentioned above.

9.4 Targeted Killing of Osama bin Laden

As mentioned above, Osama bin Laden was killed by US Special Forces outside a theater of war in a well-ordered, urban setting in Abbottabad, Pakistan, in 2011. While Pakistan was, and remains, an ally of the United

^{51.} Amnesty International, "Will I Be Next?"

States, for some reason it was not enforcing its own laws in respect of bin Laden. This presented the United States with a dilemma. On the one hand, bin Laden was a terrorist responsible, directly or indirectly, for murdering thousands of US citizens. On the other hand, it would be a violation of Pakistan's sovereignty to enter Pakistan territory without permission and kill or capture bin Laden.

Elsewhere I have argued that the targeted killing of Osama bin Laden was probably not morally permissible by the lights of just war theory. Fer I am bracketing just war theory and simply considering the moral permissibility of killing bin Laden independently of just war theory. And, indeed, my conclusion is different; for my argument here, supposing it is sound, shows that the killing of bin Laden was probably morally permissible. Naturally, I will need to help myself in passing to some of the principles constitutive of just war theory, and I also briefly summarize some of the arguments canvassed by myself and others elsewhere. However, my intention is to present a novel and more complex argument to my conclusion, albeit one that takes off from earlier arguments. In short, I seek to extend the deliberative process for and against the killing of bid Laden with a view to bringing it to a conclusion, at least from the perspective of the application of moral theory. I do so in the knowledge that unforeseen empirical consequences have the potential to undermine any such conclusion thought to be definitive.

Let me summarize the basic arguments in play. The basic moral perspectives in play are retrospective and prospective, and procedural and substantive. At the risk of oversimplification, those who regard the killing of bin Laden as morally permissible tend to offer considerations of retrospective and substantive justice, and these considerations coalesce around a principle of retribution.⁵³ Given that he murdered numerous US and other citizens, so the argument goes, he deserved to die. On the other hand, those who disagree tend to offer proceduralist considerations, especially of a legalistic kind. Some argue that even though Pakistan was evidently unwilling to hand over bin Laden to the United States, it was an unacceptable violation of its sovereignty to enter Pakistan without permission to kill or capture him. Others have recourse to the criminal law; procedural justice requires arrest and a fair trial, and, evidently, bin Laden

^{52.} Miller, "Just War Theory and Counter-Terrorism."

^{53.} If so, then the justifying principle is not the related instrumentalist principle of tit-fortat in the service of restoring symmetry of risk in armed conflict.

could have been captured and tried. By contrast with retrospective, proceduralist, and substantive moral considerations, prospective considerations evidently cut both ways. Hence both the pro-kill bin Laden and the anti-kill bin Laden groups help themselves to these, albeit to different ones. Thus the anti-kill group argues that violating Pakistan's sovereignty and killing bin Laden will simply inflame anti-US sentiment and exacerbate the problem of terrorism both for Pakistan and the United States. By contrast, the pro-kill group emphasizes considerations of deterrence: "others will think twice about murdering US citizens."

Further arguments in play include (on the pro-kill view) that procedural justice is merely a means to realize substantive justice, and that in the case of bin Laden there was not the same need for a formal evidential process as in standard criminal justice cases—after all, there could be no reasonable doubt among the authorities or the general public that bin Laden was culpable. Moreover, a due process of sorts was followed in that the killing was authorized at the highest level and only after appropriate weighing of relevant considerations, including, presumably, legal considerations. This is, of course, not to say that existing institutional arrangements in the United States in respect of targeted killings are adequate. Here there are three elements in play: (1) the decision maker and the decision-making process (e.g., the president of the United States on advice from military personnel and legal advisors); (2) the criteria used in the decisions themselves, including, crucially, moral criteria such as the principles of necessity, discrimination, and proportionality; and (3) oversight of this process (e.g., by an independent judicial entity). However, if these arrangements are not adequate, there does not seem to be any in-principle reason why they could not be renovated in a manner that rendered them adequate.⁵⁴ Another argument invokes the principle of necessity, as it applies in law enforcement contexts. For it might be claimed that bin Laden resisted arrest, and deadly force can be justifiably used against those resisting arrest for very serious offenses, such as murder, if it is necessary to do so.55

^{54.} There is an important issue here with respect to the nature of both kinds of mechanisms and their relationship to one another.

^{55.} US officials said bin Laden resisted and was shot in the head, and, as already mentioned, it has also emerged that he was unarmed. US officials also said that three other men were killed during the raid, one believed to be bin Laden's son and the other two his couriers; in addition, a woman was killed when she was used as a shield by a male combatant. There were no American casualties.

One problem with the "procedure as a means to substantive justice" claim is that such exceptionalism may well undermine the integrity of criminal justice processes. A problem with the "due process" claim is that, arguably, the institutional process actually operative in the bin Laden killing was not adequate, notwithstanding that it could be renovated. A problem with the necessity claim is that bin Laden was apparently unarmed when cornered, and it therefore seems unlikely that the use of lethal force was necessary. Moreover, if the intention was actually to capture bin Laden, and lethal force was only used when he resisted in a manner that removed all nonlethal options, then killing him was not in fact a case of targeted killing, as we are using that term.

What are we to make of these various arguments, some in favor of killing bin Laden, others against it? I suggest that, weighing one set against the other, they are inconclusive, that they fail to be decisive one way or another. My response is twofold. First, the issue needs to be framed in terms of the conflict between the law enforcement model and the military combat model. Essentially, as already argued, neither model can be straightforwardly applied, but both remain relevant. The military combat model cannot be straightforwardly applied because Abbottabad was not a theater of war; it was a well-ordered jurisdiction. But neither can the law enforcement model be straightforwardly applied, because it was not a jurisdiction in which the laws against terrorists, specifically bin Laden, were being effectively applied. Second, in the context of framing the issue in this manner, I suggest a further argument that is capable of breaking the deadlock. This is based on a notion discussed in Chapter 6.1 and 6.3 in particular; namely, collective self-defense. What is meant by collective self-defense in this context? (What is not meant is the legal idea of multiple nation-states acting collectively, as opposed to unilaterally.⁵⁶)

Evidently, killing bin Laden was not an act of individual self-defense. As already noted, it is highly unlikely that the US Special Forces personnel killed bin Laden because he constituted an imminent threat to their lives. Therefore, the principle of necessity operative in law enforcement contexts is probably not relevant (see section 9.2 above). Similarly, the principle of proportionality, as it applies in law enforcement contexts, is not relevant (see Chapters 4 and 6 and section 9.2). Notwithstanding that killing bin Laden was not an act of individual self-defense against

^{56.} Christine Gray, International Law and the Use of Force 2nd ed. (Oxford: Oxford University Press, 2004), Chapter 5.

an imminent threat, it could well have been an act done in collective self-defense. Arguably, the United States—a collective entity—was defending itself against another collective entity, al-Qaeda, in the context of an ongoing armed conflict. Here I need to rely on the discussion in section 9.2 regarding the differences between collective self-defense in the context of an ongoing armed conflict between collective entities and the use of lethal force by police officers in discrete, self-contained encounters with criminals; more specifically, the differences with respect to the application of the principles of necessity and proportionality.

As elaborated in section 9.2, in the case of collective self-defense, but not individual self-defense, the ends in play are medium and long-term (military) collective ends, and the principles of necessity and proportionality apply at this collective level. So the appropriate set of questions to be asked in relation to bin Laden were: (1) Is he an active member of the enemy organization (al-Qaeda)? (2) Would killing him be disproportionate in terms of foreseeable loss of civilian life? (3) Is killing him a necessary means to a medium or long-term collective end in the armed conflict with al-Qaeda? Question 1 must obviously receive an affirmative answer. But what of questions 2 and 3?

Question 2 is ambiguous insofar as it could apply to a theater of war or to an area outside a theater of war. Clearly, in the case of the bin Laden killing, it is the latter that is relevant. Abbottabad is a well-ordered jurisdiction, albeit one in which the laws against the terrorist, bin Laden, were, for whatever reason, not being enforced effectively. Accordingly, the argument from collective self-defense faces a serious obstacle. What of question 3? If bin Laden was encountered on a battlefield in Afghanistan rather than in Abbottabad, then it would have been fairly obviously morally permissible to kill him, assuming doing so did not put innocent civilians at a disproportionate risk of harm; in short, the principles of military necessity and proportionality would straightforwardly apply and, hence, the argument from collective self-defense would be decisive. However, this was not the case. So while the answer to question 3 is affirmative, compliance with the principle of necessity nevertheless remains problematic, given he was killed outside a theater of war.

My response to this conundrum is to construct a further argument that is derivable from the argument from collective self-defense. This argument seeks to make the best of the moral considerations constitutive of both the law enforcement model and the military combat model in a context in which neither can be straightforwardly applied. According to this argument, collective self-defense would justify the killing of bin Laden in a well-ordered jurisdiction under three conditions: (1) the laws against terrorism were ineffective—the default law enforcement model was not available; (2) the lives of innocent civilians were not put at serious risk—the principle of discrimination as it applies in law enforcement contexts rather than the more permissive one applicable in military combat contexts was applied; and (3) bin Laden was a high value target—so the fact that it would have been morally permissible to kill bin Laden in a theater of war merely on the grounds of being a member of al-Qaeda is not in itself sufficient to justify killing him in a well-ordered jurisdiction, even one in which the laws against terrorism are not effectively enforced. Evidently, conditions 1 and 2 obtained, what of 3?

I take it that the US strategy in relation to al-Qaeda consists in large part in degrading its capability by "neutralizing" "high value" targets, notably by killing them. Assuming this strategy is rationally defensible in the context of the collective military ends of the United States, the question to be asked is whether or not bin Laden is or, at least, was a high-value target at the time he was killed. I suggest that the answer is in the affirmative. How so? Presumably, bin Laden continued to be useful to al-Qaeda in an advisory role. However, his importance to al-Qaeda at the time of his death was principally symbolic; he is the person the world most associates with al-Qaeda and 9/11 and, apparently, he had got away scot-free. Moreover, symbolism is far from being inconsequential to terrorists and, therefore, to those engaged in counterterrorism. Consider, for example, the symbolic importance to al-Qaeda of its successful attack on the Twin Towers in New York in 2001. Accordingly, in the context of the ongoing armed conflict between the United States and al-Qaeda, the United States is diminished, and al-Qaeda is corresponding enhanced, so long as bin Laden has neither been killed nor captured. For this reason, bin Laden was a very high-value target. It follows that killing bin Laden was a significant symbolic victory for the United States and its allies in the overall context of their counterterrorist campaign of collective self-defense.

I conclude that, other things being equal, the killing of bin Laden was justified on the basis of the argument from collective self-defense appropriately adjusted (as described above). But are other things equal? As we saw above, there are a number of retrospective (especially retribution), proceduralist, and prospective moral considerations in play. However, it was concluded that these were not decisive one way or another; there was a deadlock. It seems, therefore, that the (adjusted) argument from

collective self-defense breaks the deadlock. I conclude that killing bin Laden was morally permissible, at least by the lights of the moral considerations canvassed here.

Naturally, from this it does not follow that, all things considered, killing bin Laden was morally permissible. To arrive at that conclusion one would have to authoritatively weigh up a number of consequentialist moral considerations (taking collective self-defense to be a deontological consideration), including ones mentioned above. However, I do not have the relevant expertise to assess these. Here I simply reiterate that while some of these weighed against killing him (e.g., the negative impact on US-Pakistan relations and an upsurge in anti-US sentiment in Pakistan), others weighed in favor of killing him (e.g., if incarcerated for a lengthy period, bin Laden may well have continued to serve as an important rallying point for pro-terrorist activity.

9.5 Lethal Use of Drones in Counterterrorist Operations

In Afghanistan and in the so-called tribal areas of Pakistan (the Federally Administered Tribal Areas, or FATA—especially North Waziristan) and in Afghanistan, the US military and the CIA⁵⁷ have engaged in a sustained campaign of killing by means of unmanned aerial vehicles (UAVs), or drones.⁵⁸ Here I note that drones are a weapons system that can be used for targeted killing but also for nontargeted indiscriminate killing. For example, a drone operator *could* deliberately activate a drone to destroy school buildings known to be occupied by children. Moreover, even when carried out with the best of intentions, drone strikes have killed innocent bystanders. Accordingly, while the moral controversy in relation to targeted killing overlaps with the moral controversy over the use of drones, it is different in important respects. One might, therefore, support the targeted killing of terrorists under certain circumstances but argue that the use of drones in counterterrorism operations should be banned.

^{57.} I will not in this work address the important question of intelligence agencies, such as the CIA—as opposed to the military—carrying out targeted killing operations.

^{58.} For example, General Atomics' MQ-1 Predator and MQ-9 Reaper. For the purposes of this chapter I will assume that the drones in question are not so-called autonomous drones—ones in which humans are (to use the jargon) out of the loop. This raises importantly different issues of moral responsibility, dealt with in Chapter 10.

There are a variety of circumstances in which the targeted killing of terrorists by liberal democratic states might take place and which bear on its legality and morality. For the sake of simplicity in this section I invoke distinctions made earlier and assume that the targeted killings in question take place either (1) in a de facto theater of war, albeit war against a nonstate actor, or (2) in a jurisdictional setting in which there is not effective enforcement of the law in relation to terrorists perpetrating ongoing, serious terrorist attacks against the liberal democratic state in question. (If 2, this is because the authorities are either unable or unwilling to enforce the relevant laws.) Accordingly, as mentioned above, I am not considering the targeted killing of terrorist suspects by state security forces in the well-ordered, liberal democratic states of those security agencies in peacetime, or, indeed, in wartime if the territory in question is enjoying effective law enforcement against terrorism.⁵⁹ Here my focus is on the targeted killing of terrorists by state security agencies in disorderly jurisdictions and, specifically, US drone attacks in the FATA of Pakistan.

Perhaps the firing of a rocket by a US unmanned aircraft in Yemen in 2002⁶⁰ that killed six al-Qaeda operatives is an instance of targeted killing in a context that is a relatively sparsely populated geographical location (so that there is little or no chance of collateral damage) and a jurisdiction in which there is no effective law enforcement in relation to terrorists conducting attacks on liberal democratic states.

I will assume in the ensuing discussion of the morality of targeted killing that targeted killings in our sense are constrained by minimal moral, or morally informed, principles strictly applied. Naturally, here I am excluding those principles the application of which are ruled out by my definition of targeted killing, notably the principle of imminent threat; as noted above, the targets of targeted killing are, by my definition, *not* imminent threats. The principles to be strictly applied include the following: (1) it has been well-confirmed that the target is a terrorist; (2) the decision has been authorized at an appropriately high political level (e.g., by the US president or the Israeli prime minister), and (3) the decision is subject to effective accountability mechanisms, (e.g., judicial oversight). Importantly, these principles also include: (4) the targeted killing

^{59.} For more on these distinctions, see Miller, Terrorism and Counter-Terrorism.

^{60. &}quot;CIA killed Al-Qaeda suspects in Yemen" BBC News: World Edition, November 5, 2002 http://news.bbc.co.uk/2/hi/2402479.stm

is principally undertaken for purposes of (collective) self-defense (e.g., to prevent future lethal terrorist attacks, as opposed to, for example, as retribution) and is militarily necessary and proportionate. That is, I assume for our purposes that the required justification is essentially prospective in character.

I take it that while the lethal use of drones in a well-ordered jurisdiction is morally impermissible, there is no good in principle moral objection against the lethal use of drones in a theater of war in the context of a just war.⁶¹ B. J. Strawser provides a sustained argument to this effect.⁶² Drones have been used by the United States, in particular, to conduct targeted killings in Afghanistan, the FATA of Pakistan, and Yemen. By the lights of the argument of section 9.3 above, insofar as these drone strikes have been genuine cases of targeted killing in a theater of war and have not violated the principles of *jus in bello*, then, other things being equal, they are morally permissible.

However, as already mentioned, the term "targeted killing" has been used by US government officials, the media, and others somewhat loosely. Sometimes it is used to refer to so-called surgical strikes on high value targets as part of a decapitation strategy (targeting "the brain"). Other times it has been used to refer to the use of drones by US armed forces in Afghanistan and Pakistan to inflict relatively heavy casualties on the enemy and, thereby, disable it (targeting "the body"). Moreover, this strategy has evidently led to significant civilian casualties—an issue I discuss below. According to a recent Stanford/NYU report, "The best currently available public aggregate data on drone strikes are provided by *The Bureau of Investigative Journalism (TBIJ*), an independent journalist organization. *TBIJ* reports that from June 2004 through mid-September 2012, available

^{61.} But for general arguments against the use of drones, see Medea Benjamin *Drone Warfare: Killing by Remote Control* (London: Verso, 2013) and Amnesty International, "Will I Be Next"

^{62.} Bradley Jay Strawser, "Moral Predators: The Duty to Employ Uninhabited Aerial Vehicles," *Journal of Military Ethics* 9, no. 4 (2010): 342–368. Strawser argues for the stronger claim that use of drones is morally obligatory in a just war. The anti-drone arguments include the claim that asymmetrical warfare is unfair, and the so-called "threshold effect" argument. According to the former argument, the fact that drone operators are safe but the terrorist-combatants are at risk is unfair. No doubt this is true, but surely a just war does not need to be fair in this sense. According to the latter argument, since the enemy does not have drones and does not have the means to target one's own drone operators, then one is more likely to resort to drones, and so the total quantum of innocent lives lost is likely to increase notwithstanding that in any given drone strike, considered on its own, the likelihood of innocent loss of live is reduced. This is, of course, a disputable empirical claim.

data indicate that drone strikes killed 2,562–3,325 people in Pakistan, of whom 474–881 were civilians, including 176 children."⁶³

As mentioned earlier, drones have also been used to conduct so-called signature strikes, or strikes on individuals who have not been uniquely identified in our sense but who exhibit a pattern of suspicious behavior. Moreover, signature strikes are also frequently referred to as targeted killings. Here there are a number of points to be made. First, using drones to inflict heavy casualties in this manner is, as already mentioned, not targeted killing in our sense—which is, of course, not to say that it is not morally permissible in a theater of war. Accordingly, the use of drones for targeting "the body" lies outside the scope of this paper. Suffice it to say here that, given the scale of such killings, the opportunities for mistaken identity and the lack of precision attaching to the weaponry deployed (including by the use of surgical drone strikes—see below), it is extremely doubtful that such a strategy could be morally justified outside a theater of war.

Second, and following on this first point, we need to invoke the distinction between targeted killing of terrorists, on the one hand, and signature strikes and surgical strikes against terrorists, on the other. Signature strikes are morally problematic because, in effect, the definitions on which they rely are far too permissive and inevitably lead to the deaths of innocent civilians. The notion of suspicious behavior is far too weak to underpin a moral justification to take the life of a person otherwise only known to be a civilian in an area in which there is terrorist activity. This problem is compounded by the fact that these definitions are inherently vague and, as such, susceptible to indefinite expansion. For example, evidently, the definition of the targets in question expanded under President Obama so that it "in effect counts all military-age males in a strike zone as combatants... unless there is specific intelligence posthumously proving them innocent."

Surgical strikes are frequently lethal drone strikes against combatants living among innocent civilians and not readily distinguishable

^{63.} International Human Rights and Conflict Resolution Clinic (Stanford Law School) and Global Justice Clinic (NYU School of Law), Living Under Drones: Death, Injury, and Trauma to Civilians from US Drone Practices in Pakistan (September 2012), vi, http://law.stanford.edu/wp-content/uploads/sites/default/files/publication/313671/doc/slspublic/Stanford_NYU_LIVING_UNDER_DRONES.pdf.

^{64.} Quoted in Micah Zenko, Reforming US Drone Strike Policies, Council on Foreign Relations Special Report No. 65 (New York: Council on Foreign Relations, 2013), 12.

from those civilians. Notwithstanding that they are, at least by definition, intended to minimize innocent civilian deaths (collateral damage), surgical strikes bring with them the distinct possibility of collateral damage, and given multiple surgical strikes, there is the likelihood of significant loss of innocent human life. By contrast, targeted killings, as we are using the term, do not necessarily imply any loss of innocent human life on any occasion, or, indeed, on multiple occasions taken in aggregate. Naturally, a targeted killing could be planned in such a way as to allow rather than remove the possibility of collateral damage. However, the point to be stressed here is that in the case of targeted killings of terrorists, but not surgical strikes against terrorists, loss of innocent human life is typically avoidable. Accordingly, surgical strikes can only be morally justified in a military conflict in which the principles of military necessity and proportionality—rather than more restrictive principles, such as those governing the use of lethal force by police—are applicable. Therefore, surgical strikes are morally permissible in theaters of war but not, at least pro tanto, elsewhere.

Third, and relatedly, notwithstanding their renowned capacity to carry out surgical strikes, drones are a relatively blunt instrument when it comes to targeted killing. Compare, for example, a drone strike on a terrorist-combatant walking in a village to shooting the terrorist with a handgun at point-blank range (or, more likely, a sniper shooting the terrorist). Hence the significant loss of innocent human life arising from drone strikes in, for example and as mentioned above, the FATA of Pakistan.

Fourth, our concern in this section is with the moral permissibility of the use of drone strikes to kill terrorists embedded in a civilian population in a disorderly jurisdiction as opposed to a theater of war or a wellordered jurisdiction. Our example here is the FATA of Pakistan.

In light of these four points, let us get clear on the moral problem presented by the lethal use of drones to kill terrorists embedded in a civilian population in the disorderly jurisdiction of FATA. Here there is the following dilemma: On the one hand, al-Qaeda has important bases in these areas from which it conducts terrorist attacks against the United States (among others), so there is a need to engage in counterterrorist operations. On the other hand, the areas in question are neither theaters of war⁶⁵ nor a well-ordered jurisdiction in which laws against terrorists

^{65.} Naturally, heavily populated areas such as towns and cities could become theaters of war if they come under sustained bombardment (e.g., by drones), as happened to German

could be enforced. So, evidently, the two salient options—the military conflict model and the law enforcement model—are both ruled out.

Evidently, there is a solution to this moral problem: targeted killing. Genuine targeted killing is, as we have seen, a *potential* solution, since under certain circumstances it may be morally permissible to kill terrorist-combatants who are unable to be arrested and tried, notwith-standing that the killing takes place outside a theater of war. Our discussion of bin Laden demonstrated as much. Moreover, the case for targeted killing of terrorists in a disorderly jurisdiction is even stronger than it was in the case of bin Laden. For in a disorderly jurisdiction, the argument that it is a violation of sovereignty is considerably weaker.

Unfortunately, however, the lethal use of drones in the FATA is frequently not targeted killing in our sense, but rather the much less discriminatory tactics of surgical strikes or signature strikes. As we have seen, whatever the strategic virtues of these tactics, they come at a heavy moral cost in terms of the loss of innocent human life. Indeed, in the FATA, commensurate with the increase in the numbers of surgical and signature strikes by drones, the quantum of collateral damage did sharply increase.

As we have seen, if drones are used for surgical strikes in a theater of war—and the war in question is morally justifiable—then what counts as an acceptable risk to, and indeed acceptable loss of life among, innocent bystanders is governed by the relevant principles of just war theory; namely, military necessity and proportionality.⁶⁶ But the FATA are not per se a theater of war. Accordingly, it is not the relatively morally permissive principles of military necessity and proportionality that are applicable.

Nor can we invoke the argument made in sections 9.3 and 9.4 above for the moral permissibility of targeted killing in the context of the failure of the law enforcement model to deal with the terrorist threat. For that argument relied on either the context being a theater of war or, if not—as in the case of bin Laden—there being no *foreseen* loss of innocent human life (and, arguably, no substantial risk of loss of innocent human life). So the crucial relevant moral requirement justifying targeted killing outside

cities during World War II. Moreover, some areas of FATA are relatively sparsely populated (e.g., areas well away from villages) and could serve as appropriate locations for targeted killings. Moreover, these areas are potentially theaters of war.

^{66.} Note that signature strikes are problematic even in theaters of war, since in these strikes terrorist-combatants are only identified as such by their suspicious behavior.

theaters of war is, at the very least, that there is no foreseen loss of innocent human life. But it is precisely this requirement that, as we have seen, cannot be met in the case of surgical or signature strikes by drones.

I conclude that, *pro tanto* at least, the use of drones to conduct surgical strikes and signature strikes to kill terrorists embedded in a civilian population in a disorderly jurisdiction is not morally permissible. This is consistent, of course, with my claim that targeted killing of such terrorists, including by means of drones, may well be morally permissible in, for example, areas well away from civilian populations.

Naturally, it might be countered that this does not demonstrate that the use of drones to conduct surgical strikes or signature strikes in these areas is not morally permissible, all things considered. This is correct, but it needs to be borne in mind that such lethal strikes would not be rendered morally permissible merely because they were a military necessity from the US perspective, for this maneuver would be tantamount to a reintroduction of the already rejected military model. The moral considerations invoked would have to be different from, and weightier than, this. It is not entirely clear what they could be, especially given the longheld view that the main aim of counterinsurgency, including operations against terrorists embedded in civilian populations, is to win over the "hearts and minds" of those populations and not increase the threat by further radicalizing these populations.⁶⁷

9.6 Conclusion

In this chapter I have defined targeted killing and distinguished it from assassination and from extrajudicial killing. I have argued that targeted killing of combatants in theaters of war is morally permissible. I have further argued that while targeted killing of terrorists is morally impermissible in well-ordered jurisdictions—since the law enforcement model is applicable—it may be permissible under certain circumstances in disorderly states, given that the law enforcement model is unable to be applied. If so, it would need to be conducted in a manner that ensures the lives of innocent civilians are not put at risk.

^{67.} Naturally, notions such as so-called extreme emergencies could be invoked. But this seems farfetched.

Autonomous Weapons and Moral Responsibility

SCIENCE FICTION MOVIES, such as the Terminator series, have accustomed us to images of armed computerized robots led by leader robots fighting wars against human combatants and their human leaders. Moreover, by virtue of developments in artificial intelligence, the robots have superior calculative and memory capacity—after all, they are computers. In addition, robots are utterly fearless in battle, since they don't have emotions and care nothing for life over death. Does the human race, then, face robopocalypse? The short answer is no. Computers, robotic or otherwise, are not minded agents, steadfast intentional stances toward them notwithstanding.1 Rather, these images are fanciful anthropomorphisms of machines; and the military reality is quite different. Nevertheless, the specter of robopocalypse persists, especially in the context of new and emerging (so-called) autonomous robotic weaponry. Consider, for example, the Samsung stationary robot that functions as a sentry in the demilitarized zone between North and South Korea. Once programmed and activated, it has the capability to track, identify, and fire its machine guns at human targets without the further intervention of a human operator. Predator drones are used in Afghanistan and the tribal areas of Pakistan to kill suspected terrorists. While the ones currently in use are not autonomous weapons, they could be, given this capability, in which case, once programmed and activated, they could track, identify, and destroy human and other targets without the further intervention of

^{1.} Daniel Dennett, The Intentional Stance (Cambridge, Mass.: MIT Press, 1987).

a human operator. Moreover, more advanced autonomous weapons systems, including robotic ones, are in the pipeline.

In this chapter I explore the implications of autonomous robotic weapons, and related military weaponry, for the individual and collective moral responsibility of human beings engaged in war. Do such weapons necessarily compromise the moral responsibility of human combatants and their leaders, and, if so, in what manner and to what extent? In order to answer these questions I rely on serviceable theoretical descriptions of the key notions of war (Chapter 6, section 6.1) and military necessity, and individual and collective moral responsibility (Chapter 5, sections 5.2 and 5.3). In respect of the questions arising for individual and collective moral responsibility in respect of autonomous robotic weaponry, I provide what I refer to as the *moral ramification argument*. The conclusion of this argument is that it is highly improbable that moral *jus in bello* principles of military necessity, discrimination, and proportionality could ever be programmed into robots.

10.1 War, Collective Action, and the Principles of Necessity and Proportionality

As discussed in Chapters 3 and 6, waging war is typically morally justified by recourse to some notion of collective self-defense, such as defense of the nation-state against the armed aggression of another nation-state or of a nonstate actor such as a terrorist group. This ultimate end of collective self-defense and, relatedly, winning the war is necessarily underspecified prior to its realization. For example, the United States did not know when it declared war on Japan as a result of the Japanese attack on Pearl Harbor that victory over Japan would ultimately result from dropping atomic bombs on Nagasaki and Hiroshima. Moreover, the ins and outs of the evolving route leading to victory is also necessarily underspecified prior to its actually being taken; after all, it largely turns on what the enemy does, including by way of response to one's own armed attacks. So war is quite unlike programming a destination into a robot-driven car with a detailed and fixed roadmap, or, for that matter, a flight path into a computer-controlled jet aircraft. Nor is it even like playing a game such as chess, albeit it is analogous in some ways. For unlike in war, in chess there is a single, definite, unchanging, and mutually known "theater of war" (the chessboard), a resource base that cannot reproduce itself (the

chess pieces), a sharply defined set of rules and contexts of application, and a fixed, finite, and knowable (at least in principle) set of possible moves and countermoves.

As we have seen, the actual conduct of war is governed by moral principles (the so-called *jus in bello* of just war theory), notably the principles of (1) military necessity, (2) proportionality, and (3) discrimination.² As will become evident, these are quite unlike the sharply defined rules and contexts of application in chess.³ For the moment I note that these principles have to be applied in very different military contexts, such as conventional theaters of war and counterterrorism operations, and that, as I argue below, their application is *radically context dependent*—so the conditions in which they ought to be applied cannot be comprehensively specified in advance of those conditions coming into existence. Importantly, unlike in the case of law enforcement, these principles apply at the collective level, as opposed to merely at the individual level. So the context of any, or at least most, applications of these principles is multileveled.

As we have seen, there is the individual level of a one-to-one encounter between a combatant and an enemy combatant, a firefight involving multiple combatants on both sides, and a battle involving possibly thousands of combatants over an extended period of time. Nor is this the end of the matter, for, as we all know, any given battle is merely a phase element in the overall war. So there are further collective levels governed by, for example, the collective end of winning the war, as opposed to merely winning one of the battles. Perhaps winning the war is describable as a level-three joint action.

The point to be stressed now is that, as argued in Chapter 6, the principle of military necessity, in particular, but also the principles of proportionality and discrimination, apply at the various conceptually distinct collective levels (e.g., the level of a battle or ongoing war fought by a military organization), and not simply at the level of an individual combatant's lethal action considered as a discrete, self-contained action (e.g., the

^{2.} There are various different possible formulations of and complications arising from these moral principles. For example, I will be concerned with proportionality as it pertains to civilian deaths. See Miller, *Terrorism and Counter-Terrorism*.

^{3.} This point is not vitiated by the fact that these ius in bello principles are further specified by the ROE. For the problem remains, both at the level of the 'derivation' of the ROE from the ius in bello principles and in the application of the ROE themselves. In order to avoid unnecessary complications in this chapter I discuss the issues purely in terms of the ius in bello principles.

necessity to kill an enemy combatant who will otherwise kill oneself). Accordingly, the context for the application of these moral principles is a multilevel (individual and collective end) context. In essence, the principle of military necessity ultimately pertains to the long-term, necessarily underspecified collective end of winning the war, which generates in turn a nested, dynamic series of medium- and short-term collective ends, such as winning particular battles or firefights. These short- and medium-term collective ends are means to the long-term collective end of winning the war, albeit means in need of further specification, adjustment, or even abandonment in light of the responses to them of the enemy armed forces.

Accordingly, the principle of military necessity is to be understood, first, in terms of short-, medium-, and long-term means and ends—that is, in diachronic terms. Something is necessary in this sense if, comparatively speaking, it is both an efficient and effective means to an end, and there is no obviously superior means available. If it is the only means then it is strictly necessary. However, this is frequently not the case, and so to this extent "necessity" is correspondingly less strict. Second, the strength of the necessity to deploy a given quantum of lethal military force in, say, the context of a battle turns in large part on the moral weight to be accorded to the winning of that battle in light of its likely contribution to the ultimate (necessarily underspecified) collective end of winning the war (and, of course, the somewhat indeterminate moral weight to be attached to the latter). In the case of a crucial battle in the context of a war of collective self-defense, the military necessity to deploy a large quantum of lethal military force might be both strong (there is much at stake) and strict (it is the only available means).

What of the principles of proportionality and discrimination? These principles are obviously also to be applied at all levels collective and individual levels: whether it is a brief one-combatant-to-one-enemy-combatant exchange of fire, a firefight involving multiple combatants on both sides, a battle, or the war as a whole that is under consideration, it is morally impermissible to intentionally kill innocent civilians, to put their lives at unnecessary risk, or to knowingly cause disproportionate large numbers of civilian deaths. Naturally, what is at stake at each of these different levels, including the quantum of lives, can vary greatly but this does not affect the applicability of the principles.

The principles of military necessity, discrimination, and proportionality are conceptually interdependent, so that one cannot be correctly applied without attending to the requirements of the others. Roughly speaking,

the principle of discrimination forbids intentional targeting of innocent civilians⁴ and foreseeably and avoidably putting their lives at unnecessary risk. The latter clause conceptually implicates the principle of military necessity, for a risk to civilians is unnecessary if the use of lethal military force that constitutes this risk is not militarily necessary. Thus the principles of military necessity and discrimination are conceptually interdependent. Moreover, as we saw above, both principles must be applied at all individual and collective levels. Since these levels are interconnected by virtue of nested collective ends, the application of the principle of discrimination may well be a complex matter necessarily involving taking into account (1) the risks to civilians at these various levels and (possibly) adjudicating between them; (2) military necessity at these various levels and (possibly) adjudicating between them; and (3) adjudicating between points 1 and 2. For example, pursuing tactic A (aerial bombing) to realize the collective end of winning a battle might lead to many more civilian casualties in this present battle than pursuing tactic B (taking and holding ground without aerial bombing). However, pursuing A might be a more efficient and effective means of decisively winning the battle (because, say, of the much heavier enemy casualties inflicted prior to the enemy's retreat), and might, therefore, reduce the number of future civilian casualties in future battles joined in further pursuit of the collective end of winning war.

The principle of proportionately arises in contexts in which both the principle of military necessity and the principle of discrimination are applicable. Roughly speaking, the legal principle requires that that the quantum of (unintended) civilian deaths resulting from the deployment of lethal military force should not be disproportionate to the strategic value, and the corresponding moral weight, of the collective military ends to be realized by that deployment. However, morally, as opposed to legally, there are three cohorts of potential lost lives to consider: civilians, one's own combatants, and enemy combatants. Naturally, military goals often involve maximizing enemy casualties in order to degrade enemy military capacity. So the means/end equation is in part to calculate the likely loss of life among one's own combatants (the cost) relative to the desired goal

^{4.} Arguably, the component clause of the principle of discrimination—the impermissibility of intentionally killing innocent civilians—is logically independent of its second clause and of the other principles. This does not affect my argument. The principle of discrimination also applies to the kind of weaponry used. For example, biological weapons are indiscriminate.

to be achieved (maximum enemy casualties). But this calculation of military necessity is already one involving the application of a principle of proportionality. As such, the principle of proportionality (in our moral sense) is logically interdependent with the principle of military necessity. Moreover, as we saw above, the principle of proportionality applies at both the individual and collective levels. So the application of the principle of proportionality is complex in the manner of the other two principles.

This combination of logical interdependence between the three *jus in bello* principles and their applicability at all interconnected individual and collective levels in the overall context of a just war waged in collective self-defense gives rise to the phenomenon I refer to as *moral ramification*, and to the associated need for complex decision making of the kind described above. In short, in general one cannot simply apply one of these principles in a discrete, self-contained context (proportionality, for example, given the likelihood of heavy civilian casualties in a firefight), without taking into account the other principles and other contexts at other levels (e.g., the military necessity to win the battle in which the firefight is an important constitutive element).

Finally, I note that the moral considerations that arise from collective military ends at the collective level often outweigh, or otherwise render irrelevant, the moral considerations that arise at the individual level. In this respect, the deployment of lethal force by the military in war is quite different from the use of lethal force by police in law enforcement (see Chapters 3, 4, and 6).

10.2 Autonomous Robotic Weaponry and Human Moral Responsibility

Autonomous weapons are weapons system that, once programed and activated by a human operator, can—and, if used, do in fact—identify, track, and deliver lethal force without further intervention by a human operator. By "programmed" I mean, at least, that the individual target or type of target has been selected and programmed into the weapons system. By "activated" I mean, at least, that the process culminating in the already programmed weapon delivering lethal force has been initiated.

^{5.} I am not arguing that the principle of proportionality as it applies in standard cases of personal self-defense is logically interdependent with the principle of necessity as that principle applies in such cases.

This weaponry includes weapons used in nontargeted killing, such as autonomous antiaircraft weapons systems used against multiple attacking aircraft, or, more futuristically, against swarm technology (e.g., multiple lethal miniature attack drones operating as a swarm so as to inhibit effective defensive measures); as well as ones used or, at least, capable of being used in targeted killing (e.g., a predator drone with face-recognition technology and no human operator to confirm a match).

We need to distinguish between so-called "human-in-the-loop," "human-on-the-loop," and "human-out-of-the-loop" weaponry. It is only human-out-of-the-loop weapons that are autonomous in the required sense. In the case of human-in-the-loop weapons, the final delivery of lethal force (e.g., by a predator drone), cannot be done without the decision to do so by the human operator. In the case of human-on-the-loop weapons, the final delivery of lethal force can be done without the decision to do so by the human operator; however, the human operator can override the weapon system's triggering mechanism. In the case of human-out-of-the-loop weapons, the human operator cannot override the weapon system's triggering mechanism, so once the weapon system is programmed and activated there is not, and cannot be, any further human intervention.

The lethal use of a human-in-the-loop weapon is a standard case of killing by a human combatant, and as such is presumably, at least in principle, morally permissible. Moreover, other things being equal, the combatant is morally responsible for the killing. The lethal use of a human-on-the-loop weapon is also, in principle, morally permissible. Moreover, the human operator is, perhaps jointly with others, morally responsible, at least in principle, for the use of lethal force and its foreseeable consequences. However, these two propositions concerning human-on-the-loop weaponry rely on the following assumptions:

- 1. The weapon system is programmed and activated by its human operator and either:
- 2. (a) on each and every occasion of use, the final delivery of lethal force can be overridden by the human operator, and (b) this operator has sufficient time and sufficient information to make a morally informed, reasonably reliable judgment about whether or not to deliver lethal force, or
- 3. (a) on each and every occasion of use, the final delivery of lethal force can be overridden by the human operator, and (b) there is no moral

requirement for a morally informed, reasonably reliable judgment on each and every occasion of the final delivery of force.

A scenario illustrating 3b might be an antiaircraft weapons system being used on a naval vessel under attack from a squadron of manned aircraft in a theater of war at sea, in which there are no civilians present.⁶

What of human-out-of-the-loop weapons? Consider the following scenario, which I contend is analogous to the use of human-out-of-the-loop weaponry: There is a villain who has trained his dogs to kill on his command, and an innocent victim on the run from the villain. The villain gives the scent of the victim to the killer dogs by way of an item of the victim's clothing, and then commands the dogs to kill. The dogs pursue the victim deep into the forest, so that the villain is now unable to intervene. The dogs then kill the victim. The villain is legally and morally responsible for murder. However, the killer dogs are not, although they may need to be destroyed on the grounds of the risk they pose to human life. Hence the villain is morally responsible for murdering the victim, notwithstanding the indirect nature of the causal chain from the villain to the dead victim; the chain is indirect, since it crucially depends on the dogs doing the actual physical killing. Moreover, the villain would also have been legally and morally responsible for the killing if the "scent" was generic and, therefore, carried by a whole class of potential victims, and if the dogs had killed one of these individuals. In this second version of the scenario, the villain does not intend to kill a uniquely identifiable individual,8 but rather one (or perhaps multiple) members of a class of individuals.9

^{6.} There are various other possible such scenarios. Consider a scenario in which there is a single attacker on a single occasion in which there is insufficient time for a reasonably reliable, morally informed judgment. Such scenarios might include ones involving a kamikaze pilot or a suicide bomber. If autonomous weapons were to be morally permissible, the following conditions at least would need to be met: (1) prior clear-cut criteria for identification and delivery of lethal force to be designed into the weapon, and used only in narrowly circumscribed circumstances; (2) prior morally informed judgment regarding criteria and circumstances; and (3) ability of operator to override the system. Here there is also the implicit assumption that the weapon system can be "switched off," which is not the case with biological agents released by a bioweapon.

^{7.} See Ronald Arkin, "The Case for Ethical Autonomy in Unmanned Systems," *Journal of Military Ethics* 9, no. 4 (2010): 332–341. Arkin has argued in favor of the use of such weapons.

^{8.} It is not a targeted killing.

Further, the villain is legally and morally responsible for foreseeable but unintended killing done by the killer dogs in the forest, if they had happened upon one of the birdwatchers

By analogy, human-out-of-the-loop weapons—called "killer-robots" are not morally responsible for any killings they cause. 10 Consider the case of a human-in-the-loop or human-on-the-loop weapon. Assume that the programmer/activator of the weapon and the operator of the weapon at the point of delivery are two different human agents. If so, then, other things being equal, they are jointly (that is, collectively) morally responsible for the killing done by the weapon (whether it be of a uniquely identified individual or an individual qua member of a class). 11 No one thinks the weapon is morally or other than causally responsible for the killing. Now assume this weapon is converted to a human-out-of-the-loop weapon by the human programmer-activator. Surely this human programmeractivator now has full individual moral responsibility for the killing, as the villain does in (both versions of) our killer dog scenario. To be sure, there is no human intervention in the causal process after programming and activation. But the weapon has not been magically transformed from an entity only with causal responsibility to one which now has moral or other than causal responsibility for the killing.

It might be argued that the analogy does not work because killer dogs are unlike killer robots in the relevant respects. Dogs are minded creatures, whereas computers are not; dogs have some degree of consciousness and can experience, for example, pain. However, this difference would not favor ascribing moral responsibility to computers rather than dogs; rather, if anything, the reverse is true. Clearly, computers do not have consciousness, cannot experience pain or pleasure, do not care about anyone or anything (including themselves), and cannot recognize moral properties, such as courage, moral innocence, moral responsibility, sympathy, or justice. Therefore, they cannot act *for the sake of* moral ends or principles *understood as moral in character*, such as the principle of discrimination. Given the nonreducibility of moral concepts and properties

well-known to frequent the forest and mistakenly killed him instead of the intended victim. (Perhaps the birdwatcher carried the scent of birds often attacked by the killer dogs).

^{10.} Rob Sparrow, "Killer Robots," Journal of Applied Philosophy 24, no. 1 (2007): 63–77. For criticisms, see Uwe Steinhoff, "Killing Them Safely: Extreme Asymmetry and Its Discontents," in Strawser, ed., Killing By Remote Control 179–209.

^{11.} Moreover, each is fully morally responsible; not all cases of collective moral responsibility involve a distribution of the quantum (so to speak) of responsibility. See Miller, "Collective Moral Responsibility."

to nonmoral ones and, specifically, physical ones, ¹² at best computers can be programmed to comply with some *nonmoral proxy* for moral requirements. For example, "Do not intentionally kill morally innocent human beings" might be rendered as "Do not fire at bipeds if they are not carrying a weapon or they are not wearing a uniform of the following description . . ." I return to this issue below.

Notwithstanding the above, some have insisted that robots are minded agents; after all, it is argued, they can detect and respond to features of their environment, and in many cases they have impressive storage, retrieval, and calculative capacities. However, this argument relies essentially on two moves that should be resisted and are, in any case, highly controversial. First, rational human thought (notably rational decisions and judgments) is downgraded to the status of mere causally connected states or causal roles, for example via functionalist theories of mental states. Second, and simultaneously, the workings of computers are upgraded to the status of mental states, for example via the same functionalist theories of mental states. For reasons of space I cannot here pursue this issue further. Rather, I simply note that this simultaneous downgrade/upgrade faces prodigious problems when it comes to the ascription of (even nonmoral) autonomous agency. For one thing, autonomous agency involves the capacity for non-algorithmic inferential thinking, such as the generation of novel ideas. For another, computers do not have interests or desires, do not pursue ends in themselves, and cannot choose their own ends. At best they can select between different means to the ends programmed into them. Accordingly, they are not autonomous agents, even nonmoral ones. For this reason alone, robopocalypse is evidently an illusion. Robotic weapons are morally problematic, but not for the reason that they are autonomous agents in their own right.

Granted that "autonomous" human-out-of-the-loop weapons are not autonomous (morally or otherwise), it has nevertheless been argued that there is no in-principle reason why they should not be used. (Moreover, they are held to have certain advantages over human-in-the-loop and human-on-the-loop systems—for example, being machines, they are not subject to psychological fear and associated stress.¹³) A key claim on which

^{12.} The physical properties in question would not only be detectable in the environment, but also be able to be subjected to various formal processes of quantification and so on.

^{13.} Arkin, "The Case for Ethical Autonomy in Unmanned Systems."

this argument is based is that moral principles, such as military necessity, proportionality, and discrimination, can be reduced to rules, and these rules can be programmed in to computers. However, I suggest that the phenomenon of moral ramification presents a critical, if not insurmountable, problem at this point. To recap this phenomenon: the combination of logical interdependence between the three *jus in bello* principles and their applicability at all interconnected individual and collective levels gives rise to *moral ramification* and the associated need for complex decision making, such that one cannot simply apply one of these principles in a given conceptually discrete and self-contained context involving the use of lethal force without taking into account the other principles and other contexts at other levels.

Let us revisit what this might mean in practice. Appropriate applications of, say, the principle of military necessity involves reasonably reliable, morally informed, contextually dependent judgments at the various collective levels, as well as at the individual level, and at the various centers of individual and collective responsibility. However, given the nested character of the individual and collective ends in play, their necessarily underspecified content, and the need to be responsive to the actions, including countermeasures, of enemy combatants and their leaders, there is a constant interplay between the various collective and individual levels (e.g., strategic commanders at headquarters and combatants in a firefight), and across centers (e.g., different theaters of war). Further, the various applications of the principles of necessity, proportionality, and discrimination are logically interdependent; for example, the application of the principle of proportionality depends on considerations of military necessity, and vice versa. Accordingly, there is a need to adjudicate not only between the means to given ends, but also with respect to the moral weight to be accorded different competing ends at different levels. For example, the individual end to advance to assist a comrade-in-arms coming under heavy fire might compete with the collective end of one's platoon or company to

^{14.} Arkin, "The Case for Ethical Autonomy in Unmanned Systems." This claim has been countered by various critics, but not, in my view, decisively. For these critics have, as far as I am aware, relied on piecemeal objections (so to speak), such as the difficulty an autonomous weapon would have in distinguishing innocent civilians from terrorists in civilian dress. See, for example, Noel Sharkey, "Killing Made Easy: From Joysticks to Politics," in Patrick Lin, Keith Abney, and George A. Bekey, eds., Robot Ethics: The Ethical and Social Implications of Robotics (Cambridge, Mass.: MIT Press, 2012), 111–128. However, a more decisive, and by contrast, holistic objection can be made to the application of these principles: the moral ramification argument.

make a tactical retreat to avoid heavy losses. Again, the collective military end to win firefights might be facilitated by relatively permissive rules of engagement (ROE), but perhaps this end competes with the collective end to avoid large-scale casualties among civilians, and the latter end is facilitated by relatively restrictive ROE. Further, at the macro-collective level, the collective end of the military leadership to win an internecine war might compete with the collective end of the political leadership not to inflict losses of a magnitude that would undermine the prospects for a sustainable peace.

In the light of this, let us see what it implies for the project to reduce the three *jus in bello* principles to rules and program them into armed robots. First, each moral principle needs to be expressible in a sharply defined rule couched in nonmoral descriptive terms. Given the nonreducibility of the moral to the nonmoral (physical?), it is extremely doubtful that this can be done for moral principles, especially ones that are relatively vague and quite general in form, as are the ones in question. Moreover, even if it could be done, the principles are logically interdependent, and this would need somehow to be accommodated; logically independent rule specifications, for example, would not work. Second, many, if not most, of the uses of lethal force in question are joint actions, and joint actions are not reducible to aggregations of individual actions (see Chapter 1). So the rules in question would need somehow to accommodate this; the mere aggregation of instructions for single actors, for example, would not suffice. Third, the sharply defined rules in question would presumably be applicable to sharply defined, discrete, self-contained contexts involving the use of lethal force; otherwise the robot would not be able to comply with them. Here the phenomenon of moral ramification comes fully into its own. For, as our above examples demonstrated, in any such conceptually discrete and self-contained context, be it a one-against-one encounter, a firefight, an air strike, or a battle, there will inevitably be moral considerations emanating from some other context (for example, another battle) or some larger context of which the discrete, self-contained context is an element (for example, the war as a whole), which bear upon it in a manner that morally overrides or qualifies compliance with the sharply defined rule in question (or set of rules, for that matter¹⁵). Given that each war

^{15.} The sharply defined computerized rule conception could be complicated by adding meta-rules, for example. However, this would not make any material difference to the problems; it would simply elevate things to a higher level of complexity.

taken in its totality, is unique, this interplay of contexts has the effect of making decisions in accordance with the *jus in bello* highly, indeed, radically, contextually dependent, and particular in character. As such, these decisions are beyond the reach of rules, however sharply defined; for rules are necessarily general in character and defined prior to their application in particular contexts. I conclude that this "computerized" conception of the application of fundamental moral principles in war faces prodigious, if not insurmountable, problems. In short, evidently robopocalypse is doubly an illusion.

An important consequence of this is that the design, construction, and use of human-out-of-the-loop weapons are highly morally problematic. Such weapons cannot be programmed to comply with the moral principles of military necessity, discrimination, and proportionality. Moreover, their use would seriously impede the capacity of their human operators to adequately comply with these moral principles, and, to this extent, it would be an abnegation of moral responsibility on the part of the military. Finally, the use of these human-out-of-the-loop weapons is evidently unnecessary, since, as we saw above, for the combat situations in which human-in-the-loop weapons are inadequate, human-on-the-loop weapons are available, and I conclude that human-out-of-the-loop weapons morally ought not to be used.

10.3 Conclusion

In this chapter I have addressed the question of whether autonomous robotic weapons necessarily compromise the moral responsibility of human combatants and their leaders. In order to answer this question, I have developed a novel argument: the moral ramification argument. The conclusion of this argument is that it is highly improbable that moral *jus in bello* principles of military necessity, discrimination, and proportionality could ever be programmed into robots. The argument utilizes theoretical descriptions of the key notions of war and military necessity (Chapter 6), and individual and collective moral responsibility (Chapters 2 and 5). Crucially, it relies on the inability of computers to detect and respond to moral properties.

Conclusion

IN THIS WORK I have analyzed the underlying moral justifications and moral responsibilities in play in the use of lethal force by ordinary citizens, police officers, and military personnel. In doing so, I have relied on my normative teleological account of social institutions. On the one hand, police and military use of lethal force is morally justified in part by recourse to fundamental natural moral rights and obligations, especially the right to personal self-defense and the moral obligation to defend the lives of innocent others under imminent threat, if one can do so without risking one's own life. On the other hand, the moral justification for police and military use of lethal force is to some extent role-specific. Both police officers and military combatants evidently have an institutionally based moral duty to put themselves in harm's way to protect others. However, police, under some circumstances, evidently have an institutionally based moral duty to use lethal force to uphold the law, and military combatants evidently have an institutionally based moral duty to use lethal force to win wars.

Two fundamental notions upon which this work relies are joint action and the natural right to self-defense. I provide my individualist collective end theory of joint actions and use it to construct the notion of multilayered structures of joint action to understand organizational action. I develop a novel theory of justifiable killing in self-defense; namely, the fault-based internalist suspendable-rights theory (FIST). FIST is a fault-and rights-based account with two distinctive features. First, it is a partialist account: the rights not to be killed are such that when one member of the set of rights is suspended, the other rights (and concomitant obligations) remain in force. Thus, if A's right not to be killed by B is suspended, then B no longer has an obligation not to kill A. However, A still has a

right not to be killed by C, and thus C's obligation not to kill A remains in force. This condition is restrictive in that it has the effect of curtailing the putative right of third parties to kill in defense of the lives of others. Second, according to FIST, a culpable attacker suspends his right not to be killed by a defender even in cases in which it is not necessary for the defender to kill the attacker to save his own life. This condition is permissive in that it has the effect of strengthening the right to self-defense.

Social institutions, such as police and military organizations, presuppose natural rights and obligations but are established to realize collective goods, such as the protection of aggregate natural rights, such as the right to life. In this process, institutional roles are created and defined in terms of institutional rights and duties that are also moral rights and duties. Moreover, the latter do not entirely mirror prior natural rights and duties. Hence there is a divergence between the moral justification for the use of lethal force by ordinary citizens, police officers, and military combatants. Thus, unlike ordinary citizens, police officers are justified in using lethal force to uphold the law. On the other hand, military combatants, but not police officers or ordinary citizens, are morally justified in ambushing and killing an enemy. So although the institutional roles of police officers and regular soldiers are similar in some respects, they are also importantly different. In general terms, military forces, unlike police forces, do not have as a defining moral purpose to enforce the law, but they do have as a defining purpose to win wars. Accordingly, soldiers use lethal force with far less moral constraints than do police officers. Moreover, unlike police officers, soldiers waive their natural discretionary right to use lethal force, and do so in favor of their superiors. That said, the advent of international terrorism has blurred the distinction between the police and military roles. The practice of targeted killing is a case in point. I have argued that targeted killing may be permissible in disorderly states, given that the law enforcement model is unable to be applied and the lives of innocent civilians are not put at serious risk.

A central moral notion deployed throughout the work is that of collective moral responsibility. I have proffered a novel individualist relational account of this notion and deployed it in respect of the members of an army fighting a war, use of lethal force by police against suicide bombers, humanitarian armed intervention, and autonomous weapons. This notion of collective moral responsibility presupposes my individualist theory of joint action and comports with my theory of organizational action as multilayered structures of joint action. Accordingly, I have reframed

the Moral Equality of Combatants debate between so-called traditionalists, such as Walzer, and so-called revisionists, such as McMahan, in terms of the collective, or joint, moral responsibility of actors engaged in multilayered structures of joint action. This provides, I suggest, a more nuanced and realistic model of individual moral responsibility in largescale collective enterprises, such as armies fighting (just or unjust) wars. In such contexts, decision making is necessarily joint, and is therefore required to be binding on all, or most, if it is to be effective. Accordingly, there is a presumption in favor of an individual who disagrees with such joint decisions to nevertheless go along with them. That said, each individual organizational actor is morally responsibility for his or her own actions, yet each also has a share, jointly with the others, of the moral responsibility for the larger organizational goals (collective ends, in my parlance). Importantly, this conception of moral responsibility enables, indeed requires, me to ascribe moral responsibility only to human beings, whether acting individually or jointly. Accordingly, I eschew the ascription of moral responsibility to collective entities per se, such as police institutions, armies, terrorist organizations, governments, or nation-states, or for that matter to computers and other machines; moral responsibility for the use of lethal force rests squarely with human beings.

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