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Killing Civilians is Worse than Killing Soldiers

1. Overview

Killing civilians is worse than killing soldiers. If any moral principle commands near universal assent, this one does. It is written into every major historical and religious tradition that has addressed armed conflict.¹ It is uncompromisingly inscribed in international law.² It underpins and informs public discussion of conflict—we always ask first *how many civilians died?*³ And it guides political practice, at least in liberal democracies, both in how we fight our wars and in which wars we fight.⁴

¹ Hinduism: Manu, *The Laws of Manu* (London: Penguin, 1991), ch. 7, vv. 91–3, 137–8; Islam: Muhammad Munir, ‘The Protection of Civilians in War: Non-Combatant Immunity in Islamic Law War’, *Hamdard Islamicus*, 34/4 (2011), <http://works.bepress.com/muhammad_munir/13>; Judaism: Daniel Reisel, ‘The Halachic Duty to Avoid Civilian Casualties’, *Jewish Chronicle Online*, <www.thejc.com/judaism/judaism-features/the-halachic-duty-avoid-civilian-casualties>; Christianity and the broader western tradition: Gregory M. Reichberg, Henrik Syse, and Endre Begby, *The Ethics of War: Classic and Contemporary Readings* (Oxford: Blackwell, 2006), 131 (Raymond of Peñafort), 222 (Christine de Pisan), 248 (Cajetan), 324 (Vitoria), 362 (Suarez), 432 (Grotius), 474 (Christian von Wolff). For a general history, see Colm Mckeogh, *Innocent Civilians: The Morality of Killing in War* (Basingstoke: Palgrave, 2002).

² Esp. Articles 48, 51, and 57 of the First Additional Protocol to the Geneva Conventions, Adam Roberts and Richard Guelff, *Documents on the Laws of War* (Oxford: OUP, 2000), 419–80.

³ See e.g. Anthony Reuben, ‘Caution Needed with Gaza Casualty Figures’, BBC News Online (2014), <www.bbc.com/news/world-middle-east-28688179>; the Iraq Body Count, which collects statistics primarily about civilian deaths in Iraq since 2003 <www.iraqbodycount.org>; and the International Committee of the Red Cross, <www.icrc.org/en/what-we-do/protecting-civilians>.

⁴ Colin H. Kahl, ‘In the Crossfire or the Crosshairs? Norms, Civilian Casualties, and U.S. Conduct in Iraq’, *International Security*, 32/1 (2007), 7–46. Recent (Libya)

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Killing civilians is worse than killing soldiers. This is not a rule of thumb. It is not a guideline to help the hard-pressed through the exigencies of combat. It is an irreducible feature of our moral landscape. And killing civilians is worse than killing soldiers, no matter how just or unjust the cause. Whether you're in the Wehrmacht artillery or British Bomber Command, Islamic State or the Peshmerga, killing civilians is worse than killing soldiers.

Few moral principles are more widely and viscerally affirmed than this one. And yet its foundations are shallow and cracked. This book is my attempt to shore up its support. The first step is to be more precise. I will defend this principle:

Moral Distinction: In war, with rare exceptions, killing noncombatants is worse than killing combatants.

Some clarifications: 'civilians' and 'soldiers' are more euphonious, but the fundamental categories here are noncombatants and combatants. I will use these pairs of terms interchangeably; but I endorse a definition of noncombatant and combatant status informed by international law. Combatants are members of the armed forces of a group at war and non-members who directly participate in hostilities. Non-combatants are not combatants.⁵ I will use 'just combatants and noncombatants' for those whose side is fighting permissibly and 'unjust combatants and noncombatants' for those whose side is fighting impermissibly.

Second, I named the principle for the moral distinction between harms inflicted on civilians and soldiers in war. It is inspired by, but differs from, the principle of distinction in the laws of armed conflict, which prohibits targeting civilians.⁶ *Moral Distinction* makes

and ongoing (Syria/Northern Iraq) interventions in the Middle East have been provoked by anti-civilian violence.

⁵ There are, in fact, two roles for combatant status in international law: to identify legitimate military targets; and to assign the right to use force. I am here interested only in the first of those roles (not everyone who is a legitimate military target has war rights under international law). See Articles 43, 48, and 51(3) of the First Additional Protocol.

⁶ This is the ICRC's statement of the Principle of Distinction: 'The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may

a comparative claim, rather than specifying a prohibition; and it covers all kinds of killing, whether intentional, incidental, or accidental. It therefore underpins the principle of distinction and the other core principles of the laws of armed conflict: proportionality and precautions in attack (Articles 51 and 57 of the First Additional Protocol). I say more on this below.

Third, by ‘X is worse than Y’, I mean ‘X is *pro tanto* more seriously fact-relative wrongful than Y’. I introduce each term in this relation below. In brief, it means that, holding constant the numbers affected, the degree of harm, and the aim sought, the objective moral reasons against X are weightier than those against Y. This is consistent with Y not being wrongful at all.

Fourth, I focus on killing, but everything I say applies to other harms as well.

Fifth, I focus on *killing*, not on deaths. My central concern is to show that it is worse to kill civilians than to kill soldiers, not that civilians’ deaths are worse than soldiers’ deaths. The truth of the first thesis does not entail the truth of the second. I think both are true, and the arguments for the first provide some support to the second, but the first is my focus. Again, more on this below.

Last, *Moral Distinction* allows for exceptions. These will be relatively rare, but they must be acknowledged. For example, prisoners of war and combatants who are wounded and *hors de combat* are still combatants, but killing them is often as bad as killing civilians. The best arguments for *Moral Distinction* will help us account for this.

2. Toolkit

My positive arguments for *Moral Distinction* should be available to all those who care about civilians in war. My ambitions are general. But

only be directed against combatants. Attacks must not be directed against civilians.’ Some legal scholars divide this into two components: to distinguish, and to attack only combatants. See Adil Ahmad Haque, ‘Protecting and Respecting Civilians: Correcting the Substantive and Structural Defects of the Rome Statute’, *New Criminal Law Review*, 14/4 (2011), 519–75.

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no argument can do without a conceptual toolkit. I advance mine in the twin hopes that it involves no more theoretical commitments than I need, and that the ensuing arguments could be expressed in a different idiom, to convince those who reject something in their foundations.

Everything starts with rights. Persons have a right to life, which protects their interest in living.⁷ Sometimes that protection can be weakened or lost. In particular, when killing someone is a necessary and proportionate means to avert an unjustified threat, for which she is sufficiently responsible, then she is *liable* to be killed and killing her does not infringe her right to life: killing her does not wrong her at all. Killing her is proportionate if the threat posed is serious enough to make her liable to be killed to avert it. It is necessary if no other less harmful means could avert the threat.⁸ When someone is not liable to be killed, I will call her *innocent*.

Any theory of liability must posit some degree of responsibility for a threat that is enough to render one liable to be killed. There are two broad approaches. The first is comparative. It says that what matters is simply the comparison between the potentially liable individual—call her Target—and the person whose life can be saved by averting that threat—call her Victim. As long as Target is more responsible for the threat than Victim, Target is responsible enough to be liable to be killed.

Non-comparative theories of liability argue that it is not enough for Target to merely be more responsible than Victim. She must also be responsible *enough*. Perhaps it would be marginally better, from an impersonal perspective, for Target to die than for Victim to do so, because Target is somewhat more responsible than Victim. But that alone cannot make Target liable to be killed, because she has moral status, which protects her against marginal interpersonal trade-offs

⁷ What makes an entity qualify for personhood is a vexed issue, which I do not address here. For a more detailed account of my theory of rights, see Seth Lazar, 'The Nature and Disvalue of Injury', *Res Publica*, 15/3 (2009), 289–304.

⁸ This is a simplification; for more detail, see Seth Lazar, 'Necessity in Self-Defense and War', *Philosophy and Public Affairs*, 40/1 (2012), 3–44.

(this will be a recurring theme in this book). Her status generates a presumption against killing her to save another's life for the sake of realizing a marginally better outcome, which can be overridden or defeated only by weighty moral considerations. If Target is substantially responsible for an unjustified threat to Victim—if she poses the threat herself, for example, or if she culpably contributes to it—that can vitiate her claim not to be sacrificed for Victim's sake.⁹

When an act is wrong, it is morally impermissible. When it is *pro tanto* wrongful, a moral reason tells against it; it would be wrong were no other moral reasons at stake.¹⁰ Normally, wrongful acts have a victim—the person who is wronged. An act can be overall permissible despite being *pro tanto* wrongful, if weighty reasons in favour override the reasons against. Since I focus throughout this book on *pro tanto* wrongfulness, I will omit '*pro tanto*' except for emphasis.

Killing the innocent is wrongful. Even when it is overall permissible as a lesser evil, the victim has a justified complaint against the agent who infringed her rights. Killings can be more or less gravely wrongful: consider the difference between murder and manslaughter, for example. Killing is generally more seriously wrongful than other kinds of harm. For seriously wrongful acts to be all things considered permissible, the overriding reasons must be proportionately weighty.

The wrongfulness of killing is a matter of both *agent-relative* and *agent-neutral* reasons.¹¹ Roughly, reasons are agent-relative when

⁹ Some hold a non-comparative view, but think the stakes can affect what degree of responsibility is required—if more can be achieved by killing a person, a lesser asymmetry is sufficient. Jeff McMahan has suggested this view in discussion, and it is implied in Jeff McMahan, *Killing in War* (Oxford: OUP, 2009), 227.

¹⁰ I understand reasons as simply considerations that count in favour of or against some action or proposition.

¹¹ The agent-relative/agent-neutral distinction was popularized in: Thomas Nagel, *The View from Nowhere* (Oxford: OUP, 1986), 152; Derek Parfit, *Reasons and Persons* (Oxford: Clarendon Press, 1984), 104; Philip Pettit, 'Universalizability without Utilitarianism', *Mind*, 96/381 (1987), 75. My own understanding is informed primarily by David McNaughton and Piers Rawling, 'Agent-Relativity and the Doing-Happening Distinction', *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition*, 63/2 (1991), 167–85; David McNaughton and Piers Rawling, 'Value and Agent-Relative Reasons', *Utilitas*, 7/1 (1995), 31–47; Douglas W. Portmore, 'McNaughton

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they apply specifically to the agent; they are agent-neutral when they are reasons for everyone. We all have agent-neutral reasons to prevent innocent deaths. But we have agent-relative *as well as* agent-neutral reasons not to kill. This is why ‘killing civilians is worse than killing soldiers’ is not equivalent to ‘civilians’ deaths are worse than soldiers’ deaths’. My arguments in this book focus on agent-relative reasons, though they all give grounds as well for thinking that killing civilians is agent-neutrally worse than killing soldiers.

An act can be wrongful in at least three senses.¹² It is *fact-relative wrongful* if it is wrongful in light of all the non-moral facts.¹³ It is *evidence-relative wrongful* if it is wrongful in light of the agent’s evidence. And it is *belief-relative wrongful* if it is wrongful in light of the agent’s beliefs. I will use ‘fact-relative’ and ‘objective’ interchangeably, and employ ‘subjective’ as an umbrella term to cover ‘evidence-relative’ and ‘belief-relative’ wrongfulness. In this book I focus on objective wrongfulness.

3. Why Moral Distinction Matters

The laws of armed conflict protect civilians through the principles of noncombatant immunity (also known as the principle of distinction), proportionality, and precautions in attack. These are most influentially articulated in the First Additional Protocol to the Geneva conventions.¹⁴ Noncombatant immunity protects civilians against intentional attack (e.g. Article 48). Proportionality protects them against excessive incidental harm (e.g. Article 51). Precautions in

and Rawling on the Agent-Relative/Agent-Neutral Distinction’, *Utilitas*, 13/3 (2001), 350–6.

¹² This terminology was introduced by Derek Parfit, *On What Matters* (Oxford: OUP, 2011), ch. 7. See also Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford: OUP, 2011), ch. 10.

¹³ Parfit writes that an act is ‘*wrong* in the *fact-relative* sense just when this act would be wrong in the ordinary sense if we knew all of the morally relevant facts’ (Parfit, *On What Matters*, 150). However, what matters is not whether we know the facts, but what the facts are.

¹⁴ See Roberts and Guelff, *Documents*, 419–80.

attack requires belligerents to take measures to reduce the risk to civilians, for example by choosing objectives that minimize civilian casualties, and warning them of impending attacks (e.g. Article 57).

These laws, and the norms that underpin them, are under constant pressure. Each imposes costs on belligerents, requiring them to take additional risks, and depriving them of tactical options that could improve their chances of success. Each principle must be constantly buttressed and reaffirmed, so that they hold up when hard-pressed military and political leaders are tempted to disregard them. *Moral Distinction* is essential to that process. If we cannot vindicate *Moral Distinction*, then we cannot endorse any of these more substantial protections. If killing civilians is not worse than killing soldiers, then either soldiers and civilians should enjoy the same protections, making it impossible to fight wars legally, or the standards that currently apply to soldiers should be extended to civilians, legitimating a form of total war. *Moral Distinction* does not entail noncombatant immunity, proportionality, or precautions in attack. But it is necessary to their justification.

Moral Distinction is not only essential to limiting armed conflict. It is also crucial to its justification. Even in the ‘best’ wars, and certainly in the kinds of morally mixed wars we more commonly fight, we invariably kill many innocent people.¹⁵ If any such wars are to be justified, we must explain how violating some people’s rights to life can be a permissible lesser evil. And we must do so without over-generating permissions. In particular, we must argue that killing innocent unjust combatants can be permissible, but that killing innocent unjust noncombatants is not. *Moral Distinction* is a central premise in that argument.¹⁶

¹⁵ Seth Lazar, ‘Responsibility, Risk, and Killing in Self-Defense’, *Ethics*, 119/4 (2009), 699–728; Seth Lazar, ‘The Responsibility Dilemma for *Killing in War*: A Review Essay’, *Philosophy and Public Affairs*, 38/2 (2010), 180–213.

¹⁶ For more on lesser-evil justifications for killing in war, see Seth Lazar, ‘Associative Duties and the Ethics of Killing in War’, *Journal of Practical Ethics*, 1/1 (2013), 3–48.

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4. Moral Distinction in Trouble

In *Just and Unjust Wars*, Michael Walzer offered a simple account of the permissibility of killing in war, which translates easily into a defence of *Moral Distinction*.¹⁷ Civilians and soldiers all start with rights to life. But soldiers pose lethal threats, so lose that right. Killing civilians violates their rights; killing soldiers does not, so killing civilians is worse than killing soldiers. In recent years, however, philosophers have exposed the flawed machinery behind this welcome result, and doubt has settled in. Walzer had his facts wrong: many soldiers contribute no more to threats than do many civilians. Worse, his account of how one loses the right to life is mistaken.¹⁸ Posing a threat is neither necessary nor sufficient for one to become liable to be killed.

The critique of Walzer has been compelling; but his critics have proved too much. They cannot explain why killing civilians is worse than killing soldiers. On their revisionist view, one loses the right to life by being responsible for contributing to unjustified threats.¹⁹ Yet, first, this principle does not distinguish between killing civilians and soldiers on the just side (if there is one).²⁰ Second, many soldiers and civilians are equally responsible for such contributions; indeed, many soldiers and civilians are not responsible at all.²¹

¹⁷ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 2006).

¹⁸ See e.g. Robert Holmes, *On War and Morality* (Princeton: PUP, 1989); Jeff McMahan, 'Innocence, Self-Defense and Killing in War', *Journal of Political Philosophy*, 2/3 (1994), 193–221; Richard Norman, *Ethics, Killing and War* (Cambridge: CUP, 1995); David Rodin, *War and Self-Defense* (Oxford: Clarendon Press, 2002); Tony Coady, *Morality and Political Violence* (Cambridge: CUP, 2008); McMahan, *Killing in War*.

¹⁹ See e.g. McMahan, 'Innocence'; Jeff McMahan, 'The Ethics of Killing in War', *Ethics*, 114/1 (2004), 693–732; Cécile Fabre, *Cosmopolitan War* (Oxford: OUP, 2012); Helen Frowe, *Defensive Killing* (Oxford: OUP, 2014).

²⁰ McMahan, 'Killing in War', 718; McMahan, *Killing in War*, 16; Fabre, *Cosmopolitan War*, 72–5.

²¹ McMahan, 'Innocence': 210; Lazar, 'Responsibility Dilemma'; Noam J. Zohar, 'Innocence and Complex Threats: Upholding the War Ethic and the Condemnation of Terrorism', *Ethics*, 114/1 (2004), 742.

The first point is widely acknowledged by revisionist just war theorists; indeed, they often regard it as a feature, not a bug, of their view.²² This is a mistake, which the arguments of this book can help to remedy. The second point is more controversial, and bears some elaboration.

We can start by distinguishing between two broad approaches to specifying when one is liable to be killed. A *low-threshold* view allows that some minimal degree of responsibility for contributing to an unjustified threat can render one liable to be killed.²³ A *high-threshold* view requires a high degree of responsibility—for example, that one pose the threat oneself or culpably contribute to it. In principle, these two approaches cut across the comparative/non-comparative distinction I have drawn, but in practice comparativists will typically endorse the low-threshold view and non-comparativists a high threshold.

The next step is to advance an empirical generalization about responsibility in war:

Overlap Hypothesis: A morally significant proportion of noncombatants are as responsible as a morally significant proportion of combatants for contributions to unjustified threats.²⁴

By ‘a morally significant proportion’, I mean that the overlap is not slight enough to yield only ‘rare exceptions’. Nor is it a coextension: it is consistent with most combatants being more responsible than most noncombatants. As already noted, revisionists readily concede that killing just noncombatants is no worse than killing just combatants. They should not do so, but set that aside for now: the *Overlap Hypothesis* is true for unjust combatants and unjust noncombatants as well, and that poses a more serious problem for their view.

The problem is this: if we make the liability threshold low enough to ensure that all unjust combatants are liable, we will make too many unjust noncombatants liable as well. If we endorse a high threshold

²² See esp. Frowe, *Defensive Killing*.

²³ Note that one can be responsible for contributing to a threat either through action or omission. On this, see chapter 6. Thanks to Steve Woodside for discussion of this point.

²⁴ This reformulates my central point in Lazar, ‘Responsibility Dilemma’.

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of responsibility for liability, then we will find that too few unjust combatants are liable. The first would radically undermine the protection of noncombatants in war; the second would leave us without legitimate means to fight otherwise just wars. And there is no ‘Goldilocks’ position. If we adopt a mid-level threshold of responsibility for liability, too many combatants and noncombatants will be innocent and liable respectively.

This responsibility dilemma throws into doubt the possibility of fighting a just but restrained war. If the low-threshold view is right, then many of the restraints that *Moral Distinction* underpins would be radically weakened in force and scope. If many civilians are liable to be killed, then they should not enjoy the protections international law currently affords them.

But if the high-threshold view is right, then fighting just wars becomes incredibly difficult. Innocent and liable soldiers will inevitably be intermingled. In the absence of ‘liability-seeking missiles’, we cannot possibly confine our attacks only to the liable. We must therefore either endorse pacifism (if we think nothing could justify us in overriding so many rights to life) or we must explain why intentionally killing so many innocent soldiers can be objectively justified as a lesser evil. Moreover, we must do so without rendering attacking innocent civilians a permissible lesser evil too, on pain of again endorsing a wholesale onslaught on the protection of civilians in war.

This is about objective justification, not about the difficulty of applying our objective moral theory in the confusing circumstances of war. We are unable to intentionally kill only the liable, and we know this from the outset. If the high-threshold view is right, then we will invariably intentionally kill many innocent people, including many innocent unjust combatants. So warfare can be permissible only if killing those innocents is an objectively permissible lesser evil. But if attacking innocent combatants can be objectively permissible, then why not also attacking innocent noncombatants?

Is the *Overlap Hypothesis* true? It is an empirical thesis, so proving it would require detailed empirical enquiry into the contributions of

combatants and noncombatants to their political communities' military efforts. Since individual rights are at stake, we would have to look at individuals' contributions. This would be a mammoth task, and is beyond me.²⁵ However, some general empirical research is relevant, as are some a priori reasons in favour of the *Overlap Hypothesis*.

First, distinguish between different categories of threat in war. Micro-threats are threats to specific people's lives; the macro-threat is the overarching threat posed by one belligerent to the other—for example, a threat to territorial integrity or political sovereignty. The best argument for the *Overlap Hypothesis* shows that many combatants make negligible, unnecessary, causal contributions to micro- and macro-threats; many noncombatants do the same, and those combatants are no more culpable for their contributions than are the noncombatants.

²⁵ Although notice that many philosophers explicitly or implicitly endorse the *Overlap Hypothesis*. For example, see Richard J. Arneson, 'Just Warfare Theory and Noncombatant Immunity', *Cornell International Law Journal*, 39 (2006), 667; Michael Gross, *Moral Dilemmas of Modern War: Torture, Assassination and Blackmail in an Age of Asymmetric Conflict* (Cambridge: CUP, 2010), 159; Noam J. Zohar, 'Collective War and Individualistic Ethics: Against the Conscriptio of "Self-Defense"', *Political Theory*, 21/4 (1993), 615; Asa Kasher and Amos Yadlin, 'Military Ethics of Fighting Terror: An Israeli Perspective', *Journal of Military Ethics*, 4 (2005), 13–14; Jeff McMahan, 'Killing in War: A Reply to Walzer', *Philosophia*, 34/1 (2006), 50–1. Empirical research on this topic is scarce, but for supporting evidence, see Benjamin Valentino, Paul Huth, and Sarah Croco, 'Bear Any Burden? How Democracies Minimize the Costs of War', *Journal of Politics*, 72/2 (2010), 531; Alexander Downes, 'Desperate Times, Desperate Measures: The Causes of Civilian Victimization in War', *International Security*, 30/4 (2006), 157–8; Benjamin Valentino, Paul Huth, and Dylan Balch-Lindsay, "'Draining the Sea": Mass Killing and Guerrilla Warfare', *International Organization*, 58/2 (2004), 379. Hugo Slim offers a detailed qualitative discussion of the ways in which civilians have been implicated in warfare throughout history: Hugo Slim, *Killing Civilians: Method, Madness and Morality in War* (London: Hurst, 2007), 148–9, 89–205. Besides the obvious points about taxes and industrial support, Slim writes, 'Social connection offers sustenance of a different but important kind to economic activity in war. If labour can be used to convert economic capital into weapons and supplies, relationships can act to convert social capital into morale. Having access to such social and emotional capital is integral to any war effort. The knowledge that one is fighting for a group, protecting a family or preserving a way of life or a set of beliefs is vital to a people fighting at the front. And the knowledge that your people are supporting you gives purpose and courage to armed forces of all kinds. Warriors are fed by affection as well as food.' (Slim, *Killing Civilians*, 195). He also notes, astutely, that 'the majority of politicians and commanders leading their nation or community into war desperately want to involve civilians in this way' (ibid. 204–5).

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Broadly speaking, there are two ways to contribute to micro- and macro-threats. Either one is the agent of the threat or one contributes to a threat ultimately posed by someone else. Whether through fear, disgust, principle, lack of opportunity or ineptitude, many combatants are wholly ineffective in war, and make little or no contribution either to specific micro-threats or to the macro-threat posed by their side (some are a positive hindrance). The much-cited research of Brigadier-General S. L. A. Marshall claimed that only 15 to 25 per cent of Allied soldiers in the Second World War who could have fired their weapons did so.²⁶ Marshall's research methods have been criticized,²⁷ but others corroborate his basic findings, arguing that most soldiers have a natural aversion to killing, which even intensive psychological training may not overcome.²⁸ This is especially likely in the less professional armies against which liberal democracies tend to fight.²⁹

Many other combatants play only a facilitating role, without directly contributing to specific micro-threats. Military units rely on cooks, medics, mechanics, and engineers, who support their more lethal comrades. These are especially numerous in the air force and the navy: for example, a Nimitz-class aircraft carrier has a crew of over 5,500, but houses only sixty to eighty aircraft and has around ten principal armaments. Only a very small proportion of the crew can be directly responsible for specific micro-threats.³⁰ Many of the rest facilitate those threats, and so make only small contributions to the overall macro-threat.

Other combatants neither pose nor contribute to immediate micro-threats, and also do little or nothing to advance the overall macro-threat. Consider, for example, reservists behind enemy lines, who have yet to arrive at the front; or a company that has finished its tour of duty and is being withdrawn; or an enemy barracks, when all

²⁶ S. L. A. Marshall, *Men Against Fire* (Gloucester: Peter Smith, 1978).

²⁷ Joanna Bourke, *An Intimate History of Killing* (London: Granta, 1999).

²⁸ David Grossman, *On Killing* (London: Back Bay Books, 1995); David Lee, *Up Close and Personal* (London: Greenhill, 2006); Mark Nicol, *Condor Blues* (Edinburgh: Mainstream, 2007).

²⁹ Grossman, *On Killing*.

³⁰ Thanks to Klem Ryan for suggesting this.

but those keeping watch are asleep. Consider also support staff who play an ostensibly restraining role, such as Judge Advocate Generals.

Finally, all wars are morally heterogeneous, with just and unjust operations and phases. Unjust combatants might contribute to limited just goals, while just combatants might contribute to unjust ones.³¹ In particular, individual acts of self- and other-defence by unjust combatants may often be permissible, for example when they are defending their own innocent compatriots against collateral or intentional harm.³² And if you are responsible only for justified threats, then you cannot be liable to be killed.

Meanwhile, individual noncombatants also contribute in negligible, insignificant ways to micro- and macro-threats posed by their community. In modern industrialized countries as much as 25 per cent of the population works in war-related industries;³³ we provide the belligerents with crucial financial and other services; we support and sustain the soldiers who do the fighting; we pay our taxes and in democracies we vote, providing the economic and political resources without which war would be impossible. Our contributions to the state's capacity over time give it the strength and support to concentrate on war. We contribute, too, to the fighting capacities of specific combatants: for example, the maths teacher who imparts to a student the skills later necessary to his role as a gunner; the parent who brings up a strong, lethal son. Even children might make relevant contributions, by motivating their parents to fight.³⁴ Nor is this observation new. In the twelfth century, John of Salisbury argued that:

The hand of the commonwealth is either armed or unarmed. The armed hand... performs the soldiering of camps and blood; the unarmed...

³¹ I give a detailed argument for how some unjust combatants can be justified in fighting in Lazar, 'Associative Duties'.

³² On this point, see Uwe Steinhoff, 'Jeff McMahan on the Moral Inequality of Combatants', *Journal of Political Philosophy*, 16/2 (2008), 220–6.

³³ Downes, 'Desperate Times', 157–8. See also Gross, *Moral Dilemmas of Modern War*, 159; Slim, *Killing Civilians*: 189–91; Valentino et al., 'Bear Any Burden?', 351; Zohar, 'Collective War', 615.

³⁴ Zohar, 'Collective War'.

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administers justice and, keeping holiday from arms, is enlisted in the service of the law. For not those alone do military service for the commonwealth who . . . ply their swords . . . against the foe, but also the advocates and pleaders of causes who . . . lift up the fallen, refresh the weary.³⁵

If some negligible degree of individual responsibility for the threats posed by our state is what grounds liability, then few of us will be immune.

These general empirical considerations are persuasive, but perhaps not decisive. We can bolster them by appealing to some further *a priori* reasons in favour of the *Overlap Hypothesis*. First, imagine the extraordinary good fortune that would be involved were the *Overlap Hypothesis* false. Revisionists want the costs of war to track responsibility. It would be remarkable if the chaos and carnage of war could reflect such an ambitious principle of justice. What matters for liability is *individual* responsibility. But individuals are radically heterogeneous; we differ in innumerable respects. It would be very surprising if merely being a member of the armed forces were enough to ensure that one is more responsible for unjustified threats than any person who is not a combatant.

This sort of good fortune is highly unlikely. I find the following description of warfare, from Michael Herr's memoir of the Vietnam War, much more realistic:

At night in Khe Sanh, waiting there, thinking about all of them (40,000 some said), thinking that they might really try it, could keep you up. If they did, when they did, it might not matter that you were in the best bunker in the DMZ, wouldn't matter that you were young and had plans, that you were loved, that you were a non-combatant, an observer. Because if it came, it would be a bloodswarm of killing, and credentials would not be examined.³⁶

Second, denying the *Overlap Hypothesis* implies an inadequate recognition of why warfare is so deeply problematic. If the harms inflicted in war could be apportioned to their victims' degree of responsibility, then

³⁵ In Reichberg et al., *Ethics of War*, 127.

³⁶ Michael Herr, *Dispatches* (London: Picador, 2004), 134.

fighting war would not be as morally troubling as it self-evidently is. Part of the tragedy of warfare is that, even when we have profoundly weighty reasons to fight, doing so inevitably involves so much morally objectionable killing. The *Overlap Hypothesis* explains why this is so; its denial asserts the possibility of a morally pure war, which any serious account of war's morality should view as a contradiction in terms. Killing in war is inherently chaotic and impersonal. Any theory of our right to life that is sufficiently indiscriminating to render this carnage rights-consistent is not discriminating enough to be an adequate theory of our right to life.

Third, conceding the truth of the *Overlap Hypothesis* is an important corollary of rejecting an unattractive picture of responsibility for warfare. In modern democratic states, our armed forces are our agents, subject to civilian control.³⁷ They fight at the behest of leaders whom we elect, and with resources that we provide. To deny that the civilian populations they serve bear any responsibility for their wars is either to doubt whether the armed forces are genuinely subject to democratic control or to outsource responsibility for the actions of our community. While none of us lives in perfect democracies, we cannot dissociate ourselves so thoroughly from the moral implications of our agents' actions. We have already shifted the physical burdens of our wars onto a subset of the population; we cannot defensibly shift the moral burdens as well.³⁸

Finally, even those who still insist that combatants are consistently more responsible for unjustified threats than noncombatants in war should be moved by the following objection. As we have seen, they must determine where the threshold of responsibility for liability should fall. Suppose that we set the threshold very low, and say that when killing A is a necessary means to avert a sufficiently serious unjustified threat, if A is at all responsible for that threat coming about, then she can be liable to be killed. On this low-threshold view,

³⁷ Of course, in non-democratic states this is not true; equally, however, members of the armed forces of those states are often proportionately less responsible for their role therein.

³⁸ Cheyney Ryan, *The Chickenhawk Syndrome: War, Sacrifice, and Personal Responsibility* (London: Rowman & Littlefield, 2009).

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few people in a modern state will escape liability—as already noted, most of us, even children, contribute, however marginally and insubstantially, to our government’s capacity to wage wars. Clearly this is too little responsibility to ground liability to be killed.

But the only explanation of this judgement is that we think there should be some degree of ‘fit’ between what the target has done and the fate of losing her right to life. This judgement reflects an implicit commitment to a high non-comparative threshold, below which one is simply not responsible enough to be liable to be killed. But if there has to be a fit between what you have done and your becoming liable to be killed, then how can we assert that all the combatants whom we will intentionally kill in war are liable? They are unified only by their combatant status. Their responsibility for unjustified threats will vary widely. It should be a truism about war that this fit does not obtain for many of them. To render all the combatants whom we will intentionally kill liable to be killed, we need to deny the need for a fit between degree of responsibility and the fate of losing one’s right to life; but if we deny that fit, then we cannot deny that many noncombatants will also be liable to be killed in war.

Competing speculations about the *Overlap Hypothesis* will never be decisive. But the general empirical case seems sound, and these a priori arguments give further support. In the rest of this book, I will steer clear of wishful thinking and presuppose that the Hypothesis is true. Even in the ‘best’ wars, a morally significant proportion of enemy soldiers and civilians will be responsible to just the same degree for contributing to unjustified threats. If we are to defend *Moral Distinction*, therefore, we cannot rely on responsibility alone.

However, the arguments that follow do not depend on endorsing my broader view of the morality of war, or even on endorsing the *Overlap Hypothesis*. Even if you think that (amazingly) we can fight wars in which all and only unjust combatants are liable to be killed, *Moral Distinction* is still a highly plausible principle, and your theory is strengthened if you can explain it.³⁹ If the invasion of Iraq in 2003

³⁹ Some philosophers now argue that liability and lesser-evil justifications can subsist alongside one another, so that even if a given unjust combatant is not liable

was unjust, then each Iraqi combat death was wrongful. But killing the thousands of civilians who died in that invasion was still worse. All killing in the pursuit of unjust aims is wrong. But some such killings are clearly worse than others.⁴⁰ Vindicating this judgement enhances any account of the morality of war; failing to do so is a serious theoretical cost.

5. Arguing for *Moral Distinction*

Everyone needs an argument for *Moral Distinction*. The best defence of this principle will rest on multiple overlapping foundations—properties that consistently but contingently co-vary with noncombatant status. Each of these properties makes killing civilians worse than killing soldiers. Each will have exceptions, but taken together they will robustly protect civilians in war. And if a civilian or soldier is an exception to each of the overlapping foundations, then she is a legitimate exception to the principle. In other words, it is not combatant or noncombatant status that explains *Moral Distinction*, but rather these other morally relevant properties. In this book, I focus on the core arguments explaining why killing civilians is worse than killing soldiers. Examining in detail the fuzzy line between these

to be killed, as long as he is liable to *some* harm, the additional harm beyond what he is liable to can be justified as a lesser evil. Whatever the merits of this mixed-justification view, note that the same dilemma arises here as before. Many noncombatants will be responsible to just the same degree as many combatants, so like those combatants will be liable to some harm, if not liable to be killed. So, if a mixed justification makes it permissible to kill those combatants, it will do the same for those noncombatants. This means that we still need *Moral Distinction* both to justify killing combatants in war and to rule out killing noncombatants. See Jeff McMahan, 'Who is Morally Liable to be Killed in War?', *Analysis*, 71/3 (2011), 544–59; Jeff McMahan, 'What Rights may be Defended by Means of War?', in Seth Lazar and Cécile Fabre (eds), *The Morality of Defensive War* (Oxford: OUP, 2014), 115–58; Saba Bazargan, 'Killing Minimally Responsible Threats', *Ethics*, 125/1 (2014), 114–36.

⁴⁰ As one reflection of how widespread this judgement is, note how easy it is to find sources on how many civilians died in the Iraq invasion (estimates vary from around 3,500 to around 7,500), and how hard to find statistics on the number of combatant deaths. See <www.comw.org/pda/0310rm8.html>, <<http://costsofwar.org/sites/default/files/articles/15/attachments/Iraqciv2013.pdf>>, <<https://www.iraqbodycount.org>>.

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classes is beyond my remit. But we can arbitrate hard cases by considering whether and how these properties apply.

Although responsibility and liability cannot alone explain the ethics of killing in war, they are nonetheless essential. Any defence of *Moral Distinction* must start with liability, since this is the most important determinant of permissible killing in war. I think the best approach is to start with a high threshold, grounded in the non-comparative view of liability. On this view, almost all noncombatants are innocent in war. The negligible, unnecessary, marginal contributions that they make to the threats posed by their community are not substantial enough to make them liable to be killed. The necessary fit between their behaviour and that fate is missing. I will not argue at length for this threshold, though my considered judgement on this is as firm as any such judgement I can make, and certainly firmer than my intuitions about any of the elaborate hypothetical cases usually invoked to challenge this view. Indeed, I think a test of the plausibility of a theory of liability is whether it leaves ordinary civilians liable to be killed in war. If it does, then it had better have some serious theoretical virtues to overcome that counterintuitive result. That said, some of the arguments to follow would work for a low threshold as well.

Of course, even on a high-threshold view, some civilians can be liable. Political leaders, some financiers, media moguls, and other such figures of influence might be liable to be killed in virtue of influencing others to fight unjust wars. But almost all ordinary non-combatants are innocent. This is the first step on the path to *Moral Distinction*, but it is also a crucial premise in the arguments for noncombatant immunity, proportionality, and precautions in attack. Those principles presuppose not only that killing civilians is worse than killing soldiers, but that killing civilians is very bad indeed. We need both the relative and the absolute claim to get those constraints off the ground.

If so many noncombatants are innocent, then many combatants will be innocent too. Few on the just side will be liable, but many unjust combatants will also be innocent. The argument for *Moral*

Distinction, then, is disjunctive: killing civilians is worse than killing soldiers, either because the soldiers are liable and the civilians are not, or because killing innocent civilians is worse than killing innocent soldiers. My focus in this book is on the second disjunct.

6. Prospectus

In the remaining chapters of this book, I canvass five arguments for *Moral Distinction*. I begin by considering an instrumental case, according to which killing civilians is worse than killing soldiers, just because it is so ineffective that it cannot satisfy a necessity constraint on permissible killing.⁴¹ No doubt killing civilians is often wanton and pointless, which partly explains why it is so egregiously wrong. But this alone is not enough. Instrumental reasons are least effective when civilians are most vulnerable—when belligerents reasonably believe that harming civilians *does* minimize wrongful suffering, because it is necessary to achieve their aims.⁴² This is when civilians need *Moral Distinction* most, but instrumental arguments protect them least. Moreover, even if this instrumental argument could overcome these objections, it would vindicate *Moral Distinction* for the wrong reasons. The outrage we feel when villages are burned, hospitals gutted, and schools bombed is not pragmatically motivated.

⁴¹ George I. Mavrodes, 'Conventions and the Morality of War', *Philosophy and Public Affairs*, 4/2 (1975), 117–31; Janina Dill and Henry Shue, 'Limiting the Killing in War: Military Necessity and the St. Petersburg Assumption', *Ethics and International Affairs*, 26/3 (2012), 311–33.

⁴² For chilling historical research to support this point, see Benjamin A. Valentino, *Final Solutions: Mass Killing and Genocide in the Twentieth Century* (Ithaca, NY: Cornell University Press, 2004). For more recent examples, see the public justifications offered for the apparently disproportionate harms inflicted on Gazan civilians in the 2014 Gaza War, which appealed to their military necessity: Herb Keinon, 'PM: Terrorists Watching whether World Gives Immunity for Attacks from Schools, Homes', *Jerusalem Post*, 6 Aug. 2014, <www.jpost.com/Operation-Protective-Edge/WATCH-LIVE-Netanyahu-addresses-foreign-press-in-aftermath-of-Gaza-operation-370255>; Yishai Schwartz, 'Israel's Deadly Invasion of Gaza is Morally Justified', *New Republic*, 21 July 2014, <www.newrepublic.com/article/118788/israels-war-gaza-morally-justified>.

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The remaining chapters concentrate on non-instrumental arguments for *Moral Distinction*. Chapter 3 asks whether killing civilians in war makes use of them in an especially wrongful way, whereas killing soldiers involves a less objectionable form of harmful agency. Certainly, attacks on noncombatants are often *opportunistically* intended: twentieth-century strategic bombing, for example, was explicitly conceived as a means to ‘break the will’ of the adversary, either coercing its leaders to surrender or causing the polity to rise up and overthrow them.⁴³ Attacks on combatants, by contrast, are often *eliminative*: the defender gains nothing by killing them that he would not have enjoyed in their absence. If opportunistic killings are worse than eliminative ones, then killing civilians is worse than killing soldiers.

In Chapter 4 I turn to risk. I first argue that riskier killings are, other things equal, worse than less risky killings. I then argue that, because civilians are more likely to be innocent than are soldiers, with rare exceptions, killing civilians is riskier than killing soldiers. So, I conclude, killing civilians is worse than killing soldiers.

Chapter 5 explores the moral significance of vulnerability and defencelessness. I first analyse these much-used but undertheorized concepts, then present several arguments to show that killing the vulnerable and defenceless is, other things equal, worse than killing those who are less vulnerable and defenceless. I then show that civilians are more vulnerable and defenceless than are soldiers.

All the arguments so far focus on showing that killing civilians is worse than killing soldiers. In Chapter 6, I shift focus, and argue that killing soldiers is better than killing civilians. In other words, I argue for ‘combatant non-immunity’, focusing on combatants’ recklessness, their willingness to draw fire away from their civilian population, arguments from complicity and positive duties, on the legal standing of killing in war, and on combatants’ voluntary exposure of themselves to risk.

⁴³ Giulio Douhet, *The Command of the Air* (Washington, DC: Office of Air Force History, 1983).

Each of the arguments presented in Chapters 2–6 contributes to the justification of *Moral Distinction*. Each is subject to exceptions. Only when all are considered in concert do we have grounds for this principle that are as robust as its intuitive support.

In the Battle of the Bzura, September 1939, the German 10th Army crushed several infantry divisions of the Polish Army. The Wehrmacht killed perhaps 20,000 Polish soldiers. At the same time, Nazi forces were carrying out Operation Tannenberg, slaughtering 20,000 Polish civilians over two months, shot and buried in mass graves. No doubt, the invading army wrongly killed those Polish soldiers. But killing those civilians was still worse.

In Syria and Northern Iraq, in 2014, the Islamic State was locked in battle with the Peshmerga. If ever there was a just cause, it was defending Kurdistan against the predations of these Manichaeen militants. Almost certainly, every Peshmerga guerrilla killed by Islamic State was killed wrongfully. But still, IS attacks on Yazidi civilians were worse.

These judgements reflect the common-sense morality of war, and *Moral Distinction* is at its heart. Until recently, it stood at the centre of just war theory too. But recent work has undermined familiar arguments in *Moral Distinction*'s favour. It has suggested that the real dividing line is between the just and the unjust, the responsible and the non-responsible. And that division does not respect the line between combatants and noncombatants.

At the same time, more and less scrupulous militants, politicians, and public intellectuals have espoused similar views in public debates over the ethics of force. They say that civilians' responsibility for the actions of their elected officials deprives them of their privileged status, leaving them no different from combatants.⁴⁴ They say that

⁴⁴ See e.g. Osama bin Laden's 'Letter to America', and the equally poisonous online editorial of retired Major-General Giora Eiland (a former Chief of the Israeli National Security Council). Osama Bin Laden, 'Letter to America', *Guardian*, <www.theguardian.com/world/2002/nov/24/theobserver>; Giora Eiland, 'In Gaza, there is No Such Thing as "Innocent Civilians"', *Ynetnews.com* (2014), <www.ynetnews.com/articles/0,7340,L-4554583,00.html>. Still more disturbing—because of the publication

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the potential that any civilian will be conscripted makes them all legitimate targets.⁴⁵ They say that we must abandon restraint or else unjust foes will take advantage of our reserve.⁴⁶ They say that anyone killed by a drone attack counts as a combatant, just in case he is male, and of military age.⁴⁷

Almost everyone agrees that killing civilians is worse than killing soldiers. But the voices of dissent are getting louder. No principle is more fundamental to the ethics of war than this one. We should mobilize all the resources of moral and political philosophy in its defence.

venue, and the audience reached—is a similar argument made by Thane Rosenbaum in the *Wall Street Journal*: Thane Rosenbaum, ‘ Hamas’s Civilian Death Strategy’, *Wall Street Journal* (2014), <www.wsj.com/articles/thane-rosenbaum-civilian-casualties-in-gaza-1405970362>. It was syndicated to (at least) *The Australian* and *Jerusalem Post*.

⁴⁵ As discussed (with a quote from Sheikh Ahmed Yassin, one of the founders of Hamas) in this Human Rights Watch report: *Erased in a Moment: Suicide Bombing Attacks against Israeli Civilians* (New York: Human Rights Watch, 2002). See <www.hrw.org/reports/2002/isrl-pa/ISRAELPA1002-04.htm#P678_150385>.

⁴⁶ Schwartz, ‘Israel’s Deadly Invasion’; Keinon, ‘Terrorists Watching’.

⁴⁷ Scott Shane and Jo Becker, ‘Secret “Kill List” Proves a Test of Obama’s Principles and Will’, *New York Times*, <www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?smid=pl-share>.