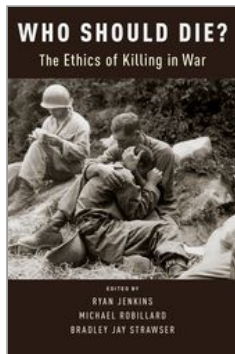


University Press Scholarship Online

Oxford Scholarship Online



Who Should Die?: The Ethics of Killing in War

Bradley Jay Strawser, Ryan Jenkins, and Michael Robillard

Print publication date: 2018

Print ISBN-13: 9780190495657

Published to Oxford Scholarship Online: November 2017

DOI: 10.1093/oso/9780190495657.001.0001

Distributing Death in Humanitarian Interventions

Lars Christie

DOI:10.1093/oso/9780190495657.003.0010

Abstract and Keywords

Armed military interventions often inflict large amounts of collateral harm on innocent civilians. Ought intervening soldiers, when possible, to direct collateral harm to one innocent population group rather than the other? Recently several authors have proposed that expected beneficiaries of a military intervention ought to carry greater risk of collateral harm than neutral bystanders who are not subject to the threat the military forces are intervening to avert. According to this view, intervening soldiers ought to reduce the risk of collateral harm to neutral bystanders, even if this means foreseeably imposing a somewhat higher overall number of collateral casualties among those for whom the intervention is conducted. This chapter raises a number of challenges to this view. Even if the beneficiary thesis is accepted with respect to discrete risk-imposing acts, it should not be with respect to risk-imposing strategies individuated on a war-by-war basis.

Keywords: beneficiary, bystander, collateral harm, innocent agent, military intervention

Introduction

The rights and liabilities of combatants have been subject to intense dispute in just war theory. One issue that has been particularly contested is whether combatants have equal rights and liabilities irrespective of which side of the war they are on, as long as they adhere to the *jus in bello* principles. Less attention has been given to the closely related question of the moral equality of noncombatants on either side of the conflict. Some authors have suggested that combatants may favor the lives of fellow noncombatant citizens over enemy noncombatants. One way to attempt to justify such a claim has been advanced by Thomas Hurka, who claims that combatants are under an associative duty to their fellow nationals, which requires them to differentiate between conational noncombatants and noncombatants belonging to an enemy state.¹ This view does not, however, rely on a claim about the unequal moral status of noncombatants on either side of the war but rather on the relationship between a combatant and noncombatants who belong to the same state or political entity. In cases where humanitarian intervention is carried out by a third party with no particular political or institutional relationship to any particular group of noncombatants, this argument has no purchase.

A few authors have directly challenged the idea of the moral equality of noncombatants. Independently, both Gerhard Øverland and Jeff McMahan have claimed that noncombatants differ with respect to an allegedly morally relevant **(p.187)** factor: whether or not they stand to benefit from a military intervention.² Using this criterion, Øverland and McMahan distinguish between expected beneficiaries of and bystanders to military action.³ Bystanders to military action do not contribute to either side of the conflict, nor do they stand to benefit from the goal of the military action. Examples of expected beneficiaries of a military intervention can be a persecuted minority within an oppressive regime who would benefit greatly if the regime was overthrown. Examples of neutral bystanders in this scenario can be nonoppressed fellow citizens or citizens of other nations who do not contribute to the oppression and who do not stand to benefit from the intervention. Both Øverland and McMahan claim that the immunity of the former group to collateral harm inflicted as part of a humanitarian intervention is weaker than the immunity of the latter. As McMahan puts it, “it does make a difference to the degree to which noncombatants are morally immune in war whether they are bystanders to military action or expected beneficiaries of it” (2010, p. 363). I will refer to this claim as the *beneficiary thesis*. The beneficiary thesis is not merely relevant in humanitarian interventions but in all cases where a third party has a choice between imposing an unavoidable harm associated with a defensive intervention on one innocent person or group rather than another. For instance, Helen Frowe has defended the relevance of the beneficiary thesis in wars of self-defense, suggesting that combatants must choose tactics that expose their own noncombatants to collateral harm rather than the noncombatants on the unjust side since the former group stands to benefit from their defensive action and not the latter.⁴ For reasons of space, I will not consider this extension of the beneficiary thesis here.

In the following two sections I clarify how I understand the beneficiary thesis and contrast it with other justifications of harm imposition. In the fourth section, **(p.188)** I review how the beneficiary thesis interacts with the thesis according to which there is a moral asymmetry between innocent threats and their victims. In this section, I argue that the two views are conceptually related since both are views that allow brute bad luck to determine a person's moral status. At the same time the two views also counterbalance each other: because the potential victim of an innocent threat is also the beneficiary of a defensive act against the threatener, the potential victim will have reduced immunity to the harm associated with this act. In the fifth section, I point out that an expected beneficiary could be defined either relative to a given epistemic perspective or relative to objective probabilities and that either alternative invites serious objections. In the sixth and final section I argue that the beneficiary thesis cannot be applied to war since noncombatants in war will not be expected beneficiaries of risk of collateral harm at the time this risk is imposed. Attempts at accommodating this objection by arguing that such noncombatants nevertheless have reduced immunity because they were expected beneficiaries when the intervention strategy was devised at the outset of the war fail because there is no reason to privilege this time to fix their status as expected beneficiaries. Once the beneficiary thesis is applied to strategies rather than discrete acts, I argue that there is no convincing argument for why this strategy should be individuated at the level of a single war. Since everyone is at risk of becoming exposed to wrongful threats at some point or another in our lives, the strategy we have most reason to accept is a higher-order strategy which minimizes unavoidable harm associated with rescue interventions in general, rather than a lower-level strategy specified on a war-by-war basis.

Between Liability and Lesser Evil

Before evaluating the beneficiary thesis, it is worth clarifying the notion of immunity and how it relates to the justifications for the infliction of nonconsensual harm. In spite of voluminous literature addressing the factors which govern liability to harm, less attention has been devoted to the notion of immunity to harm. One reason for this may be that most authors tie the concept of immunity directly to the concept of rights, either by understanding rights as immunities or by understanding rights as conferring immunities. On this reading, immunity is a statement about a person's moral status, where moral status tracks the moral protection conferred to an agent arising from his or her rights.⁵ This is the way the concept of *immunity* will be used here.

(p.189) One way in which agents can come to lose their immunity to harm is through rights forfeiture. Such agents are, following McMahan's usage of the term, liable to harm. Since liable agents are not immune to be harmed to avert a threat, harming them for this purpose (provided it is necessary and proportionate) does not wrong them. Exactly what it takes to forfeit one's right against harm is controversial, but standardly forfeiture-based liability is justified by reference to morally relevant internal and external facts about an agent. Internal facts are about the agent's mental state while acting (such as knowledge, intention, and beliefs) and external facts are about an agent's place in the local causal architecture, specifically whether he or she has causally contributed or is the causal antecedent of a threat of harm. Whereas internal facts are relevant to whether the agent fulfills the conditions for moral responsibility, external facts inform us about the causal relationship between an agent and a threat which the agent might be liable to be harmed to prevent.

In contrast to justifications that rely on forfeiture, impositions of harm that appeal to lesser-evil considerations do not appeal to facts about the agent on whom the harm is imposed. Lesser-evil justification appeals to the ratio between the harm averted and the harm caused and the mode of agency with which it is inflicted (especially whether it is foreseen or intended).

Although the immunity of a person is overridden when harm justified on lesser-evil grounds is imposed, his or her immunity, as a moral matter, remains intact. For example, to say that lesser-evil consideration can justify imposing proportionate collateral damage on noncombatants in war does not imply that victims of collateral harm have lost their immunity to this harm. To have one's immunity to harm overridden is distinct from having one's immunity undermined or lost through forfeiture, which is why victims of lesser-evil justified harm are entitled to compensation, whereas liable individuals standardly are not.⁶

The novelty of the beneficiary thesis is that it relies on a type of justification which does not invoke lesser evil considerations or the agent's rights forfeiture. Unlike lesser-evil considerations, it appeals to facts about the agent on whom the risk of harm is imposed. But unlike the forfeiture view, the beneficiary thesis only invokes external facts about the expected beneficiary's role in the causal architecture, not internal facts about his or her agency or moral responsibility for occupying this role.⁷

(p.190) By relying on this third type of justification, the beneficiary thesis distinguishes between the permissibility of imposing harms on neutral bystanders and expected beneficiaries, even though individuals in neither group have forfeited their rights and even though lesser-evil consideration gives us no reason to favor imposing harm on one group over the other.

In sum, the beneficiary thesis entails a claim that a person's immunity to harm can be weakened, even if this agent has done nothing to forfeit or waive his or her rights against harm. If the beneficiary thesis is correct, it represents a basis for the justification of harm different from the traditional categories of lesser evil and forfeiture. If sound, the beneficiary thesis establishes a moral asymmetry between innocent agents (bystanders and expected beneficiaries) without appealing to their agency in any shape or form.

Motivating the Beneficiary Thesis

The motivation for the beneficiary thesis is easy to see when we consider a single risk-imposing defensive act. Consider the following case.

Jones is solely responsible for his wrongful attempt to take innocent Smith's life. Defender can intervene to save Smith, but depending on how she angles her shot, she will impose a risk of paralyzing innocent bystander Brown or innocent bystander Black. If Defender refrains from shooting Jones, there is a significant risk that Jones will proceed to kill Brown. The risk that Jones will kill Brown if he is not stopped is greater than the risk that Defender's shot will kill Brown.⁸

According to the beneficiary thesis, Brown is an expected beneficiary of the preventive killing of Jones since the risk it exposes him to is smaller than the risk Jones would otherwise impose on him. This reasoning is then applied to the distribution of collateral harm in the case of war. McMahan invites the reader to imagine a situation where the NATO forces had to choose between two **(p.191)** military options that would have been equally effective in reducing the threat to Kosovo Albanians. One option would have imposed collateral harm on Kosovo Albanians, who are expected beneficiaries of the war; the other would impose an equal amount of collateral harm on Greeks or Bulgarians, who are innocent bystanders to the war.

In such a case involving genuinely innocent bystanders, it may seem wrong to force Greeks or Bulgarians to pay with their lives for the protection of an equal number of Albanians. It might have been permissible to sacrifice innocent bystanders for the sake of the Albanians, but only if that would have involved significantly fewer killings of innocent people than the alternative.⁹

The idea behind the beneficiary thesis is that agents who are already exposed to a prior risk have a reason to accept a new risk associated with a preventive action that seeks to avert the initial risk, as long as the preventive actions reduce the overall risk to those agents. This reason is not shared by neutral bystanders and gives rise to the claim that the “risks of defensive action ought to be borne by those who stand to benefit from the action rather than imposed on uninvolved third parties.”¹⁰ Øverland justifies his claim in the same manner, pointing out that expected beneficiaries “have good reason to accept a certain level of risk [associated with a military intervention] if it means getting rid of the government.”¹¹ Both Øverland and McMahan appeal to reasons of self-interest shared by expected beneficiaries of the military intervention but not by neutral bystanders who do not stand to benefit.

The beneficiary thesis does not claim that the expected beneficiaries have consented to being exposed to collateral harm. If it did, it would collapse into a theory of right waiver, and the notion of expected beneficiary would do no actual normative work in the theory.¹² Moreover, even if a theory that relied on actual consent was theoretically sound, it would be wholly unworkable in the context of military intervention since it is unlikely that all expected beneficiaries **(p.192)** would actually consent to the military intervention and since it would be impossible to transmit this consent to the intervener.¹³ Instead, the beneficiary thesis appeals to the *reasons* which make it rational for an expected beneficiary to consent to the risk of collateral harm, whether or not he or she actually consents to this risk or expresses such consent.

Moral Luck Among Innocent Agents

The beneficiary thesis belongs to a family of views according to which one can establish a moral asymmetry between innocent people wholly on account of their place in the local causal architecture. Another member in this family is the view that there is a moral asymmetry between wholly innocent threateners and their victims. A standard case from the literature of a conflict between an innocent threatener and a victim is the following:

Ray Gun: Falling Person is blown by the wind down a well at the bottom of which Victim is trapped. Falling Person will crush Victim to death unless Victim vaporizes her with his ray gun. If he does not vaporize her, Victim will cushion Falling Person's landing, saving her life.¹⁴

The standard discussion that accompanies this example is whether there is a moral asymmetry between Victim and Falling Person which grants Victim or a third party the permission to kill Falling Person in self-defense. Many authors believe that innocent agents, such as Falling Person, who through no act or fault of their own threaten someone else can permissibly be killed to avert the threat they pose, in whole or in part because the threatener's immunity to harm is weaker than that of the victim.¹⁵ The claim about the weakened immunity of **(p.193)** the innocent threatener shares with the beneficiary thesis an assumption that moral luck is a legitimate feature of morality. Both the innocent threatener and the expected beneficiary have no responsibility for the situation they are in; they are merely victims of brute bad luck. The moral status of both types of agents is altered by factors entirely beyond their control and indeed even beyond their agency. While it is conceptually coherent for friends of moral luck to hold that brute luck affects the moral status of both innocent threateners and expected beneficiaries, it leaves open the question of how a conflict between them ought to be solved, whether one party's bad luck cancels out the other or whether the bad luck of one party is attributed greater moral relevance than the other (and if so, why). Consider a version of the Ray Gun, where a third party can avert Falling Person from killing Victim by seriously harming either of the two. In alleged favor of imposing the preventive harm on the Falling Person is the causal fact that the threatener is threatening to harm the Victim. However, since the beneficiary of a potential defensive act would be the Victim, the beneficiary thesis would indicate that the Victim also has weakened immunity. A virtue of the view that innocent threateners have weakened immunity against harm is that it conforms to the apparently widespread intuitive judgment that there is a moral asymmetry between the innocent threatener and the innocent threatener's victim. Yet once the view is combined with the beneficiary thesis, we are pushed back toward accepting a symmetry between the innocent threat and the victim, given that both would seem to have a weakened immunity to harm.

Those who deny that innocent threateners have weakened immunity against defensive harm just by virtue of their bad brute luck, like McMahan, are faced with both a conceptual and an intuitive problem if they also want to hold on to the beneficiary thesis. To see the conceptual problem, consider how McMahan rejects the idea that the immunity of innocent threateners can be weakened by the mere fact that they pose a threat.

Although she [the innocent threatener] is causally implicated in the threat to you, that is a wholly external fact about her position in the local causal architecture. It has no more moral significance than the fact that an innocent bystander might, through no fault of her own, occupy a position in the causal architecture that makes your killing the only means by which you could save your own life.¹⁶

This explanation of the irrelevance of causation to the moral status of the innocent threatener invites the following question: If external facts about one's **(p.194)** position in the causal architecture cannot establish a moral asymmetry between innocent threateners and bystanders, how can they establish an asymmetry between expected beneficiaries and bystanders? In virtue of what does one's place in the local causal architecture acquire moral relevance in cases where we compare bystander with beneficiary cases but does not when we compare bystanders with innocent threateners? The intuitive problem is this: if the immunity of innocent threateners is wholly intact and on par with that of a neutral bystander, as McMahan claims, while the immunity of expected beneficiaries is not, then a third party ought to direct the harm associated with a preventive action to Victim and not Falling Person. The view that there's a symmetry between innocent threateners and their victims is normally thought, even by proponents of the symmetry view, to be counterintuitive. The view that there's an asymmetry to the victim's disfavor (on account that he would benefit from the defense, whereas the innocent threatener would not) is presumably even harder to swallow.

Whose Expectations?

Unfortunately, adherents to the beneficiary thesis do not properly spell out how we are to understand the notion of “expected beneficiary.” One obvious question is, *Expected by whom?* At first glance, the notion “expected beneficiaries” seems to presuppose the epistemic vantage point of a subject, yet it is not entirely clear which epistemic vantage point is privileged.¹⁷ One option would be to privilege the victim’s perspective and define a person as an expected beneficiary of a given risky action if that person believed that the act in question would reduce the overall risk he or she is exposed to. This does not seem like a promising strategy, however, for at least two reasons. Firstly, we can easily imagine cases where a person is reasonably mistaken about whether a given act will benefit him or her or not. If the third-party defender realizes this mistake, he or she clearly cannot justify exposing a person to risk by reference to that person’s mistaken belief. Once this constraint is admitted, we have also admitted that the victim’s epistemic perspective cannot be what determines his or her status as an expected beneficiary. Secondly, it would severely restrict the beneficiary thesis and make **(p.195)** it inapplicable to cases where the victim is unaware that he or she is exposed to a prior risk or is wholly unconscious and unable to form any beliefs. Rather than privileging the victim’s epistemic perspective, it may seem more promising to privilege the intervener’s epistemic perspective. Some of the adherents to the beneficiary thesis invoke the concept of *intended beneficiary* interchangeably with the concept of *expected beneficiary*.¹⁸ The concept of “intended beneficiary” suggests that it is the intentions of the intervener the beneficiary thesis tracks and, consequently, that the intervener’s epistemic perspective is privileged. Understood this way, the concepts of *intended* and *expected* beneficiary invite other objections. The most serious is this: if a person’s status as expected beneficiary is determined by the intervener’s reasonable belief, a person would have no right to defend himself or herself against an intervener who imposes a grave risk of harm on him or her on the mistaken but epistemically justified assumption that he or she was an expected beneficiary of this intervention. On the conceptual level, it is hard to see how people’s immunity to harm can be determined by the intentions or epistemic perspective of others. What determines a person’s moral status is presumably facts about this person (whatever they be), not facts about the intentions or epistemic perspective of others.

One response to the problem of choosing which epistemic perspective to privilege is to insist that a person's immunity is reduced only insofar as he or she *actually*, in terms of objective probabilities, stands to benefit from the defenders' action—irrespective of what anyone may believe about this.¹⁹ The notion of objective probabilities, chances, as mind- and perspective-independent features of the world is controversial, largely because it is seen as incompatible with a deterministic universe. As I cannot hope to make any progress on the metaphysical debate over the soundness of objective chances and their compatibility with determinism, I will limit my comment to another complication that arises from relying on the notion of objective probabilities.²⁰ Even if we grant **(p. 196)** that the expected beneficiaries are defined relative to objective probabilities, actual verdicts about expected benefits will always be made by epistemically limited agents. As such, the theory owes us an explanation of how we should address the possibility of reasonable mistakes. There are essentially two types of reasonable mistakes a third-party intervener can make: he or she can mistake expected beneficiaries for neutral bystanders—call this group *merely apparent bystanders*—and mistake neutral bystanders for expected beneficiaries—call this group *merely apparent beneficiaries*. To illustrate the case of a merely apparent bystander, consider the case introduced at the beginning of the section “Motivating the Beneficiary Thesis.” As described, Defender's intervention to stop Jones is expected to benefit both Smith and Brown. We may easily imagine, however, that unbeknown to Defender, Jones also harbors the undisclosed but clear intention to kill Black. In this scenario, Black is merely an apparent bystander. The problem of merely apparent bystanders also applies in war. A successful reversal for armed aggression might deter the same aggressor from going to war again later or deter other aggressors. Consider the Second World War: if German aggression had been stopped and reversed when Germany first annexed Sudetenland, it would at the time have been reasonable to believe that expected beneficiaries primarily would have been the Czechoslovakian inhabitants facing immediate threat of occupation. The much larger threat that the German regime posed to Europe as evidenced by the later actual turn of events was hardly recognized by anyone (thus the weak response to Germany's first aggressive moves). The fact that the reduction in risk to a great number of people that would have resulted from an early reversal of German

aggression would be spread across time and space does not undermine the fact that these benefits would in fact be highly significant. If allied forces had decided to defeat the German army in 1938, thereby preventing the war from escalating, Jews, who later turned out to be among the primary victims of the ensuing war, might have appeared at the time as neutral bystanders. Yet they would in fact be expected beneficiaries of such a war and, by the light of the beneficiary thesis, therefore have weakened immunity to collateral harm of such a war. If the notion of expected beneficiaries relies on objective and not epistemic probabilities, causally and temporally remote beneficiaries cannot be excluded from the group of expected beneficiaries just because they may *appear* as neutral bystanders. A defender of the beneficiary thesis may argue that the problem of merely apparent bystanders is unproblematic since it leads us to treat people as if their immunity to harm is higher than what their actual but unforeseeable status as expected beneficiaries would imply. Yet this type of move is not available to the adherents of the beneficiary thesis since the consequence of this mistake would be that genuine bystanders were made to bear the risk that by the light of the beneficiary thesis should have been borne by the merely apparent **(p.197)** bystanders. To see this, imagine a third party who imposes an equal amount of collateral risk on two individuals on account of his or her reasonable but mistaken belief that both are neutral bystanders. If only one is in fact a neutral bystander, whereas the other is a merely apparent bystander, and the actual neutral bystander somehow is aware of this mistake, then the beneficiary thesis owes us a story as to what the actual bystander may do to avoid being exposed to a risk that ought to have been shifted toward the merely apparent bystander.

This second problem, that of mistaking a neutral bystander for an expected beneficiary is more severe. Most accounts of liability to lethal harm hold that agents can themselves become liable when they impose a risk of harm on another person on the mistaken assumption that this person is liable to that risk of harm. On McMahan's own account of liability to defensive harm, for instance, a person who innocently mistakes a merely apparent aggressor for an actual aggressor and then engages in mistaken self-defense becomes liable to defensive harm from the apparent aggressor or a third party as a means of averting the threat from the innocently mistaken defender.²¹ Does a third-party defender who mistakes a bystander for an expected beneficiary become liable just like he or she would if he or she mistook the same person for an aggressor? If reasonably mistaken third-party defenders are deemed liable, the beneficiary thesis will dramatically sanction defenders for unavoidable and blameless mistakes they occasionally will make in the course of trying to follow the beneficiary thesis.

Any moral theory of defensive harm that in part relies on objective probabilities must confront some version of the dilemma described above. Yet the dilemma is more pressing for the beneficiary thesis, at least if the notion of expected beneficiary is exclusively defined in terms of probabilities. Moreover, unlike agents who act in self-defense, third-party defenders act in accordance with a moral duty or in a supererogatory manner. Stripping agents who act in line with a moral duty, or beyond the call of duty, of immunity to harm whenever their reasonable beliefs turns out false seems unduly harsh. At the very minimum, we are owed an account by the proponents of the beneficiary thesis of how this implication of the thesis can be justified or how it can be avoided. It seems to me the only way this implication can be avoided is to revert to the notion of subjective probabilities, but this would invite the objections raised at the beginning of this section back in.

(p.198) Act-Relative and Strategy-Relative Expected Beneficiaries

Before focusing the application of the beneficiary thesis on the context of war, it is necessary to distinguish more clearly between two ways of understanding the notion of *expected beneficiary*. The first way is relative to a single defensive act, as illustrated by the example with Smith, Jones, Brown, and Black. On this understanding, a person is an expected beneficiary of an act if this act diminishes the overall expected risk of harm to that person. The other way the notion of expected beneficiary can be understood is relative to an overall strategy. On this understanding, a person is an expected beneficiary if the strategy will reduce the overall expected risk of harm to this person. As McMahan points out, if the beneficiary thesis could only be applied in contexts where noncombatants were expected beneficiaries in the act-relative sense, the thesis would have little purchase in war:

Suppose that at the time a decision has to be made about whether to fight a war in defense of a group of non-combatants, all those non-combatants are expected beneficiaries of the war, even if the war will be fought in a way that will expose them to new risks. They all have reason, at that time, to want the war to be fought. They know that the strategy will later require acts that will convert some of them from expected beneficiaries into expected or actual victims. They also know that if it were a constraint on the implementation of the strategy that no individual act of war could be done unless all those noncombatants it would expose to risk would be expected beneficiaries [in the act-relative sense] of it, it would be impossible to implement the strategy.²²

As McMahan points out in this quote, individual acts of war often expose noncombatants to extremely high degrees of risk, turning those noncombatants into expected victims rather than expected beneficiaries. The challenge is to justify how someone's prior status as an expected beneficiary can justify imposing a risk of harm on that person, after that person has become an expected victim of that act. This challenge is met, according to McMahan, by switching to the strategy-relative notion of expected beneficiary: "what is relevant to the justification of the strategy is whether those whom it will expose to risk are expected beneficiaries when it is adopted, rather than later during its implementation" (p.199) (p. 363). The quote makes clear that the notion of expected beneficiary, as it applies in war, is to be defined relative to a strategy.

But the strategy-relative notion of expected beneficiary invites new objections. To see this, let's call the time at which we decide the strategy for how collateral harm should be distributed t_0 and the times when the subsequent risk is imposed through discrete acts (and sometimes materialized) t_1, t_2 , etc. McMahan suggest that t_0 should be made to overlap with the time when "a decision has to be made" about going to war. The problem with this approach can be illustrated by the following example. Suppose that minority group A is among the several minority groups expected to benefit from an intervention at time t_0 , the time when the decision to go to war is undertaken. Suppose that after some years, due to changing war dynamics, they are no longer expected beneficiaries of a continuation of the war but that repressed minority group B, which initially appeared to be made up of neutral bystanders of the war, now emerges as being made up of expected beneficiaries. What reason do we have to keep treating minority group A as expected beneficiaries and group B as neutral bystanders, even after it is apparent that their statuses have been reversed? To fix their moral immunity to collateral harm by their status as expected beneficiaries or neutral bystanders at the very beginning of the war and not adjust these categories as probabilities change seems difficult to defend. McMahan argues that fixing the label "expected beneficiary" at the outset of the war is justified because "they [those for whom the intervention is conducted] all have reason, at that time, to want the war to be fought." The reasons McMahan refers to are based on the probabilities that apply at that time, but these probabilities change over time; and when the probabilities change, so do the reasons. It is difficult to see how past reasons that no longer apply can be binding on a person absent that person's consent. Given that the beneficiary thesis does not rely on consent-based justifications, it seems odd to claim that the probabilities that gave an individual a reason at a previous point in time can be relevant to that person's moral status at a later point, when those probabilities have changed. It might be thought that this problem can be avoided by pushing t_0 forward in time, reassessing the category of expected beneficiaries continually as the war progresses, essentially shrinking the temporal distance between t_0 and the subsequent individual acts of war. But once we engage in this adjustment, we realize that there is no nonarbitrary stopping point until we have reached a point where soldiers assess the

expected beneficiaries of each of their discrete actions. This would collapse the distinction between act-relative and strategy-relative beneficiaries and constrain the beneficiary thesis, as McMahan observes, in a way that would make it inapplicable to war.

The arbitrariness of fixing the strategy-relative notion of expected beneficiaries at the outset of the war can be illustrated in another way. Consider what an **(p.200)** adherent of the beneficiary thesis would answer someone who is exposed to a high risk of collateral harm on account of his or her prior status as a strategy-relative expected beneficiary at the outbreak of the war. We can imagine this person complaining, asking what justifies exposing him or her, rather than a neutral bystander, to a risk of collateral harm, when it is clear that he or she has become an expected victim of this act. The response the adherent of the beneficiary thesis gives is that he or she had reasons to accept the strategy of which this action is a part at the outbreak of the war, before it became clear he or she would become an expected victim of the strategy. But if this is a legitimate answer to strategy-relative expected beneficiaries, then presumably we could say the same to neutral bystanders. Imagine a neutral bystander complaining about being exposed to a high risk of collateral harm when this risk could, at a small increase, be shifted to a strategy-relative expected beneficiary of the intervention. To him or her we could also say that he or she, at an earlier point in time, before it became clear who would become in need of humanitarian intervention, had reasons to accept a strategy that distributes collateral harm in a way that strictly minimizes collateral harm irrespective of the noncombatants' status as expected beneficiary or neutral bystander relative to that specific intervention as this generalized strategy would reduce the overall risk he or she was exposed to at that time. Perhaps it may be thought that the strategy-relative notion of expected beneficiary can be made sense of through the idea of risk pooling. Expected beneficiaries at the outset of the war have reason to pool their risk and accept a strategy that lowers the risk that they all face at that point. But this reply invites the same objection. Once we appeal to the reasons people have for pooling involuntarily and morally arbitrary risk of harm, it does not seem optimal to pool risks at the level of specific wars. Given that we are all at risk of accidental or wrongful harm at some point or another in our lives, the risk-pooling strategy would seem to suggest that we pool all such risks at a general level and adopt a strategy for averting such risk in a manner which minimizes overall risk of harm to innocents.

In sum, even if we, contrary to the argument in the previous sections, accept the beneficiary thesis with respect to discrete risk-imposing defensive acts, we should reject the attempt at applying the thesis to arbitrarily individuated risk-imposing strategies. Once we appeal to agents' interests in accepting general strategies that reduce the overall risk those agents are exposed to, we need a criterion by which to identify when such reasons should be consulted. The beneficiary thesis fails to provide any justification for why we should privilege the reasons that apply to agents at the onset of a specific humanitarian intervention. Once this failure is recognized, the moral relevance of the distinction between strategy-relative beneficiaries and strategy-relative bystanders individuated on a war-by-war basis disappears.

(p.201) Acknowledgment

I am very grateful to the Stockholm Centre for the Ethics of War and Peace, which awarded me a Summer Fellowship in June 2016, enabling me to present this work and develop the arguments in this chapter. I also thank the participants at the CELPA seminar in Warwick for helpful comments to previous version of this chapter.

References

Bibliography references:

Bazargan, Saba. "Complicitous Liability in War." *Philosophical Studies* 165, no. 1 (2013): 177–195.

Draper, Kai. *War and Individual Rights: The Foundations of Just War Theory*. New York: Oxford University Press, 2015.

Frowe, Helen. *Defensive Killing: An Essay on War and Self-Defense*. Oxford: Oxford University Press, 2014.

Hurka, Thomas. "Proportionality in the Morality of War." *Philosophy and Public Affairs* 33, no. 1 (2005): 34–66.

McMahan, Jeff. "The Ethics of Killing in War." *Ethics* 114, no. 4 (2004): 693–733.

McMahan, Jeff. "Liability and Collective Identity: A Response to Walzer." *Philosophia* 34 (2006): 13–17.

McMahan, Jeff. "Humanitarian Intervention, Consent, and Proportionality." In *Ethics and Humanity: Themes from the Philosophy of Jonathan Glover*, edited by N. Ann Davis, Richard Keshen, and Jeff McMahan, 44–74. New York: Oxford University Press, 2009.

McMahan, Jeff. "The Just Distribution of Harm Between Combatants and Noncombatants." *Philosophy and Public Affairs* 38, no. 4 (2010): 342–379.

McMahan, Jeff. "Self-Defense Against Justified Threateners." In *How We Fight: Ethics in War*, edited by Helen Frowe and Gerald Lang, 104–138. Oxford: Oxford University Press, 2014.

Otsuka, Michael. "Killing the Innocent in Self-Defense." *Philosophy and Public Affairs* 23, no. 1 (1994): 74–94.

Øverland, Gerhard. "Contractual Killing." *Ethics* 115, no. 4 (2005): 692–720.

Øverland, Gerhard. "High-Fliers: Who Should Bear the Risk of Humanitarian Intervention?" In *New Wars and New Soldiers: Military Ethics in the Contemporary World*, edited by Paolo Tripodi and Jessica Wolfendale, 69–86. Farnham, UK: Ashgate, 2011a.

Øverland, Gerhard. "Moral Taint: On the Transfer of the Implications of Moral Culpability." *Journal of Applied Philosophy* 28, no. 2 (2011b): 122–136.

Quong, Jonathan. "Liability to Defensive Harm." *Philosophy and Public Affairs* 40, no. 1 (2012): 45–77.

Schaffer, J. "Deterministic Chance?" *British Journal for the Philosophy of Science* 58, no. 2 (2007): 113–140.

Tadros, Victor. *The Ends of Harm: The Moral Foundations of Criminal Law*. Oxford: Oxford University Press, 2011.

Tadros, Victor. "Orwell's Battle with Brittain: Vicarious Liability for Unjust Aggression." *Philosophy and Public Affairs* 42, no. 1 (2014): 42–77.

Notes:

(¹) Thomas Hurka, "Proportionality in the Morality of War," *Philosophy and Public Affairs* 33, no. 1 (2005): 62

(²) Thomas Hurka, "Proportionality in the Morality of War," *Philosophy and Public Affairs* 33, no. 1 (2005): 62; Jeff McMahan, "Humanitarian Intervention, Consent, and Proportionality," in *Ethics and Humanity: Themes from the Philosophy of Jonathan Glover*, ed. N. Ann Davis, Richard Keshen, and Jeff McMahan (New York: Oxford University Press, 2009), 44–74, and "The Just Distribution of Harm Between Combatants and Noncombatants," *Philosophy and Public Affairs* 38, no. 4 (2010): 342–379; Gerhard Øverland, "Contractual Killing," *Ethics* 115, no. 4 (2005): 692–720, and "High-Fliers: Who Should Bear the Risk of Humanitarian Intervention?" in *New Wars and New Soldiers: Military Ethics in the Contemporary World*, ed. Paolo Tripodi and Jessica Wolfendale (Farnham, UK: Ashgate, 2011a), 69–86. Helen Frowe, *Defensive Killing: An Essay on War and Self-Defense* (Oxford: Oxford University Press, 2014), 146–147; and Kai Draper, *War and Individual Rights: The Foundations of Just War Theory* (New York: Oxford University Press, 2015), 160–165, have endorsed similar ideas. As far as I can tell, Frowe and Draper offer no substantial modifications to the view offered by Øverland and McMahan. For that reason, I will focus on Øverland and McMahan in this chapter.

(³) The terms are McMahan's. Øverland uses the terms *to-be-liberated-civilians* and *third parties* to cover the same groups.

(⁴) Frowe, *Defensive Killing*, 147; McMahan, "Just Distribution of Harm," 364.

(⁵) Jeff McMahan, "Liability and Collective Identity: A Response to Walzer," *Philosophia* 34 (2006): 15

(⁶) Jeff McMahan, "Self-Defense Against Justified Threateners," in *How We Fight: Ethics in War*, ed. Helen Frowe and Gerald Lang (Oxford: Oxford University Press, 2014), 104–138

⁽⁷⁾ One may think that the type of justification the beneficiary thesis provides is fundamentally different from the type that lesser-evil and liability justifications provide since the beneficiary thesis does not provide a justification for harm imposition full stop but rather that justification for why one person (an expected beneficiary) rather than another (a bystander) should suffer a given amount of harm. But both lesser-evil and liability justifications are also comparative, providing reason for why an impending threat ought to be redistributed. Neither lesser-evil nor liability justification relies on noncomparative desert-based reasons for imposing harm on a person.

⁽⁸⁾ All the proponents of the beneficiary thesis motivate their support for it by invoking analogies to individual cases: Frowe, *Defensive Killing*, 147; Draper, *War and Individual Rights*, 162; Øverland, "High-Fliers," 73; McMahan, "Just Distribution of Harm," 360, 361. This case is based on a similar case offered by Draper.

⁽⁹⁾ McMahan, "Just Distribution of Harm," 375.

⁽¹⁰⁾ McMahan, "Just Distribution of Harm," 361, see also 363.

⁽¹¹⁾ Øverland, "High-Fliers," 76. Although Øverland invokes this consideration to justify why soldiers have to take on less risk to themselves in humanitarian interventions than in wars of self-defense, the underlying claim remains the same: that the expected beneficiaries' immunity to collateral harm is less than that of individuals who do not stand to benefit from the military action.

⁽¹²⁾ Except, perhaps, if the validity of a subject's consent were conditioned on that subject also being an expected beneficiary. If so, expected beneficiary status would be a constraint on a consent-based justification, not an independently justifying factor. Exploring this theoretical avenue, however, will lead me too far astray from the topic of the chapter.

(¹³) While the beneficiary thesis does not require actual consent, it is intended to be compatible with attributing moral relevance to actual dissent of the expected beneficiaries, such that third-party intervention to rescue a victim can be deemed impermissible if the victim, or a sufficiently large number of the victim group, refused to be saved by outside interveners. However, Draper also defends the view that it would be permissible to expose an expected beneficiary to a risk of collateral harm, even if he irrationally dissents to this exposure (*War and Individual Rights*, 162).

(¹⁴) The case is taken from Frowe, *Defensive Killing*, 22.

(¹⁵) Frowe, *Defensive Killing*, 68–69; Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), 45; Gerhard Øverland, “Moral Taint: On the Transfer of the Implications of Moral Culpability,” *Journal of Applied Philosophy* 28, no. 2 (2011b): 124–125. Tadros, Frowe, and Øverland all argue, roughly along the same lines, that the innocent threateners’ immunity to harm is weakened or lost because such agents have an enforceable duty to allow themselves to be harmed in order to avert the threat they pose.

(¹⁶) Jeff McMahan, “The Ethics of Killing in War,” *Ethics* 114, no. 4 (2004): 720

(¹⁷) One could try to avoid this, as Draper does, by referring to “expectable” rather than “expected” beneficiaries (*War and Individual Rights*, 160). But trying to distinguish an expectable from an expected beneficiary runs into the same problem as distinguishing a foreseen consequence from a foreseeable consequence. Expecting, like foreseeing, cannot be given a meaning in the abstract without specifying a subject doing the foreseeing or expecting. What is expectable to one agent might not be expectable to another.

(¹⁸) McMahan, “Just Distribution of Harm,” 366, 373; Draper, *War and Individual Rights*, 160).

(¹⁹) McMahan, “Just Distribution of Harm,” 360, 363, explicitly formulates his version of the beneficiary thesis in terms of objective probabilities, whereas Draper grants that “the probability that a risk will be realized is always relative to an epistemic situation and so must be subjective in that sense” (*War and Individual Rights*, 99). It’s not entirely obvious what Drapers means by this, however, since he also claims that “intended beneficiaries, even the ones who will ultimately be killed, are actually better off (in terms of expectable benefit) at the outset of the war, because, for each individual, the small chance of being killed as a side effect of the liberation effort is more than compensated for by the high likelihood of reaping the benefits of liberation” (p. 160). These formulations seem to presuppose the existence of objective probabilities since reduction in the merely subjectively ascribed probability that the beneficiary will be killed presumably cannot be a compensation for anything.

(²⁰) Jonathan Schaffer, “Deterministic Chance?” *British Journal for the Philosophy of Science* 58, no. 2 (2007): 113–140

(²¹) For others who share this view, see Michael Otsuka, “Killing the Innocent in Self-Defense,” *Philosophy and Public Affairs* 23, no. 1 (1994): 74–94; Jonathan Quong, “Liability to Defensive Harm,” *Philosophy and Public Affairs* 40, no. 1 (2012): 45–77; Saba Bazargan, “Complicitous Liability in War,” *Philosophical Studies* 165, no. 1 (2013): 177–195; and Victor Tadros, “Orwell’s Battle with Brittain: Vicarious Liability for Unjust Aggression,” *Philosophy and Public Affairs* 42, no. 1 (2014): 42–77.

(²²) McMahan, “Just Distribution of Harm,” 363.



Access brought to you by: