

The Limits of Liability in War



DPhil Thesis

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Abstract

This doctoral thesis addresses questions in contemporary just war theory about the relationship between a combatant's moral liability to be killed and an opposing combatant's moral permission, justification, or obligation to kill her. It is a thesis by four relatively independent but thematically interrelated papers. Following a brief integrative chapter, each substantive paper addresses a different question in contemporary just war theory, and each relates, to one degree or another, to a combatant's liability to be killed in war.

Just War Traditions and Revisions. In this paper I distinguish between exceptionalist-collectivist and reductivist-individualist approaches to just war theory. I argue against the former and for the latter by appeal to a number of real-world cases. Ultimately, I argue that on a reductivist-individualist account, the set of liable persons and the set of military members who fight an unjust war overlap to a greater degree than might first appear.

Duty Killing and a New Moral Equality of Combatants. In this paper, I argue that one does not become liable to defensive harm if one is epistemically justified in believing that one acts on a moral obligation. By extension, even on a responsibility account of liability, combatants on both the just side and the unjust side of a war might remain immune to attack and therefore be morally equivalent.

Continuing Threats in War. By “continuing threat,” I mean one in which an unjust attacker both continuously harms and continuously threatens to harm a victim. According to this definition, victims of kidnapping, hostages, and those unjustly imprisoned are, all else equal,

victims of continuing threats of harm. I argue that war consists of, *inter alia*, continuing threats of harm and threats of this kind can have a decisive effect on the proportionality calculus and therefore on liability to harm.

Reasons Not to Kill in War. The language of rights can provide only an incomplete account of the moral costs of killing in war. When the person who is killed is liable to be killed, her rights have neither been violated nor infringed. And yet, her death is still morally bad in an objective sense. Some have argued that this objective moral badness is discounted in liability cases. In this paper I argue that the objective moral badness of death obtains in liability cases and is not discounted. Thus, if lethal harm is justified, the moral badness of death must be outweighed even in liability cases. On this view, therefore, liability-based justifications and lesser-evil justifications for defensive harming are structurally similar. The upshot of this view is that the objective badness of a combatant's death—even the death of an unjust combatant—is included in the moral costs of war.

Conclusion. Finally, in a brief concluding chapter, I explain how each of the substantive papers relates to theme of liability and accounting for the moral costs of war; I address an important distinction between moral harm and moral tragedy; and, where appropriate, I point out the practical implications of the various papers.

1. Integrative Chapter

1.1. INTRODUCTION

I have a moral right not to be killed. You have a moral duty not to kill me.¹ But my right is not “unalienable,” *pace* Jefferson. There are actions I can commit that would cause me to lose my right and therefore absolve you of your duty. This language of rights has had a profound influence on just war theory. Medieval and early modern just war theorists were concerned about whether an agent acted rightly or wrongly; in good faith or bad; righteously or sinfully; but they lacked the language of rights violations and infringements. Walzer’s seminal 1977 work, *Just and Unjust Wars*, is often credited with reinvigorating just war thought within the academy. One of Walzer’s contributions in that work was, as Brian Orend puts it, “the cementing of human rights theory within the core propositions of just war theory.”² On Walzer’s view, whether one acts rightly or wrongly in war can decisively depend upon whether one violates a person’s rights. Thus, the reason that one may kill combatants but may not kill noncombatants is cast, in Walzer’s account, in the language of rights. Combatants are liable to be killed as a class because “as a class [they] are set apart from the world of peaceful activity.”³ Though Walzer’s account is thorough and influential, in many

¹ The views expressed throughout this thesis are my own and do not necessarily reflect those of the US Air Force, the Department of Defense, or the US Government.

² Michael Walzer, *Just and Unjust Wars : A Moral Argument with Historical Illustrations*, 1st ed. (New York: Basic Books, 1977); For commentary on Walzer’s importance, see e.g. Jeff McMahan, “Rethinking the ‘Just War’ Part I,” *The New York Times*, 11 November 2012; Brian Orend, *The Morality of War*, 2nd ed. (Peterborough, Ont.: Broadview Press, 2013), 24-25; Naomi Sussman, “Introduction: The Substantive Unity of Michael Walzer’s Pluralism,” in *Reading Walzer*, ed. Yitzhak Benbaji and Naomi Sussman (New York: Routledge, 2014), 14; Seth Lazar, “War,” *The Stanford Encyclopedia of Philosophy*, no. Spring 2017 (2017); Ryan Jenkins, Michael Robillard, and Bradley Jay Strawser, “Editors’ Introduction,” in *Who Should Die? The Ethics of Killing in War*, ed. Ryan Jenkins, Michael Robillard, and Bradley Jay Strawser (Oxford: Oxford University Press, 2018), 1-3. Throughout the thesis, I refer to the 5th edition of *Just and Unjust Wars*. The one exception is where I explicitly refer to Walzer’s preface to the 4th edition in “Just War Traditions and Revisions.”

³ Michael Walzer, *Just and Unjust Wars : A Moral Argument with Historical Illustrations*, 5th ed. (New York: Basic Books, 2015), 144-45.

respects, his treatment of liability and immunity to harm, though invoking the language of rights, is left open to questions about the substance of those rights. Walzer's account is open, for example, to the charge that arose in earnest in the 1990s. If combatants—even combatants who fight for a just cause—are liable to be killed, then correlatively, they have no right not to be killed; but what, many contemporary theorists have asked, has the combatant on the just side done to forfeit his right not to be killed? The just war literature that has developed in response to Walzer has been largely dominated by a focus on this question. As Ryan Jenkins, Michael Robillard, and B. J. Strawser have aptly described it,

A schism is under way in the military ethics community, and the concept of liability is the wedge. ... The foundations of Walzer's view of just war have recently come under an onslaught of criticism, due in large part to this turn to liability.⁴

My own view is that this turn to liability, though it has provided clarity and rigor on questions crucial to just war theory, has, however inadvertently, allowed liability to eclipse other important questions. Liability has come to play an outsized role in just war theory. Liability considerations can provide only partial insight into war's moral costs. Each of the substantive paper that follow can stand on its own and is independent of the others. But, taken as a whole, these papers improve upon extant answers to this question: How ought we to account for the moral costs of war? I will describe how each paper relates to this theme in more detail in the outline at the end of this introductory chapter.

1.2. SCOPE

The disagreement between those who broadly accept Walzer's account and those who broadly reject it is often referred to as a disagreement between "traditionalists" and "revisionists." I shall refrain from using these terms. This is first because they are misleading even at a superficial level and second because even once one is armed with a more nuanced

⁴ Jenkins, Robillard, and Strawser, "Editors' Introduction," 1.

understanding, these terms are contentious. Throughout the thesis, I will refer to what is sometimes called “revisionist” just war theory as the “reductivist-individualist” account, or sometimes just as the “reductivist” view for short. Likewise, I will refer to what is sometimes called the “traditionalist” view as the “exceptionalist-collectivist” account, or sometimes just “exceptionalist” for short. I will explain both of these compound terms later in this section. First, I wish to explain why “revisionist” and “traditionalist” will not do.

The reductivist-individualist view arose, most directly, as a response to Walzer’s exceptionalist-collectivist account. It is fair to say that what reductivist-individualists offered beginning in the 1990s and to the present is a revision of Walzer’s account of just war theory. Numerous scholars, however—and especially those with a particular interest in the history of just war theory—have responded that the term, “revisionist,” gives too much credit to Walzer and not enough to many of the earlier just war theorists. One of the most important differences between Walzer’s account and most leading reductivist accounts pertains to the moral responsibility an individual combatant bears for the harms she causes in support of an unjust war. On Walzer’s exceptionalist-collectivist view, she bears moral responsibility for any violations of *jus in bello* principles, but she bears no responsibility for her participation in an unjust war as long as she meets *in bello* requirements. For Walzer, the war is not her war and even if it is a crime, it is not her crime.⁵ Most who hold a reductivist-individualists view, however, hold that she is morally responsible for the wrongful harms she causes, and that if she fights for an unjust cause, she is responsible for objectively unjust lethal harms, and she is liable to be killed on those grounds. As many have pointed out, although the reductivist-individualist view represents a stark departure from Walzer’s account, it aligns to some degree

⁵ In Walzer’s own words, “We know that [enemy soldiers] are not responsible [for the war]. ... The enemy soldier, though his war may well be criminal, is nevertheless as blameless as oneself. ... Hence the moral reality of war can be summed up in this way: when soldier fight freely, choosing one another as enemies and designing their own battles, their war is not a crime; when they fight without freedom, their war is not their crime.” Walzer, *Just and Unjust Wars*, 36-37.

with much earlier accounts offered by, for example, Aquinas, Grotius, Vitoria, and Suárez.⁶

The alignment, however, between the reductivist-individualist account and some of the medieval and early modern just war theorists is sometimes overstated. For instance, Uwe Steinhoff overstates the alignment when he argues that McMahan's moral inequality of combatants is hardly revisionist since much earlier theorists have also held a moral inequality view. McMahan admits, in fact, that Vitoria and Suárez "scooped [him] more than half a millennium earlier."⁷ Steinhoff's claim is true, but it is more limited in scope than it first appears. Both the reductivist-individualist account and numerous historical contributors to the just war tradition hold that there can be a moral disparity between combatants on the just side and combatants on the unjust side of the war. Both groups would reject Walzer's moral equality of combatants thesis. But the reductivist-individualist and the medieval and early modern thinkers have two very different conceptions of the conditions under which that moral inequality might arise.⁸

Though there are others, one common account of liability among reductivist-individualists is the responsibility account. On this view, one becomes liable to defensive harm just if the harm for which one is responsible is wrongful harm. If, for example, the US war in Vietnam was an objectively unjust war, then on the responsibility account of liability, the harm US combatants caused to North Vietnamese combatants was objectively unjust

⁶ See, e.g., A. J. Coates, *The Ethics of War*, 2nd ed. (Manchester: Manchester University Press, 2016), 3-9; Roger Wertheimer, "Reconnoitering Combatant Moral Equality," *Journal of Military Ethics* 6, no. 1 (2007): 6, 67; Gregory M. Reichberg, "The Moral Equality of Combatants—a Doctrine in Classical Just War Theory? A Response to Graham Parsons," *ibid.* 12, no. 2 (2013): 181-82; Saba Bazargan, "Moral Equality of Combatants," *International Encyclopedia of Ethics* (2013); David Rodin and Henry Shue, "Introduction," in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, ed. David Rodin and Henry Shue (Oxford: Oxford University Press, 2008), 14-15.

⁷ Uwe Steinhoff, "Rights, Liability, and the Moral Equality of Combatants," *The Journal of Ethics* 16, no. 4 (2012): 346; Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009), 238n26.

⁸ Walzer seems willing to admit that his moral equality of combatants thesis breaks with the tradition. He writes, "Catholic writers have long argued that [soldiers] ought not to volunteer, ought not to serve at all, if they know the war to be unjust. But the knowledge required by Catholic doctrine is hard to come by." Walzer, *Just and Unjust Wars*, 39. For additional commentary on this Walzer quotation, see Steinhoff, "Rights, Liability, and the Moral Equality of Combatants," 342.

harm. The American soldiers were morally responsible for wrongful harm even if they thought their cause was just, indeed, even if they had no way of knowing their cause was unjust.

On the much older view offered by theorists such as Vitoria, Suárez, and others, a combatant's participation in a war is impermissible only if it is obvious to him that it is unjust. Vitoria, for example, provides a bifurcated set of moral obligations. Policy makers—princes, senators, and territorial magnates—are “duty bound” to investigate the facts of the case and to determine whether the proposed war is just or unjust. Ordinary soldiers, on the other hand, are under no moral obligation to subject the war's justice to close scrutiny. Vitoria writes that, whether the war is offensive or defensive, “subjects are not merely permitted to follow their prince into battle even where the justice of the case is in doubt, but are indeed bound to do so.” His defense of this claim is more practical than moral. “If subjects were unable to fight until they understood the justice of the war, the safety of the commonwealth would be greatly endangered.”⁹

Vitoria leaves open the possibility of a justified refusal to fight only in cases in which, to the soldier, the war is patently unjust.

If the war seems patently unjust to the subject, he must not fight, even if he is ordered to do so by the prince. ... And from this flows the corollary that if their conscience tells subjects that the war is unjust, they must not go to war even if their conscience is wrong.¹⁰

Those who hold a responsibility account of liability agree with Vitoria that there are conditions under which it is morally impermissible for a soldier to participate in an unjust war, but disagree as to what those conditions are. The central question for McMahan, for example, is whether the war is objectively unjust, and therefore whether the harms a combatant causes in its pursuit are objectively wrongful. For Vitoria and Suárez, the central

⁹ For the preceding quotations, see Francisco de Vitoria, “On the Law of War,” in *Political Writings*, ed. Anthony Pagden and Jeremy Lawrance, Cambridge Texts in the History of Political Thought (Cambridge: Cambridge University Press, 1991), 308, 11.

¹⁰ Ibid., 307-08.

question is about the combatant's epistemic position—and even then, the epistemic standard to which ordinary soldiers are held is low. The soldier fights impermissibly only if the war's injustice is obvious.

Suárez similarly distinguishes between sovereigns, generals, and common soldiers holding each to a different epistemic standard. While princes are indeed morally obligated to “make a diligent examination” into whether a potential war is just, even generals need to engage the question only if they are called by the sovereign to give advice.

Generals and other chief men of the kingdom, whenever they are summoned for consultation to give their opinion on beginning a war, are bound to inquire diligently into the truth of the matter; but if they are not called, they are under no greater obligation to do so than others who are common soldiers. ... when they are not summoned [to give advice], their part in the affair becomes simply that of private soldiers, since they are merely set in action by others, but do not control action.¹¹

Echoing Vitoria almost seventy years later, Suárez holds ordinary soldiers to an even lower epistemic standard. Common soldiers are “in no wise bound to make diligent investigation” into the war's cause and its justice but instead “may go to war when summoned to do so.” Suárez equivocates on whether a soldier is morally obligated to fight in a war if he is in doubt as to the war's justice. In the first instance, Suárez says that the soldier “may” fight in a war if summoned to do so as long as the war is not obviously unjust, which suggests a mere permission rather than an obligation. But just a few sentences later, he defends this claim by saying that ordinary soldiers, when in doubt about the war's justice, “are bound to obey their superiors.” Suárez's argument for this claim is similar to Vitoria's. He thinks that fighting in a war when the justice of the war is in doubt is less morally risky than not fighting. “In cases of doubt the safer course should be chosen; therefore, since the prince possesses rightful authority; the safe course is to obey him.”¹² Vitoria and Suárez are, of course, evaluating the morality of war without the language of rights. Thus, it would be anachronistic to attribute

¹¹ Francisco Suárez, *Selections from Three Works*, Natural Law and Enlightenment Classics (Indianapolis, Indiana: Liberty Fund, 2015), 948.

¹² *Ibid.*, 949.

to them any claims about moral liability to defensive harm. Even so, their conclusions about what is morally permissible and obligatory for individual soldiers is very different from the conclusions put forward by many reductivist-individualists.

Walzer's view was, therefore, revisionist in its own way. But just because Walzer revised long-standing tenants of just war theory and McMahan et al. revise Walzer does not mean that McMahan et al. are in conformity with the long-standing view. There are important differences between the medieval and early modern accounts of what might be called the moral inequality of combatants and the reductivist account. The primary point I make here is that the term "revisionist" lacks sufficient nuance to capture these twists and turns in the history of just war theory.

There is a second reason to reject the term "revisionist" in favor of "reductivist-individualist" and to reject "traditionalist" in favor of "exceptionalist-collectivist." When one refers to "revisionist" just war theory, it is not clear whether one means to invoke the underlying assumptions most reductivist-individualists make about morality or the specific revisions theorists have made to just war theory. For instance, consider again the moral equality or inequality of combatants. McMahan's account was a revision of Walzer's on this point. But not all so-called "revisionists" agree with McMahan. Some theorists—even theorists who would be labeled "revisionist"—hold that a combatant's liability to defensive harm depends, not upon his responsibility for harms caused in pursuit of an objectively unjust war, but upon his epistemic state with respect to the war's justice. If the combatant justifiably believes he fights for a just cause, then he might remain immune to attack even if his war is objectively unjustified.¹³ The term "revisionist" suggests that what unites the relevant theories is the degree to which a theory revises previous approaches. But in practice,

¹³ For example, Jeff McMahan holds a "responsibility account" of liability while B. J. Strawser holds an "evidence-relative view" of liability. Jeff McMahan, "The Basis of Moral Liability to Defensive Killing," *Philosophical Issues* 15 (2005): 394-404; Bradley Jay Strawser, "The Bounds of Defense: Moral Responsibility, Autonomy, and War" (Dissertation, University of Connecticut, 2012), 66-144.

this is not the salient feature the relevant theories have in common. What unites this group of theorists is not the degree to which they wish to revise the just war tradition, but the fundamental claims they make about morality and war.

The terms “reductivist-individualist” and “exceptionalist-collectivist” provide a more accurate description of the relevant theories. The former is reductivist in that it holds that the moral principles that govern war are reducible to the same moral principles that govern everyday life. This view is in opposition to an exceptionalist view according to which war is morally exceptional among other human activities, that it is *sui generis*, and is therefore governed by a different set of moral principles and “subject to its own morality.”¹⁴ By “morally exceptional,” I mean only that the exceptionalist holds that the moral rules that govern war are different from the moral rules that govern ordinary life. It is in this limited sense that war is an exception to ordinary morality. I do not mean to attribute to the exceptionalist the stronger claim that in war there are no moral rules at all.

The reductivist-individualist view is individualist in that it gives moral weight to relationships and collectives only to the degree that those relationships and collectives are reducible to, or derived from, the moral significance of individual persons. As Frowe puts it, “the account is individualist because it holds that individuals are the proper focus of moral theory and evaluation, rather than collectives such as corporations or states.”¹⁵ Consider, for example, the claim that the Japanese military—a collective—attacked Pearl Harbor in 1941. When it did so, some Japanese combatants—namely the airmen and sailors aboard the naval ships and aircraft in the Pacific—violated the rights of individuals who lived and worked in Hawaii. But by waging an unjust war against the United States, they also affected the rights and duties of other US citizens. First, the attack signaled a wider threat to US citizens’ rights

¹⁴ Helen Frowe, *Defensive Killing* (Oxford: Oxford University Press, 2014), 123. Frowe is a reductivist but provides a cogent description of the exceptionalist position.

¹⁵ *Ibid.*, 13.

to life and political autonomy. Second, it triggered a duty for some US citizens to defend the rights of other US citizens. Those who joined the military, especially those who would fight the war in the Pacific, fulfilled that duty. The collectivist and the individualist accounts differ in this important regard: The collectivist takes these claims about Japan and the United States for granted. The collectivist stipulates that collectives have moral significance and therefore that the Japanese attack on the US had moral implications for the political community that is Japan and the political community that is the United States. The individualist cannot take this claim for granted. If an individualist is to defend the claim that political communities have a right to defend themselves against unjust aggression, he must show how the rights and obligations of members of the political community are affected by acts of war. Or, in other words, he must show that the political community does indeed have rights, though those rights are reducible to or derived from the rights of persons. Specifically, the individualist just war theorist must explain why Japanese soldiers and sailors at Midway, Iwo Jima, and Wake Island—many of whom were presumably not at Pearl Harbor—become liable to be killed. This is a nontrivial task I take up at the end of the second paper, “Just War Traditions and Revisions.”¹⁶

Though perhaps unwieldy, the use of two descriptors rather than one helps to show that two assumptions often coincide among theorists. Most just war theorists who are reductivist are also individualist and most exceptionalists are also collectivist. But the distinctions to which they refer can cut across one another. One could hold, for example, an exceptionalist-individualist view or a reductivist-collectivist view. An exceptionalist-individualist would hold that war is an exceptional human activity and is therefore governed

¹⁶ Some commentators argue that Walzer is an individualist because he holds that the rights of the political community “derive ultimately from the rights of individuals.” This claim relies on a conception of collectivism that is different from my own. Because Walzer stipulates that political communities have rights without showing how those rights are derivative of individual rights, I interpret his theory of the just war as a collectivist account. See Graham Parsons, “The Incoherence of Walzer’s Just War Theory,” *Social Theory and Practice* 38, no. 4 (2012).

by a moral system distinct from the moral system that governs ordinary life. But as an individualist account, that moral system would still focus on the rights and duties of individual persons and the rights of collectives would be seen as derivative of persons' rights. A reductivist-collectivist account would hold that the morality of war is reducible to the morality of everyday life, but also that collectives have moral status without a necessary grounding of that status in the rights and duties of individual persons.¹⁷

As a result, throughout the thesis, I will use “reductivist-individualist” and “exceptionalist-collectivist” rather than “revisionist” and “traditionalist.”

1.3. THE LEXICON

There are other terms that recur throughout the four papers. To avoid repetition throughout, I introduce and define many of them here. In most cases, I am using the terms in the way that is common in the contemporary defensive harming literature, but trends are subject to change and I am willing to accept some monotony here for the sake of clarity later.

“Combatant” is used differently by different theorists. As Henry Shue points out, the category of combatants is a legal construct.¹⁸ The class of combatants exists only because the laws of war have defined it and distinguished it from the class of noncombatants. On this legal definition, therefore, there might be people who fight in a war who are not combatants. For instance, there is some debate as to whether fighters in a terrorist network such as al Qaeda meet the legal definition of “combatant.”¹⁹ For want of a better term, I use

¹⁷ For example, on my understanding of his position, Ian Fishback is a noteworthy exception as a reductivist-collectivist. Though she does not advocate for the position directly, Toni Erskine appears to be an exceptionalist-individualist. See Ian Fishback, “Necessity and Institutions in Self-Defense and War,” in *The Ethics of Self-Defense*, ed. Christian Coons and Michael Weber (Oxford: Oxford University Press, 2016); Toni Erskine, “Assigning Responsibilities to Institutional Moral Agents: The Case of States and Quasi-States,” *Ethics & International Affairs* 15, no. 2 (2001).

¹⁸ Henry Shue, “Do We Need a ‘Morality of War?’,” in *Fighting Hurt* (Oxford: Oxford University Press, 2016), 416.

¹⁹ See, e.g., Peter Berkowitz, *Terrorism, the Laws of War, and the Constitution : Debating the Enemy Combatant Cases*, Hoover Institution Press Publication (Stanford, Calif.: Hoover Institution Press, 2005).

“combatant” to mean just anyone who fights in an armed conflict between two political communities; whether those political communities are states, sub-state groups, revolutionaries, terror networks, or otherwise. My use of “combatant” is a departure from the legal use. In specific cases, I will refer to “soldiers,” “marines,” “airmen,” etc. as the case requires.

References to just, unjust, justified, and unjustified wars can be confusing. By a “just war,” I mean a war that is fought for an objectively just cause. If defense against unjust aggression is the only just cause for war, then, as theorists have maintained for a millennium, it is not possible for belligerents on both sides of a conflict to maintain a just cause at the same time. It is possible, however, for belligerents on both sides to fight for an unjust cause. As numerous authors have pointed out, many wars throughout history have lacked a just cause on both sides.²⁰ And in such cases, all combatants fight for an unjust cause. On my use of the terms, it is possible for a war to be just—because it is fought for a just cause—and yet remain all things considered unjustified—because it fails, for example, the necessity or proportionality requirements. On my use of the terms, if a war is justified, by implication, it is also just. In the hypothetical cases to which I will refer, one state engages in a war that lacks justification while the victim state has a just cause for defending itself and is justified in doing so. In these cases, I use the common shorthand, “the just side” to refer to the side that has met the relevant *jus ad bellum* criteria and “the unjust side” to refer to the aggressor state. Similarly, those who fight for the just side, I call “just combatants,” and those who fight for the unjust side “unjust combatants.” An unjust combatant, therefore, can commit a justified act within the context of war and a just combatant can commit an unjustified one.

I will sometimes distinguish between the “strategic level” of war and the “tactical

²⁰ See, e.g., Jeff McMahan, “Innocence, Self-Defense and Killing in War,” *Journal of Political Philosophy* 2, no. 3 (1994): 206; Saba Bazargan, “Morally Heterogeneous Wars,” *Philosophia* 41, no. 4 (2013): 691-92; James Pattison, “The Legitimacy of the Military, Private Military and Security Companies, and Just War Theory,” *European Journal of Political Theory* 11, no. 2 (2012): 149.

level” of war. This is an important conceptual distinction as it pertains to responsibility. Those at the strategic level (heads of state, ministers and secretaries of defense, senior generals, etc.) are often responsible for *jus ad bellum* decisions whereas individuals at the tactical level are responsible for *jus in bello* decisions. I accept James Dubik’s argument that there are important senses in which the levels of war do not perfectly overlap with *jus ad bellum* and *jus in bello*.²¹ Those concerns, however, do not affect my arguments in the thesis.

I follow a common use of “liability to harm” which entails only that if one is liable to be harmed, then one lacks the right not to be harmed. Saying that one is liable to be harmed is equivalent to saying that one is not immune to harm. My use of these terms conforms to common uses, for example, of the term “noncombatant immunity” which suggests that noncombatants are immune—that is, they are not liable—to harm.

I follow McMahan’s use of “narrow” and “wide” proportionality.²² Defensive harm is proportionate in the narrow sense just if it is harm that the object of that harm is liable to suffer. Defensive harm is proportionate in the wide sense only if the harm caused to those who are not liable to suffer harm and the harm caused to the liable party that is beyond what she is liable to suffer are outweighed by the morally weighted good to be achieved. For instance, if a defender can defend a single victim from a lethal attack only by intentionally killing the attacker who is liable to be killed and by unintentionally killing two bystanders as a side effect, the defensive harm is proportionate in the narrow sense, but not in the wide sense.

I interpret the “necessity requirement” and the “minimal harm” requirement synonymously. I frequently use “necessity” because it is the common term among US military practitioners, though I recognize that many philosophers use “minimal harm” and many

²¹ James M. Dubik, *Just War Reconsidered : Strategy, Ethics, and Theory* (Lexington, Kentucky: University Press of Kentucky, 2016).

²² McMahan, *Killing in War*, 20-21.

European international legal scholars use “precaution.” For my purposes, these terms are synonymous and the requirement to which they refer stipulates that as just combatants and other defenders attempt to achieve justified ends, they must use the means that will cause the least weighted moral harm. My use of “necessity” is therefore distinct from the legal conception of “military necessity.”²³

I will often refer to “permission,” “justification,” and “obligation.” Each of these is distinct from the others. I follow McMahan’s distinction between permission and justification. One is permitted to commit some act just if one is not prohibited from acting. One’s action is justified only if one has a positive moral reason to act and if it would be permissible for one not to act. Finally, one is obligated to act only if one would be prohibited from not acting.

I use “justified” and “unjustified” to refer to actions and I use “just” and “unjust” to refer to harms. If a defender can defend against an unjust lethal attack only by breaking a third party’s finger as a side effect, the defensive action is all things considered justified (and possibly obligatory) even though the harm she causes to the bystander is unjust harm. I use “unjust” and “wrongful” synonymously.

I will say that a right is “violated” when the denial of that right is unjustified. For example, when an attacker unjustly threatens to kill an innocent victim, the attacker threatens to violate the victim’s right not to be killed. I will say that a right is “infringed” when the denial of that right is all things considered justified. For instance, if a defender can defend against an unjust threat to a victim’s life only by collaterally breaking a bystander’s finger, breaking the finger is unjust, wrongful harm. The defender is, however, all things considered justified in harming her and her right not to have her finger broken is infringed, but not

²³ See, e.g., David Luban, “Military Necessity and the Cultures of Military Law,” *Leiden Journal of International Law* 26, no. 2 (2013).

violated.²⁴

When I say that a reason, claim, argument or judgment is “*prima facie*,” I mean that it has intuitive appeal, whether or not it retains its appeal under closer scrutiny. A “*pro tanto*” reason, claim, argument, or judgment has both intuitive appeal and maintains its force under closer analysis, even though it is outweighed by a countervailing reason.²⁵

I often apply Parfit’s three-fold distinction between fact-relative, evidence-relative, and belief-relative moral judgments. An act is “wrong in the fact-relative sense just when [it] would be wrong in the ordinary sense if we knew all of the morally relevant facts;” it is “wrong in the belief-relative sense just when [it] would be wrong in the ordinary sense if our beliefs about these facts were true;” and it is “wrong in the evidence-relative sense just when this act would be wrong in the ordinary sense if we believed what the available evidence gives us decisive reasons to believe, and these beliefs were true.”²⁶ The kind of moral judgment that applies in a given case depends on the circumstances. For example, liability to defensive harm in self-defensive situations depends, as I argue in the third paper, upon a fact-relative justification whereas liability to defensive harm in cases of obligatory other-defense depends upon an evidence-relative obligation.

Some readers prefer hypothetical cases in which the participants are named according to their role, e.g., Attacker attacks Victim. Others find that proper names are easier to follow, e.g., Andrew attacks Anthony. I have done my best to find a middle ground by referring to proper names that alliterate with their respective roles. In non-combat cases, the attacker is Agatha, the victim is Violet, and the third party defender is Theresa. In combat cases, the

²⁴ This has become the common use of these terms. See, e.g., McMahan, *Killing in War*, 10; Jonathan Quong, "Killing in Self-Defense," *Ethics* 119, no. 3 (2009): 513; Frowe, *Defensive Killing*, 56; Thomas W. Simpson and Vincent C. Müller, "Just War and Robots' Killings," *The Philosophical Quarterly* 66, no. 263 (2016): 310-11.

²⁵ See Shelly Kagan, *The Limits of Morality* (Oxford: Clarendon, 1989), 17.

²⁶ Derek Parfit, *On What Matters: Volume 1*, ed. Samuel Scheffler (Oxford: Oxford University Press, 2011), 150-51.

just combatant is Jason, the unjust combatants are Ursula and Umberto, a third party defender—who is also a just combatant—is Jane, and the non-labile noncombatant is Nicholas.

1.4. METHODS

The argumentative methods employed throughout will be familiar from analytic normative theory. Here I will specifically mention three facets: reflective equilibrium; the use of hypothetical cases; and the distinction between combat and non-combat cases.

Reflective equilibrium is, according to John Rawls, a means of bringing our considered judgments and our principles into conformity with one another. “It is an equilibrium because at last our principles and judgments coincide; and it is reflective since we know to what principles our judgments conform and the premises of their derivation.” This method has become widely accepted and employed in analytic moral theory. Indeed, Scanlon has even said it is “the only defensible method [of] making up one’s mind about moral matters.”²⁷

Reflective equilibrium is advantageous in part because I begin neither from a strictly consequentialist nor a strictly deontological starting point. I assume, and do not argue for it here, that deontic relationships are relevant to moral judgments and that, therefore, it is morally worse to cause harm to someone who is not liable to that harm than to someone who is. But numbers are also relevant to moral judgments. All else equal, it is morally worse to harm two people than to harm one. It is conceivable that morality might require a defender to infringe one person’s right—that is, to cause unjust harm—to prevent the rights violations

²⁷ John Rawls, *A Theory of Justice* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1971), 20; T. M. Scanlon, “Rawls on Justification,” in *The Cambridge Companion to Rawls*, ed. Samuel Freeman, Cambridge Companions to Philosophy (Cambridge: Cambridge University Press, 2002), 149. See also Carl Knight, “Reflective Equilibrium,” in *Methods in Analytical Political Theory*, ed. Adrian Blau (Cambridge: Cambridge University Press, 2017), 46.

of many others. Adjudicating between numerical, consequentialist concerns and deontic concerns is difficult. Because we can retreat neither into pure consequentialism nor into pure deontology, reflective equilibrium is the best means of adjudicating between principles and judgments in particular cases.

In the papers that follow, this reflective equilibrium relies upon a number of cases. The cases are meant to elicit moral judgments and are therefore crucial to the method of reflective equilibrium. Kimberly Brownlee and Zofia Stemplowska call these kinds of cases “thought experiments” and describe them as “independent argumentative moves [that] test, and hence support or undermine, argumentative moves.”²⁸ These thought experiments are the particular cases against which we will test our moral principles. Cases such as these are familiar from the moral and political philosophy literature. If we want to determine which principle best explains the grounds of liability to defensive harm, we might be asked to imagine a person who is thrown against her will so that her falling body becomes a weapon. If we wish to determine which principle best accounts for the moral asymmetry between causing harm and allowing harm, we might be asked to imagine a runaway trolley that might be switched from a track that would result in five deaths to a track that will result in just one death.

One criticism of the employment of cases such as these is that they are too far removed from the real world. That some of these cases are fanciful, though, might be advantageous. Brownlee and Stemplowska defend these contingent hypothetical cases by saying that “we might be better able to react only to the variables that the thought experiment is meant to test when the case is set in the context that we do not normally encounter and are not familiar with.”²⁹ Real world cases often raise numerous moral questions and answers

²⁸ Kimberley Brownlee and Zofia Stemplowska, “Thought Experiments,” *ibid.*, 24-25.

²⁹ *Ibid.*, 37.

to those questions often rely upon multiple, at times conflicting, moral principles. Hypothetical cases, though sometimes fanciful, can allow us to consider a single moral principle in isolation. Cases that we might never expect to find in the real world might, therefore, be of some conceptual benefit.

I am, however, sympathetic to the concern that the principles that result from judgments in the various cases must be applicable to the real world. In an attempt to strike a balance between these two requirements, I appeal to three different kinds of cases throughout the thesis. These are purely hypothetical cases, real-world cases, and plausible hypotheticals set in a real-world context. These three categories are important for a few reasons. First, as I have said, purely hypothetical cases allow us to isolate and modify the variables relevant to a particular normative question and thereby to determine which of our moral principles is doing the work in a given case. For instance, in the fourth paper, I develop an implausible case in which a person is held captive in such a way that, though her captor violates her right to personal freedom, she does not violate any of her other rights. The case is fanciful, but necessarily so. All cases of imprisonment in the real world involve harms beyond the mere restriction of the victim's personal freedom. The fanciful case is necessary to access our intuitions about the defensive harm to which one might be liable for the violation of a person's right to personal freedom by itself.

The use of real-world cases, by contrast, is important because these cases help to ensure that the theoretical claims are applicable, not just to war as we might imagine it to be, but to war as it is. As I will describe more thoroughly in the second paper, a common criticism of reductivist just war theory is that it often relies upon cases that are too philosophical, too abstract, or too fanciful. I attempt to use real world cases where feasible in an effort to show that reductivist-individualist just war theory is indeed applicable to war as it is.

Finally, there is the middle category of plausible hypothetical cases set within real-world contexts. I use this set of cases for all the same reasons that I use actual real-world cases. But just as the need to isolate variables drives philosophers to use more fanciful cases, the real-world cases, though narratively compelling, are often missing this or that feature that would cut to the heart of the issue in question. For example, in the second paper, I offer a real-world case of a US infantry patrol in Vietnam and then stipulate some hypothetical facts about the colonel who directed the patrol to conduct this particular mission. We do not have the historical record to determine whether these stipulated facts are true. But by stipulating them as hypotheticals, we can still evaluate our intuitions in the case without deviating unreasonably from the real-world historical context.

Finally, the distinction between combat and non-combat cases will be more relevant to some readers than to others. On the reductivist view, the moral principles that govern war are the same moral principles that govern everyday life. The moral principles that apply to war therefore must plausibly apply in a domestic context. If I employ a case of defensive harming in the non-combat case, a reader operating from a reductivist perspective will be able to see that the principle conforms to the reductivist view. A reader approaching these issues as an exceptionalist will not be willing to accept cases of individual defensive harm as relevantly similar to combat cases without an argument for it. Just as I attempt to use real world cases in addition to fanciful hypotheticals, I also attempt some semblance of balance between non-combat cases and combat cases to appeal to a broader audience.

1.5. OUTLINE

This is a thesis by interrelated papers. Each of the substantive papers following this integrative chapter can be read and understood independently of the other substantive papers. In this section, I briefly outline the five substantive papers and, as applicable, identify

the relationship between each paper and the limited role that liability plays in the ethics of war.

2. Just War Traditions and Revisions

In the first substantive paper, I argue against the exceptionalist-collectivist account and for the reductivist-individualist account. In the first half of the paper, I appeal largely to two hypothetical cases set in a real world context to show that the exceptionalist account appears to offer conflicting conclusions. In the first case, a US infantry patrol in the Vietnam war is tasked with attacking enemy combatants. Once all the targets are killed, the patrol investigates and learns that those killed were, in fact, noncombatants. On my understanding, the exceptionalist account will conclude that the attack was objectively wrongful—the noncombatants' rights not to be killed were violated. This conclusion holds even though the patrol members had an evidence-relative justification for killing them. I argue that this same structure ought to apply to the *jus ad bellum* case of an unjust war. A policymaker commits forces to attack an enemy for a cause that is objectively unjust. If so, the combatants cause objectively unjust harm to their targets—they lack a fact-relative justification. And, if the US patrol case is to be our guide, the victims of that objectively unjust attack are permitted defensively to harm their attackers and their attackers are liable to defensive harm. And yet, the exceptionalist must reject this analogy and insist that when a policymaker commits forces to an unjust cause, even if the war is unjustified, the combatants who are killed are liable to be killed by virtue of their being military members at war.

In the second half of the paper, I defend the individualist position. One important critique of the reductivist-individualist account is that the set of people who are liable to be defensively harmed is not coextensive with the set of combatants. Therefore, a significant number of combatants on the unjust side are not liable to be harmed while a significant set

of civilians on the unjust side are liable to be harmed. I defend the individualist position against this critique with a novel account of signaling as threatening in war. Even on the individualist account, I argue, when a soldier dons a uniform and fills a post, she signals to the enemy that she is participating in hostilities. And by participating in hostilities, she contributes to the threat her side poses to the other side—even if she never fires a shot. I appeal to military deception as an archetype of signaling as threatening and argue that mere participation in the warfighting arm of the military organization contributes to the threat. Therefore, combatants on the unjust side become liable to defensive harm even if they are not directly involved in employing weapons. Ultimately, I argue that on a reductivist-individualist account, the set of liable persons and the set of military persons on the unjust side overlap to a greater degree than might first appear. This paper can be seen primarily as a defense of the reductivist-individualist account of just war theory.

3. Duty Killing and a New Moral Equality of Combatants

In this paper, I argue that even on a responsibility account of liability one does not become liable to defensive harm if one justifiably believes one acts on a moral obligation. I argue that, though theorists use the term “voluntary,” the responsibility account depends in fact on optionality. Agents are responsible in the relevant sense for the wrongful harms that eventuate only if they engage in optional acts that are foreseeably risk-imposing. There is an important distinction at work here between one’s epistemic justification in believing some proposition and one’s moral justification for committing some act. When I say “justified in believing,” I refer to a person’s epistemic justification for believing and not to her moral justification for acting. I first argue for the weaker claim that if one acts on a fact-relative obligation to cause harm, then one does not become liable to defensive harm. I then argue for the stronger claim that when an agent is justified in believing she has a moral obligation

to act, her action is not morally optional even if her belief is objectively false. If this is right, then an agent might cause objectively wrongful harm and yet remain immune to defensive harm. And, by extension, even on a responsibility account of liability, combatants on both the just side and the unjust side of a war might remain immune to attack and therefore be morally equivalent.

On the view presented in this paper, in some cases, the set of liable parties under the responsibility account of liability and the evidence-relative account of liability can be coextensive. A considerable number of objectively unjust combatants might justifiably believe their war is just and therefore believe they have a moral obligation to cause harm. If so, on my view, they remain immune to attack and the defensive harms just combatants impose on them, though all things considered justified, is wrongful harm. If the defensive war against them is to be justified, therefore, these harms must be included in the wide, rather than the narrow, proportionality calculus. On this view, therefore, the number of non-labile people who will be killed in war is higher than on previous moral responsibility accounts of liability. This constraint on the set of unjust combatants who are liable to attack amounts to a higher threshold for the *jus ad bellum* proportionality calculus.

4. Continuing Threats in War

The distinction between imminent threats and non-imminent threats is widely accepted. This common two-fold distinction, however, fails to account for continuing threats. By “continuing threat,” I mean one in which an unjust attacker both continuously harms and continuously threatens to harm a victim. According to this definition, kidnapping victims, hostages, and those unjustly imprisoned are, all else equal, victims of continuing threats of harm. If we fail to account for continuing threats of this kind, we also fail to account for the role the duration of the relevant harm can play in the proportionality calculus. One is

undoubtedly permitted to cause more harm to keep oneself or others from being held hostage for a year than one is permitted to cause to keep from oneself or others being held hostage for a day. To explain this difference, we must appeal not just to imminent threats and non-imminent threats but specifically to continuing threats. Finally, I argue that at least some of the harms that unjust aggressors cause in war are of this kind. Therefore, a complete theory of the just war must incorporate continuing threats in war.

Though the argument in this paper, in one sense, bolsters the role of liability, in another sense, it entails that unjust combatant liability in war is curtailed in cases of non-liable harm that will continue for limited periods of time.

5. Reasons Not to Kill in War

In the deontic language of rights and liability, it is not clear how we ought to weigh the moral badness of death when the person who is killed is liable to be killed. Some have argued that the badness of death is discounted in liability cases, at least in so far as proportionality is concerned. On my view, the moral badness of death is not discounted in the proportionality calculus even in liability cases. I argue that even when a defender kills an attacker who is liable to be killed, she imposes a significant moral cost. The objective moral badness of death obtains in liability cases and stands as a *pro tanto* moral reason not to kill that must be outweighed if the defensive harm is to be justified. On this view, liability-based justifications and lesser-evil justifications for defensive harming are structurally similar. When defensive killing is justified, it is so because a countervailing reason outweighs the strong moral prohibition against killing. In liability-based justification cases, as in lesser-evil justification cases, there is a remaining moral cost for justifiable killing in war.

This paper is perhaps the most obviously applicable to the limitations on liability in just war theory. According to the position against which I argue—that the badness of death

is discounted in liability cases—liability plays an outsized role in how we understand the moral costs of harm. In this paper, I show that the moral badness of one's death maintains its full weight in spite one's of liability to be killed.

6. Conclusion

Finally, in a brief concluding chapter, I revisit the themes of liability and accounting for the moral costs of war; I distinguish moral costs in general from moral tragedies in particular—a distinction that arises primarily from the two different kinds of moral costs that arise in the third and fifth papers; and, in some cases, I point to practical implications of the arguments made in the various papers.

2. Just War Traditions and Revisions

2.1. INTRODUCTION

In this paper I defend the reductivist-individualist approach to just war theory. I make two substantive contributions and one rhetorical one. The first substantive contribution is a novel argument against the exceptionalist-collectivist position. I argue that the exceptionalist view entails a normative asymmetry between policy-makers who decide to wage unjust wars and military commanders who direct their subordinates to commit unjustified acts of violence. On the exceptionalist view, the policy-maker's decision to wage war provides a moral justification for combatants to cause harm, as long as they do so within the *jus in bello* constraints. The military commander's decision to cause wrongful harm, however, does not translate into a moral justification for subordinates. This is, admittedly, a small point, but it is one I have not seen made elsewhere.¹ I do not see this argument against exceptionalism as decisive, but rather, as one reason not to accept the exceptionalist view that can sit alongside other reasons. As David Lewis has said, knocking down a philosopher by sheer force of argument "cannot be done. ... The theory survives its refutation—at a price. ... [In philosophical argument], we measure that price."² My argument here shows that the price of holding an exceptionalist view is that one must incorporate this counterintuitive normative symmetry. This price is sufficiently high, on my interpretation, to reject the exceptionalist account. Others will undoubtedly disagree.

The second substantive contribution is a defense of the reductivist-individualist view against a common attack. One common concern people have with the reductivist-

¹ Though McMahan also discusses this asymmetry. McMahan, *Killing in War*, 127-128.

² David K. Lewis, *Philosophical Papers. Vol. 1* (New York: Oxford University Press, 1983), x.

individualist approach is that the set of people on the unjust side who are liable to be killed can be very different from the set of combatants on the unjust side.³ This is because, as an individualist account, the view holds that one becomes liable to be killed only if one's actions meet some threshold for liability to lethal defensive harm. So, for example, soldiers who are cooks, administrative personnel, or serve in other support capacities might not meet the relevant threshold for liability. Meanwhile, there can be non-combatants—government officials or weapons manufacturers—who do meet the relevant threshold for liability. This is a counterintuitive claim and one that runs counter to the laws of war.⁴ My second substantive contribution in this paper is a novel account of signaling as threatening in war according to which most unjust combatants do meet the threshold for liability to defensive killing, however small their material contribution to the violence might be.

I also make a rhetorical contribution in this paper. Though reductivist just war theory is often praised for its philosophical rigor and sophistication, it is sometimes criticized for relying too heavily on abstract hypothetical cases and for remaining too detached from war in the real world. A. J. Coates describes the reductivist methodology this way.

This task involves an abstract process of moral reasoning based, largely, on the analysis of hypothetical or fictional examples. Historical or real-life cases are deliberately set aside and even the hypothetical constructs themselves often either lack any immediate reference to war or contain features that are difficult to square with the experience of war.⁵

Walzer offers a similar critique of McMahan's work when he says "Some of it is a little too fine for my head. ... I don't deny its perceptiveness; I only want to deny its relevance to the circumstances of war."⁶ In this paper, I seek to argue for the reductivist position through the

³ See, e.g., Seth Lazar, "The Responsibility Dilemma for Killing in War : A Review Essay," *Philosophy & Public Affairs* 38, no. 2 (2010); "Liability and the Ethics of War: A Response to Strawser and McMahan," in *The Ethics of Self-Defense*, ed. Christian Coons and Michael Weber (Oxford: Oxford University Press, 2016).

⁴ *St. Petersburg Declaration*, (1868), Preamble; *Additional Protocol I to the Geneva Conventions*, (1977), Art 48.

⁵ Coates, *The Ethics of War*, 9.

⁶ Micheal Walzer, "Response to McMahan's Paper," *Philosophia* 34, no. 1 (2006): 43.

use of real-world cases or hypothetical cases set in a real-world context. In so doing, I argue for the reductivist position in a way that avoids some of these general criticisms.

2.2. WHY I AM NOT AN EXCEPTIONALIST

The exceptionalist approach holds that war is a *sui generis* human activity that has its own system of morality—war is morally exceptional. I find this claim untenable for a number of reasons. Perhaps ironically, among the most important of these is that it is open to a charge often levied against the reductivist position. There are a range of real world cases that the exceptionalist view seems ill suited to address. To demonstrate the kinds of cases to which the exceptionalist view is inapplicable, I point to two cases that, on the exceptionalist view, result in a normative asymmetry. As I show, the exceptionalist account cannot adequately explain why there is a normative difference between a combatant who follows an unjust order given by, e.g., a president and a combatant who follows an unjust order given by a superior officer.

2.2.1. *Unforeseen wrongful harm*

I appeal to the following cases from Vietnam and the 2003 US invasion of Iraq to show that the exceptionalist account allows too wide a gap between policy makers' responsibility for the decision to wage an unjust war and the absence of individual combatant's responsibility for participation in an unjust war. The challenge to the exceptionalist account, as I argue in section 2.2.3., is that it generates an implausible asymmetry between two sets of relationships. On the exceptionalist account, I argue, a combatant is justified in committing a wrongful harm if ordered to do so by, for example, the president, but not justified if ordered to do so by, for example, her commander. On my view, the exceptionalist owes an account of this normative asymmetry.

Jonathan Shay opens his 1994 book, *Achilles in Vietnam*, with an account of a US soldier who had only just arrived in Vietnam. He and his patrol were tasked with attacking a group of enemy soldiers who, according to the available intelligence, would be unloading boats full of military equipment on the beach.

Shay's Fishermen: The US soldiers began moving at about 10 o'clock at night and arrived at their firing position by about four o'clock the next morning. They fired upon the men at the boats and, as the soldier interviewed describes it, the "firepower was unreal." At daybreak, the US soldiers investigated the scene and discovered, to their horror, that they had not killed enemy soldiers, but local fishermen—men and boys alike. When the patrol reported the event to their commander, the colonel said, "don't worry about it. We'll take care of it. ... We got body count."⁷

The United States military defined success during much of the Vietnam conflict as a favorable comparison between friendly losses and enemy losses. This system offers a perverse incentive for leaders to claim civilian or noncombatant deaths as combatant deaths to increase the "body count," to improve the putative friendly-to-enemy loss ratio, and therefore to make the unit look more favorable within the military institution.⁸

What moral judgments are we to make about this case? On the one hand, surely the colonel behaved impermissibly in counting the fishermen as combatants in the "body count." But it is not obvious that the colonel's moral failure implicates members of the patrol. In what sense were the patrol members' actions right, wrong, good, bad, praiseworthy, or blameworthy? On my reading, plausible answers to these questions present a challenge for the exceptionalist account of just war theory.

Suppose for the sake of argument, not just that the US soldiers on the patrol were mistaken, but that they were justifiably mistaken. That is, based on the evidence available to them, they were justified in believing that the people unloading the boats were enemy

⁷ Jonathan Shay, *Achilles in Vietnam : Combat Trauma and the Undoing of Character*, 1st Scribner trade pbk. ed. (New York: Scribner, 2003), 3-4.

⁸ Gregory A. Daddis, *No Sure Victory: Measuring U.S. Army Effectiveness and Progress in the Vietnam War* (Oxford University Press, 2011), 88-89, 123; Scott Sigmund Gartner, *Strategic Assessment in War* (New Haven: Yale University Press, 1999), 118, 28-30.

combatants. We might say, then, that the US soldiers were epistemically justified in believing the fishermen were North Vietnamese Army (NVA) soldiers; and that they were morally justified in killing the fishermen in the evidence-relative sense even though they lacked a justification in the fact-relative sense. Assuming an evidence-relative justification, we might also say that the US soldiers' behavior was not blameworthy. That is, they are not legitimate objects of moral blame in the way that they would have been if their mistake had resulted from their own negligence, or in the way the colonel is blameworthy for his decision to include the civilian casualties in the "body count."

Suppose further that the colonel acted maliciously. Because he had self-interested reasons to inflate the "body count," he deliberately tasked the patrol with attacking the men and boys he knew to be fishermen while telling the patrol that the people unloading the boats were enemy combatants. This assumption might be ahistorical, but it is not impossible. This is, in fact, similar to the way another of Shay's interview subjects interpreted the case. He said the colonel had probably tasked the patrol with targeting those whom he knew to be noncombatants to "blood" the unit—to make unit members feel invincible.⁹

So far, the reductivist and the exceptionalist can agree: the colonel behaved impermissibly and is blameworthy while patrol members had an evidence-relative justification for their actions and are not blameworthy. But the reductivist insists that we take two additional steps. First, the reductivist asks whether the fishermen were wrongfully harmed. This is a question about the rights of the fishermen and not about the epistemic states of the US soldiers.¹⁰ The fishermen certainly were wronged even if the US soldiers are

⁹ I am not committed to the idea that the colonel did in fact intentionally have the fishermen killed. I mention the second interviewee's interpretation only because I am attempting to constrain my use of cases in this paper to either real-world cases or to not implausible cases set in real-world contexts. For the second interviewee's interpretation, see Shay, *Achilles in Vietnam*, 153.

¹⁰ Reductivists disagree about whether an evidence-relative justification on the part of the US soldiers affects their liability to the fishermen's defensive harms. Reductivists agree, however, that the fishermen were wronged by the US soldiers. I address the evidence-relative view in the third paper, "Duty Killing and a New Moral Equality of Combatants."

not blameworthy for wronging them. They were wronged because they had done nothing to give up their right not to be killed and yet they were killed anyway. The US Patrol—wittingly or not—violated the fishermen’s rights not to be killed. This kind of right violation is familiar territory in other combat contexts even on the exceptionalist view. When military commanders conduct proportionality calculus in cases in which the military action will foreseeably harm noncombatants, noncombatant lives ought to be weighed more heavily than enemy combatant lives.¹¹ In fact, on the exceptionalist view, combatants are permitted to try to kill combatants; and yet they must try not to kill noncombatants. This is because when a combatant collaterally harms noncombatants, the harm she causes them is wrongful. She infringes their rights, even if that right infringement is all things considered justified. But it is justified only when the wrongful harm is outweighed, on the exceptionalist view, by the military value of the objective. (The reductivist insists that these infringements of right are justified only if significantly outweighed by the moral good to be achieved). The reductivist and the exceptionalist can agree that when the US soldiers inadvertently killed the Vietnamese fishermen, the fishermen suffered wrongful harm.

The reductivist now asks a second question, this one about responsibility. Are the US soldiers morally responsible for the wrongful harm they caused the fishermen? “Morally responsible” is potentially ambiguous and must be defined. I follow McMahan’s terminology here as his account of liability represents a large swath of reductivist just war theorists. Moral responsibility is distinct from mere causal responsibility. An “innocent threat” is a person who is part of the causal chain that results in unjust harm but is so through no agency of his own. In Nozick’s example, “if someone picks up a third party and throws him at you down at the bottom of a deep well, the third party is innocent and a threat; had he chosen to launch

¹¹ I discuss this morally weighted conception of proportionality in greater detail in the fifth paper, “Reasons Not to Kill in War.”

himself at you in that trajectory he would be an aggressor.”¹² On the moral responsibility account of liability, the US soldiers are morally responsible for the wrongful harm they caused to the fishermen. They are not only causally responsible, but they participated in causing the wrongful harm by acts of their own agency—even though they did so from an epistemically limited position.

Thus far I have shown that the reductivist and the exceptionalist can agree that the fishermen’s rights not to be killed were violated. It is incumbent upon the exceptionalist to determine whether, on the exceptionalist view, the US patrol members made themselves liable to defensive harm, a question to which I will return in section 2.2.4.

2.2.2. *Harming combatants in an unjust war*

To see why it should be troubling on the exceptionalist account that the fishermen’s rights not to be killed were violated, consider *Shay’s Fishermen* alongside another case. Let us agree for the sake of argument that the US’s 2003 war in Iraq was objectively unjustified. On the exceptionalist-collectivist account, US policy-makers committed unjustified actions by deciding to wage the war, but US combatants—as long as they submit to the dictates of *ius in bello*—committed justified acts of violence within the war. Here is a hypothetical, but plausible, case.

Night Attack. In the opening moments of the 2003 invasion, a US bomber crew drops precision-guided munitions on fielded Iraqi military forces, killing twenty Iraqi soldiers without causing any harm to civilians or civilian infrastructure.

On the exceptionalist-collectivist account, the bomber crew has, not just an evidence-relative justification, but a fact-relative justification for this attack. On this view, when two political communities go to war with one another, combatants on both sides become liable to attack and combatants on both sides have a moral justification for trying to kill enemy combatants

¹² Robert Nozick, *Anarchy, State, and Utopia* (Oxford: Blackwell, 2003), 43.

as long as they submit to the dictates of *jus in bello*. In *Night Attack*, those harmed are uniformed military members and there are no other relevant *in bello* constraints on the attack. Therefore, on the exceptionalist account, the bomber crew is justified in the fact-relative sense. The exceptionalist account generates a troubling moral asymmetry between *Shay's Fishermen* and *Night Attack*. In *Night Attack*, the bomber crew has a fact-relative justification for killing the 20 Iraqi soldiers. The patrol in *Shay's Fishermen*, however, has only an evidence-relative justification. Moreover, the bomber crew has not caused wrongful harm, but the patrol has. The exceptionalist must explain why we should accept this asymmetry.

The first response the exceptionalist might offer is that the US patrol's action in *Shay's Fishermen* can be individuated and considered independently from, say, the colonel's action. On this view, the fishermen's rights were violated—but not by the patrol. Instead it was the colonel who violated the fishermen's rights not to be killed. But I think this response would be self-defeating for the exceptionalist-collectivist view. For, if we are to individuate the patrol's action in *Shay's Fishermen*, then we must also individuate the bomber crew's action in *Night Attack*. In *Night Attack*, the exceptionalist is committed to the view that the Iraqi soldiers' rights not to be killed were not violated. But if we individuate the bomber crew's actions from the President's actions, as we did in *Shay's Fishermen*, we are left with the same asymmetry as before. It was, ex hypothesi, the colonel who violated the fishermen's rights, not the patrol. So is it the case that it was President Bush, and not the bomber crew, who violated the Iraqi soldiers' rights? The exceptionalist cannot accept this conclusion and must insist that neither President Bush nor the bomber crew violated the Iraq soldiers' rights because in war, combatants on both sides are liable to be killed. This points us back to the same asymmetry as before. Why does President Bush have the power to render otherwise innocent people liable to be killed but the colonel in Vietnam does not?

The Exceptionalist might instead say that it was not President Bush that rendered

the Iraqi soldiers liable to be killed in *Night Attack*, but instead, the Iraqi soldiers' membership in the military rendered them liable to attack. But this cannot be so, despite Walzer's rhetoric.

Walzer seems to claim that the Iraqi soldier is liable just because he joined a military.

[He is] set apart from the world of peaceful activity, ... trained to fight, [and] required to fight on command. ... He has joined the army because he thinks his country must be defended, or he has been conscripted. ... He is already a fighter. He has been turned into a dangerous man.¹³

But these claims are just as true of South African soldiers, Singaporean soldiers, Swiss soldiers, and Sri Lankan soldiers in March of 2003. Surely these soldiers are not liable to be killed by US bomber crews at any time and for any reason.

Walzer objects to this kind of argument by appeal to exceptionalism. Membership in the military is not, on this more nuanced view, a sufficient condition for one's liability to be killed in war. On Walzer's view, membership in the military and what he calls "reason of war" are instead jointly sufficient to render the Iraqi soldiers liable to be killed. But notice that if the US's 2003 war was unjust, this second stipulated requirement, "reason of war," is not Iraq's reason of war with the US—for prior to the attack it had none—but the US's reason of war with Iraq. The exceptionalist account can address the challenge posed by the Iraqi soldiers in *Night Attack* only if it includes the collectivist assumption that one is justified in killing soldiers on the other side, not because of something the other soldiers have done, but because one's own state has ordered one to war. The bomber crew's justification for killing Iraqi soldiers in *Night Attack*, according to the exceptionalist-collectivist account is that the state has ordered them to do it.

This account of the Iraqi soldiers' liability to be killed in *Night Attack* is not logically inconsistent, but it is implausible. Suppose it is the case that becoming a "dangerous man" is not sufficient to trigger the Iraqi soldiers' liability, and instead, that which makes them liable

¹³ Walzer, *Just and Unjust Wars*, 144-45.

is the combination of military service with the US President's decision to wage war. This would explain why Iraqi soldiers are liable to be killed in 2003 but Sri Lankan soldiers are not. But what reasons do we have for granting this implausible premise? This view entails that by deciding to wage an objectively unjust war, President Bush caused some half a million Iraqi soldiers to transition from a condition in which they retained their right not to be killed to a condition in which they lost their right not to be killed. This implication of the exceptionalist account—that heads of state have the power to cause hundreds of thousands of otherwise innocent people to lose their right not to be killed—requires some argument in its defense.¹⁴

2.2.3. The exceptionalist asymmetry

To avoid the claim that President Bush caused the Iraqi soldiers to become liable to attack, the exceptionalist would instead have to admit something like the following: The US bomber crew is justified in causing harm to the Iraqi soldiers because the US President ordered them to do so, and they cannot be expected to know that the war in which they were ordered to participate was unjust. It is this inability to know the moral facts of the case that render them morally justified. This is an old concern and it is often employed in arguments against the reductivist view. As early as the 16th century, Vitoria said of ordinary soldiers that,

It would be impossible, and inexpedient, to put the arguments about difficult public business before every member of the common people. ... [Additionally], men of lower condition and class cannot prevent war even if they consider it to be unjust, since their opinion would not be heard.¹⁵

The problem with deploying this argument in the *Night Attack* case is that it seems equally

¹⁴ When I say the Iraqi soldiers are innocent, I mean that they are innocent with respect to the US's 2003 attack. Some of them might very well have been complicit in the targeting of Kurdish and Shia civilians in the preceding years, but the common exceptionalist view does not appeal to those attacks to justify US combatants' actions in the 2003 invasion. For Iraq's military strength, see Jim Loney, "Factbox: Iraq's Military Strength," *Reuters*, 11 December 2011.

¹⁵ Vitoria, "On the Law of War," 308.

to apply to the patrol in *Shay's Fishermen*. The fishermen have done nothing to warrant their own deaths; nor have the Iraqi soldiers. The fishermen pose no threat to anyone prior to the attack; nor do the Iraqi soldiers. The US patrol in Vietnam was ordered to undertake this military action and to target these people; but so was the US bomber crew in Iraq. Even arguments from epistemic limitation fail to distinguish the two cases. Perhaps the bomber crew could not possibly have known that the 2003 Iraq war was unjustified; but neither could the army patrol have known that the people they killed were noncombatants.

In retreating to the exceptionalist premise—that the morality of war is triggered only by conditions of war—the exceptionalist does account for the asymmetry, but only by means of an implausible assertion. The Iraqi soldiers are liable to be killed only because President Bush took the US into an objectively unjust war. The exceptionalist-collectivist can explain the liability asymmetry in *Night Attack* and *Shay's Fishermen* only by appeal to an unsatisfying, and on my view artificial, distinction between strategic-level and tactical-level commanders. On this view, the Iraqi soldiers' liability to be killed in some sense lay dormant during peace time. Iraqi soldiers have been made into dangerous men, but they remain immune to attack like the Swiss and Sri Lankan soldiers. Their liability to be killed is triggered by the US Government's decision to wage war. Moreover, the bomber crew's justification for killing them is triggered by the US Government's decision to wage war. In one sense, this two-fold claim should come as no surprise. The exceptionalist position is simply that war represents an exception to ordinary morality. We should not be surprised, on this view, that a whole package of moral principles and deontic relationships are triggered when hostilities commence.

Even if we accept these claims, though, what are we to say of the civilians in *Shay's Fishermen*? If President Bush's order to engage in an unjust war makes it the case that the Iraqi soldiers are liable to be killed, why doesn't the colonel's order to kill the fishermen

likewise make it the case that they are liable to be killed? The only answers available to the exceptionalist are first that the Iraqi soldiers' membership in the military is a necessary condition for their liability and second that orders have greater deontic power when given by heads of state than when given by senior military officers. On my view, both of these assertions require an argument.

The reductivist account, by contrast, provides a more compelling moral account in both cases. The US patrol in Vietnam and the US bomber crew in Iraq are relevantly similar. Both were ordered to commit objectively wrongful harms. Both were justified in believing their harms were just. Both have an evidence-relative justification and lack a fact-relative justification. And neither group is blameworthy.

In the next section, I address the question whether either party—the Vietnam patrol or the bomber crew—is liable defensively to be harmed by those they target.

2.2.4. *Liability*

If the fishermen in *Shay's Fishermen* were threatened with unjust harm, would they have been justified in defending themselves against the unjust attack? On both the exceptionalist and reductivist accounts, the patrol members are already liable to be killed by enemy combatants. On the exceptionalist view, this is because combatants on both sides are liable to be killed by opposing combatants. On the reductivist view, it is because combatants on the unjust side are liable to be killed by, perhaps among others, just combatants and many agree that the US war in Vietnam was an unjust war. But the question I raise here is whether, because the US soldiers—however unwittingly—violate the fishermen's rights not to be killed, the US soldiers become morally liable to be killed by the fishermen in self-defense.

It seems to me that the only plausible response, even on an exceptionalist view, is to admit that the US soldiers in *Shay's Fishermen* are liable to defensive harm. That is, if in the

midst of the slaughter, the fishermen had fought back with whatever means they had at their disposal, the harm the fishermen would have caused to the US soldiers would not have been wrongful harm. I suspect this is how most exceptionalists will respond. The soldiers' action was a violation, in fact, of the principle of distinction—the people they tried to kill were innocent in the relevant sense. And the fact that the fishermen's rights not to be killed were violated is true whether or not the soldiers knew, or even could have known, that the fishermen were innocent.

To insist instead that the fishermen were not morally permitted to defend themselves against the lethal, wrongful attack on the grounds that the US soldiers had done nothing to make themselves liable to attack is to accept the implausible claim that one is permitted to use force to defend oneself only if one's attacker intends to cause the wrongful harm. If one's attacker is mistaken about the facts and intends only justified harm, then one has no moral recourse to defend oneself. This is a counterintuitive position. For the exceptionalist insists that war is a special environment and is subject to a different set of moral principles from those that govern everyday life. According to one of those principles, a person becomes liable to be killed just for putting on the uniform and participating in hostilities. This is a comparatively low threshold for liability to be killed and is crucial to the disagreement between exceptionalists and reductivists. The reductivist-individualist must show that the individual combatant has, by some act of his agency, made himself liable to be killed. In ordinary life, mere participation in an organization would hardly reach this threshold—and yet that is what the exceptionalist claims of the combatant in war. It would be a strange thing for the exceptionalist to hold this low threshold for liability when attacking one's military adversary and nevertheless hold an extremely high threshold for liability to defensive harm when attacking unarmed, non-uniformed, non-combatant fishermen. In other words, it would be strange to hold that soldiers become liable to be killed just for being military

members and are yet not liable to be killed when they wrongfully and lethally harm innocent non-combatants.

I expect most exceptionalists to agree that the Vietnam patrol is morally liable to the fishermen's defensive harms; but this points back to the aforementioned asymmetry. The Vietnamese fishermen are permitted defensively to harm the US patrol because the US patrol has—wittingly or not—wrongfully attacked them. This, the exceptionalist holds, is different from *Night Attack* in which both sides are liable to be harmed in virtue of their membership in the military organization and the fact that hostilities have commenced. I have already explained why I find it implausible that combatants become liable to be killed simply in virtue of their being military members ordered to war. But, as I argue in section 2.2.5., the challenge the exceptionalist faces is exacerbated in cases that fall outside the bounds of the wartime exception.

2.2.5. The ad hoc critique of exceptionalism

I turn now to a challenging real-world case. It poses a challenge to the exceptionalist premise and to the individualist one. Here, I show why the exceptionalist response to the challenge is implausible. In sections 2.3. and 2.4., I develop a more compelling individualist response.

Following the 1991 war between Iraq and the US-led coalition, the UN Security Council issued two resolutions prohibiting certain Iraqi behaviors, including targeting Iraqi civilians in the north and south of the country and developing weapons of mass destruction. Throughout the next decade, the US would conduct a number of military operations coercively to enforce those resolutions. Until 1998, the rules of engagement (ROE) established by US President Clinton permitted US combat aircraft to engage any threat that fired upon them. For instance, when an SA-8 mobile surface-to-air missile (SAM) system fired upon a US F-16 aircraft, the aircraft's pilot was then legally permitted to return fire

upon that specific mobile SAM—but not upon other Iraqi military systems or personnel.¹⁶

Imagine a hypothetical, but plausible, case in the context of this pre-1998 ROE.

Original Rules of Engagement: Under the rules of engagement before 1998, a mobile SAM operator fires a missile at a US F-16. The F-16 pilot evades the missile and shoots back at the SA-8, destroying the vehicle and killing the operator without causing harm to anyone or anything else.

On the reductivist-individualist view, the SA-8 operator is responsible for having threatened the F-16 pilot with unjust lethal harm and the F-16 pilot has good reason to believe that, if not attacked, the SA-8 operator will do so again in the future. The SA-8 operator is therefore liable to defensive harm—he has given up his right not to be defensively harmed. If the only way for the F-16 pilot to defeat the threat she faces entails killing the SA-8 operator, she is justified in doing so. The defensive harm the pilot inflicts is discriminate, proportionate, and necessary. Though she harms the SA-8 operator, she does not wrong him. One might question whether the F-16 pilot was morally justified to be in Iraqi airspace in the first instance. Suppose, based on the justification provided by the UN Security Council and especially the defense of the Kurds and Shia whom Iraqi forces had repeatedly attacked, the pilot was justified. Because I think my view conforms to the common intuition, I stipulate this justification for the sake of argument, but I do not argue for it here.

The exceptionalist explanation for the F-16 pilot's justification is not as clear. This is, first and foremost, because on the exceptionalist account, the morality of war applies only in certain circumstances, namely, only in the exceptional context of war. Though the US was at war with Iraq in 1991 and would be again in 2003, most theorists agree that by enforcing the no fly zones (NFZs), the US was engaged in something other than war in the intervening

¹⁶ The rules of engagement (ROE) were actually more complicated than this and the definition for being targeted depended upon radar modes. I return to this nuance in section 2.4.2. The relevant UN Security Council Resolution was 688 that required Iraq to “immediately end this repression” of Iraqi Kurds in the north and Shia in the south. Micah Zenko, *Between Threats and War: U.S. Discrete Military Operations in the Post-Cold War World* (Stanford, California: Stanford Security Series, 2010), 33. For the 1998 change in ROE see *ibid.*, 42-43; Michael Knights, *Cradle of Conflict: Iraq and the Birth of Modern U.S. Military Power* (Annapolis, Md.: Naval Institute, 2005), 212-13.

period. Military theorists often call these kinds of operations measures “short of war,” or operations “below the threshold” of war.¹⁷ From an exceptionalist perspective, therefore, one cannot apply the rules of *jus in bello* to the *Original Rules of Engagement* case because neither the F-16 pilot’s nor the SA-8 operator’s actions are constitutive of a war. Neither can one apply the rules of *jus ad bellum* because neither is engaged in a decision about whether to wage a war. If the conditions under which the two parties find themselves in *Original Rules of Engagement* are not conditions of war, then, on the exceptionalist view as Walzer presented it in 1977, just war theory is silent on the case.

As I see it, if the exceptionalist agrees that the F-16 pilot is morally justified in killing the SA-8 operator, there are at least three available explanations. First, the exceptionalist might suggest that because the engagement falls outside the sui generis context of war, it falls therefore under the dictates of ordinary morality. Here, if nowhere else, the exceptionalist might admit that the reductivist account obtains. In other words, because the reductivist understands the morality of war to reduce to ordinary morality, and because this case is not war, and is therefore governed by the dictates of ordinary morality, the reductivist and exceptionalist should agree. If so, it is the fact that the SA-8 operator wrongfully threatens the F-16 pilot that the F-16 pilot is justified in causing defensive harm.

I suspect that most exceptionalists will find this explanation of the F-16 pilot’s justification dissatisfying on the grounds that surely when an SA-8 operator from one military

¹⁷ For “short of war,” see Gabriel Marcella, “National Security and the Interagency Process,” in *U.S. Army War College Guide to National Security Issues, Volume II: National Security Policy and Strategy*, ed. J. Boon Jr. Bartholomees (Carlisle Barracks, PA: U.S. Army War College, 2006), 64; Vincent C. Müller, “Autonomous Killer Robots Are Probably Good News,” in *Drones and Responsibility: Legal, Philosophical and Socio-Technical Perspectives on Remotely Controlled Weapons*, ed. Ezio Di Nucci and Filippo Santoni de Sio (Abingdon: Routledge, 2016), 77; Yoram Dinstein, *War, Aggression and Self-Defence*, 5th ed. (Cambridge: Cambridge University Press, 2012), 11; John F. Troxell, “Military Power and the Use of Force,” in *U.S. Army War College Guide to National Security Policy and Strategy*, ed. J. Boon Jr. Bartholomees (Carlisle: US Army War College, 2006), 219. For “below the threshold” or war or armed conflict, see, e.g., Edward F. Dorman III and Christopher P. Townsend, “Laying the Foundation for a Strategic by-with-through Approach,” *Joint Force Quarterly* 89, no. 2 (2018): 70; Joint Chiefs of Staff, “Joint Publication 3-24: Counterinsurgency,” ed. Department of Defense (Washington, DC: The Joint Staff, 2013); “Joint Publication 1: Doctrine of the Armed Forces of the United States,” ed. Department of Defense (Washington, DC: The Joint Staff, 2013), V-4.

fires upon an F-16 pilot of another and when the F-16 pilot returns fire, the relationship between the two parties is much more like war than like a personal conflict between two individuals—especially because each fights, in an important sense, for his or her country. This exchange, even if it is not war, is still constitutive of a collective endeavor. Surely, the exceptionalist will insist, just war theory must have something to say about a case like *Original Rules of Engagement*. This concern lay at the heart of one exceptionalist argument against the reductivist account. In the opening lines of his 2006 response to McMahan, Walzer criticized the reductivist view on the grounds that it failed to distinguish between combat and noncombat. As Walzer puts the critique,

What Jeff McMahan means to provide in this essay, is a careful and precise account of individual responsibility in time of war. What he actually provides, I think, is a careful and precise account of what individual responsibility in war would be like if war were a peacetime activity.¹⁸

The claim Walzer makes here is not just that war is *sui generis* and that McMahan's reductivist account is applicable only in contexts other than war. Instead Walzer makes the stronger claim that McMahan's account is applicable only to conditions of peace. And whether or not the F-16 pilot and SA-8 operator are at war, surely they are not at peace.

A second option available to the exceptionalist is to suggest that we have simply drawn the threshold between war and not-war too high. Even this seemingly individual exchange between the F-16 pilot and the SA-8 operator ought to count as war. The exceptionalist who takes this step broadens the scope of what war is to the degree that, though war as a category is still *sui generis*, it can include conflicts that we might not intuitively count as war. But this move seems to make interstate conflict far too permissible. For, if this one exchange between the F-16 pilot and the SA-8 operator constitutes a war, then, on the exceptionalist account, both sides may now avail themselves of the relaxed moral

¹⁸ Walzer, "Response to McMahan's Paper," 43.

constraints *in bello*. If so, why should the F-16 pilot constrain her attack to this one combatant? All Iraqi combatants are dangerous men and the F-16 pilot's justification for killing them is triggered by the decision to wage war. If, on the proposal considered here, the decision to enforce no fly zones is a decision to wage war, then the US Air Force is permitted not just to shoot back at the SA-8 that engaged the F-16, but to decimate the Iraqi military. This seems overly permissive.

There is a third option available to the exceptionalist. One could introduce an additional exception to ordinary morality alongside the war exception. One might argue that there is one set of moral rules for ordinary life, another set of rules for conditions of war, and a third set of rules for a condition of violence between political communities that falls below the threshold of war. This is precisely Walzer's claim. In the preface to the 2006 edition of *Just and Unjust Wars*, Walzer suggests that, in addition to the bounded conceptions of *jus ad bellum*, *jus in bello*, and *jus post bellum*, we are in need of a new category of the ethics of force short of war. He calls this regime "*jus ad vim*," or the "justice of force." Though in the intervening years, some theorists have applied Walzer's conception of *jus ad vim* to conflicts between states and non-state actors, especially transnational terrorist organizations, the impetus for Walzer's conception of *jus ad vim* is in fact the US's attempt to contain Iraq during the 1990s, including the Northern and Southern Watch no fly zones.

The Iraqi case invites us to think about the use of force-short-of-war. The containment regime of 1991-2003 that the UN endorsed and the United States enforced is only one possible example of this use. ... The argument about *jus ad bellum* needs to be extended, therefore, to *jus ad vim*. We urgently need a theory of just and unjust uses of force.¹⁹

This is a logically coherent view. After all, if there is already one exception to ordinary morality, why not introduce another? But the view does seem ad hoc. The exceptionalist account, as we have seen, makes a strong claim about the forfeiture of one's right not to be

¹⁹ Michael Walzer, *Just and Unjust Wars : A Moral Argument with Historical Illustrations*, 4th ed. (New York, NY: Basic Books, 2006), xv.

killed. A combatant becomes liable to be killed on the exceptionalist account when these two necessary and jointly sufficient conditions are met: He is trained and equipped by the political community thereby becoming a “dangerous man” and his political community commits him to war. This is a strong claim because it entails that a person loses his right not to be killed even though he has not done anything to threaten anyone else’s rights. And yet, the resort to *jus ad vim* suggests that, in fact, the second condition—that the combatant’s political community commits him to war—is not a strictly necessary condition after all. In *Original Rules of Engagement*, the F-16 pilot has been trained and equipped but has not been sent to war. She has, instead, been sent to conduct other-defensive acts of violence outside the context of war. As we saw in *Night Attack*, the exceptionalist account is a radical one in that it entails that a policy maker in one state can cause otherwise innocent people in another state to lose their right not to be killed. *Jus ad vim* is even less plausible as an extension of the exceptionalist position because it broadens policy makers’ ability to cause people who are innocent in the relevant sense to become liable to be killed.

My own view is that the reductivist-individualist position provides a better account of the F-16 pilot’s justification for shooting at the SA-8 operator. But in so doing, it opens itself to an important challenge which I address in the next two sections.

2.3. THE REDUCTIVIST-INDIVIDUALIST ACCOUNT

In the preceding sections, I have looked at real-world cases to show that the exceptionalist premise is problematic. It is not logically inconsistent, but the assumptions upon which it must rely in the difficult cases seem to me to be implausible. The preceding therefore, has been largely an argument for rejecting the exceptionalist premise. In this section, I develop a challenge to the individualist premise upon which the reductivist-individualist account crucially relies. Then in the subsequent section, I develop a response to this challenge, and

thereby a positive argument for accepting the reductivist-individualist account as the most plausible approach to just war theory—at least as it applies to the cases considered.

2.3.1. *Defensive harm*

By 1998, the Iraqi SAM operators had become proficient at firing on US aircraft and then making themselves hard to find. Because the SA-8 is a mobile system, it is capable of firing upon a target and then moving under concealment. Thus, it was not often feasible for aircraft to follow through on the attacks permitted under the original rules of engagement. As Iraqi surface to air threats increased the frequency of their attacks on US aircraft in 1998, President Clinton established more permissive rules of engagement according to which US aircrew could respond, not just by striking the SAM site that had engaged them, but by striking “almost any element of the air-defense system (and even naval systems) within the no-fly zones.”²⁰ If attacked by a mobile SA-8, US combat aircraft were now permitted to fire upon, for example, an SA-5—a fixed system incapable of retreating to concealment.

Imagine now another hypothetical, and yet plausible, case under the new, 1998 rules of engagement.

New Rules of Engagement: Under the new rules of engagement in 1998, a mobile SA-8 operator fires a missile at a US F-16. The F-16 pilot evades the missile and then shoots at a fixed SA-5 site, destroying the command trailer and killing the operator without causing harm to anyone or anything else.

Here, too, I think the common intuition will be that the F-16 pilot is morally justified in killing the SA-5 operator. I am not simply asserting that it must be morally permissible because it was legally permissible under the new rules of engagement. I am instead relying upon what I think will be a widely held intuition that the pilots would have been morally justified in engaging fixed SAM sites after being fired upon by mobile ones. The *New Rules of*

²⁰ For a survey of the decade-long containment operations, see Zenko, *Between Threats and War*, 29-51. For the quoted text, see Knights, *Cradle of Conflict*, 213.

Engagement case points to two crucial questions. The first is about what we mean by “defensive” harm and the second is about liability.

There are *prima facie* reasons to think the harm the F-16 pilot causes in *New Rules of Engagement* is retributive rather than defensive. By striking the fixed SA-5 and its crew after the fact, it looks as though the F-16 pilot is carrying out an act of retribution, rather than defending herself against an unjust threat. This is, in fact, how some US Air Force senior leaders described it. Air Force Major General Stephen Plummer was the commander of Joint Task Force Southwest Asia at the time and was influential in convincing President Clinton to alleviate the restrictions in the rules of engagement. He argued for “retaliatory strikes” because “we’ve got to have a way to show [Iraq] some retribution.” He told his boss that he wanted “to punish [Saddam] for violating the no-fly zone and shooting at us.”²¹ Many—though not all—contemporary just war theorists reject retribution as a just cause for war.²²

General Plummer’s arguments notwithstanding, the F-16 pilot’s actions in *New Rules of Engagement* can indeed be justified on grounds of self- and other-defense. If the purpose of the response to Iraqi surface to air threats was to dissuade the Iraqi military from committing

²¹ Knights, *Cradle of Conflict*, 212. Plummer was not alone in his use of retributive language to describe motivations for war. Following the 2001 terrorist attacks on the United States, US President George W. Bush announced before Congress that “whether we bring our enemies to justice or bring justice to our enemies, justice will be done.” The allusion seems to be to retributive justice, though the word is perhaps ambiguous. Later in the same speech, President Bush discussed what would happen if “this terror goes unpunished.” UK Prime Minister Winston Churchill used retributive language to describe the RAF bombing campaigns against German cities. “We will mete out to the Germans the measure, and more than the measure, that they have meted out to us.” Ironically, perhaps, it was the UK’s decision to bomb population centers that prompted Hitler to respond with his rocket attacks on the UK. The “V” in “V-1” and “V-2,” of course, marks his “vengeance weapons”—an overt reference to the fact that Hitler intended to punish the UK. See, respectively, George W. Bush, “Text: President Bush Addresses the Nation,” *The Washington Post*, 20 Sept 2001; Winston Churchill, “Do Your Worst; We’ll Do Our Best,” National Churchill Museum; Michael Neufeld, ““Buzz Bomb”: 70th Anniversary of the V-1 Campaign,” Smithsonian National Air and Space Museum.

²² There is a very old tradition of punishment as a just cause for war with such notable contributors as Augustine, Aquinas, and Grotius. But punishment and retribution are not synonymous. The nuances of the debate fall outside the scope here. I mean only to suggest that many contemporary just war theorists hold that defense against unjust harm is the only viable justification for war. There are a number of contemporary scholars who consider retributive justice to be a legitimate cause for war. See, e.g., J. Daryl Charles, “The Moral Underpinnings of Just Retribution: Justice & Charity in Symbiosis,” *Providence*, 29 September 2016; John D. Carlson, “Just War as Punishment,” *First Things*, 1 October 2013; Nigel Biggar, *In Defence of War* (Oxford: Oxford University Press, 2013). For an argument against retribution as a just cause, see David Luban, “War as Punishment,” *Philosophy & Public Affairs* 39, no. 4 (2011).

unjust attacks on US Aircraft in the future, and if striking the SA-5 and its operator will, in fact, prevent future unjust attacks, then the harm to the SA-5 operator is defensive, whether or not it is all things considered permissible. This bears out in the historical case. After the shift in the Rules of Engagement, when fired upon, US Aircraft did carry out attacks against parts of the Iraqi integrated air defense system (IADS) otherwise unrelated to the initial threat. And this did, in fact, have the intended effect: the frequency with which US aircraft were fired upon decreased.²³

This kind of case seems intuitively to support the collectivist assumptions. War, and military operations below the threshold of war, are collective activities. Combatants do not act in isolation, but are instead instruments of war as, in Clausewitz's famous words, "policy by other means."²⁴ On a collectivist account, the SA-5 operator is liable to be killed in virtue of his membership in the collective. It is precisely this move, however—from membership in the military organization to liability—that the individualist must defend if the individualist is to make the broader claim that members of a military engaged in an unjust war are liable to be killed.

2.3.2. *Liability*

The SA-5 operator's liability to be killed is crucial in *New Rules of Engagement*. If he is not liable to be killed, and the F-16 pilot is nevertheless justified in killing him, this would mean that the F-16 pilot's justification is a lesser evil justification. If so, it would mean that the F-16 pilot would have been permitted to kill any one person as long as doing so successfully deterred the Iraqi military from future attacks. But this cannot be right. We can more clearly

²³ This was especially true in Operation Southern Watch. Though the US ROE was just as permissive in Operation Northern Watch, because US aircraft there launched from Turkey, operations in Northern Iraq remained constrained by the dictates of the Turkish General Staff. See Zenko, *Between Threats and War*, 37-38. David A. Deptula, Email Correspondence, 7 July 2019.

²⁴ Carl von Clausewitz, *On War*, trans. Michael Howard and Peter Paret (Oxford: Oxford University Press, 2008), 28.

see the challenge by looking at a domestic case: because the reductivist holds that the same moral principles govern both peace and war, the appeal to a domestic case is not problematic. Imagine a case in which an attacker unjustly threatens to kill me. There is nothing I can do to the attacker to prevent the attack, but I can threaten his innocent child with lethal harm. I know that if I do, the attacker will cease his attack on me to take his child to safety. The harm with which I threaten the innocent child is defensive in the sense that it will successfully prevent the wrongful harm with which I was threatened. But this defensive harm would be wrongful harm and my action would be impermissible. The child is not liable to be harmed and therefore the morally weighted harm I cause would outweigh the moral good to be achieved—it would violate the proportionality requirement.²⁵ On a reductivist-individualist account, if the SA-5 operator in *New Rules of Engagement* is not liable to be harmed, he is relevantly like the child in the domestic case. He has done nothing to make himself liable to be harmed, and if the F-16 pilot kills him to deter future Iraqi military attacks, she kills someone who is not liable to be killed. The relationship between the morally weighted harm prevented and the morally weighted harm caused is insufficient to amount to a lesser evil justification for killing the SA-5 operator. Therefore, if the intuition that the F-16 pilot is justified in killing the SA-5 operator is the right one, it must be the case that the SA-5 operator is liable to be killed.

In the next section, I develop an individualist argument for the claim that the SA-5 operator is in fact liable to be killed.

2.4. SIGNALS AND THREATS

The charge sometimes levied against individualists is that individualism cannot possibly apply

²⁵ I provide a thorough account of moral weight, liability, and the proportionality requirement in the fourth paper, “Continuing Threats in War.”

to war because war is not an individual exercise. But this is not quite right. The individualist position holds only that individuals and their actions are the primary focus of morality; not that they are the only focus. Collectives are morally significant to the degree either that they are reflective of or derivative of the ways in which individuals are morally relevant. The task at present, then, is to show why in most cases membership in a military organization at war can affect one's liability to defensive harm.

2.4.1. A problem for the individualist

In what we might think of as paradigm cases—complex campaigns between large armies in declared wars—the challenge dissipates. For example, during the D-Day landings, Allied aircraft bombed the German 12th S.S. and Panzer Lehr tank divisions that had been moved to Paris prior to the invasion. These were to serve as reserves to reinforce German forces wherever the Allies were eventually to invade. In fact, Hitler placed such importance on these two divisions that they remained under his direct control and would not be released to subordinate commanders without his personal approval. Secured in Paris, these two divisions were not participants in the D-Day hostilities, and yet, Allied bombers attacked them. Were the S.S. and Panzer Lehr crews liable to be defensively harmed during the invasion? Surely, one might think, they were liable to harm on the grounds that they would eventually engage in battle and therefore cause unjust harm—as they did on the 7th and 9th of June, respectively.²⁶ Killing the tank crews on the 6th of June would be discriminate, proportionate, and necessary harm to defend against a future unjust attack.²⁷ If this is right, then in at least some cases, the individualist has an easy task in the case of full-scale war. To show that

²⁶ See Cornelius Ryan, *The Longest Day* (Dunton Green: Coronet, 1987), 171, 271. Incidentally, the Panzer Lehr was unable, even once released, to flank the main Allied invasion force in part because D Company of the Oxford and Buckinghamshire light infantry secured, and the 6th Airborne Division subsequently held, Pegasus Bridge at Caen. See, e.g., Stephen E. Ambrose, *Pegasus Bridge: June 6, 1944* (New York: Simon and Schuster, 1988).

²⁷ I address imminent threats in the fourth paper, “Continuing Threats in War.”

fielded military forces on the unjust side of a conflict are liable to attack, one needs to show only that fielded military forces are likely to cause unjust harm in the future. This assumption might be reasonable in large-scale war, but it seems much less plausible in military operations below the threshold of war.

It is not immediately clear in *New Rules of Engagement*, on an individualist account, why the F-16 pilot would be morally justified in killing the fixed SA-5 operator. Because Iraq and the US are not in a full-scale war and because the exchange of fire was relatively intermittent, it is not at all clear that this particular SA-5 operator would commit some future unjust attack. What, then, has the SA-5 operator done to make himself liable to defensive harm?

My response to this question depends on a robust account of signaling in war. One is liable to be harmed defensively on many reductivist-individualist accounts only if one is morally responsible for causing unjust harm. Bystanders who are innocent with respect to the attack remain immune to harm. The task for the individualist in *New Rules of Engagement* is to show that the SA-5 operator is not a bystander who is innocent with respect to the attack, but rather is morally responsible for an unjust threat.

To see why this is so, consider a slight modification of the case above.

New Rules of Engagement Tradeoff. Under the post-1998 rules of engagement, a mobile SA-8 fires upon an F-16 pilot. The F-16 pilot is unable to return fire on the SA-8. She can, however, attack a fixed SA-5 site, killing a single operator; or she can attack a house, killing the sole noncombatant resident. In either case, Saddam will be deterred from future attacks against US aircraft.

An individualist account must provide an explanation for the SA-5 operator's liability to be killed even though he is not *prima facie* morally responsible for the attack on the F-16 pilot. In the absence of such an explanation, the individualist has only three options. One could either become a collectivist and admit with Walzer that uniform-wearing military members are liable to be killed just because they are uniform-wearing military members in conflict. Or the individualist might admit that the F-16 pilot is permitted to kill either the SA-5 operator

or the noncombatant resident. This is because if the SA-5 operator is not liable to be harmed, then harming him and harming the resident noncombatant are morally equivalent, yet this seems obviously false. The intuition in the case is not that the F-16 pilot is morally permitted to kill the SA-5 operator because he is an Iraqi citizen. Instead, the intuition in *New Rules of Engagement* and in *New Rules of Engagement Tradeoff* is that there is something about the relationship between the F-16 pilot and the SA-5 operator that makes it the case that the former is morally justified in killing the latter. The claim that the F-16 pilot is equally justified in killing the SA-5 operator or the noncombatant resident defies this intuition. Finally, the individualist might instead reject the intuition in the case and conclude that neither the SA-5 operator nor the noncombatant resident is liable to be killed and that the F-16 pilot is therefore not permitted to attack other operators within the Iraqi military. This would be a de facto admission that the post-1998 rules of engagement are indiscriminate and therefore wrong. This final option is, I suspect, the one many collectivists will assume that individualists must choose. As I argue in section 2.4.2., however, the SA-5 operator is liable, but the argument depends upon a broader conception of the unjust threat and a somewhat novel account of military signaling as threatening.

2.4.2. *The threat of “Quaker guns”*

In what remains of this paper, I aim to show that in military operations, merely signaling a threat is a sufficient condition for responsibility for the threat. This is not a collectivist claim, but an individualist one. As I show at the end of this section, the claims I make about signaling and threatening are equally applicable in war as they are in domestic cases of defensive harming involving small numbers of people. If a threat is unjustified, signaling that threat is sufficient to make one liable to defensive harm. I first argue that in war, some acts of deception are acts of signaling that do not include any physical harm at all. Combatants

on one side convince combatants on the other side that they pose a threat even though as individuals, they lack the means to actualize the threat. Then I argue that in war, this kind of signaling does in fact partially constitute a threat. I conclude that in war, if one is morally responsible for signaling an unjust threat, one is liable to defensive harm.

Signaling has a long history in war and is crucial both to the operational art of war and also to the ethics of war. At the most basic level, when one person attacks another, the attacker often simultaneously signals and attacks. One example in which actualized threats and signaled threats come apart is operative in the background of the Operation Southern Watch cases introduced above. Under the pre-1998 rules of engagement, US aircrews were permitted to fire upon a surface to air missile threat only if the missile system's crew launched a missile or illuminated the aircraft with an acquisition or tracking radar, but not if illuminated only with a surveillance radar. In radar-guided missile systems, illuminating the target aircraft with an acquisition or tracking radar is a necessary condition for engagement. And yet, illuminating the aircraft without firing a missile will cause no damage and does not constitute an attack. Even the more restrictive pre-1998 rules of engagement, therefore, recognized this intermediate phase during which the illumination of a target with an acquisition or tracking radar signaled a threat and justified defensive harm—even though the missile had not yet been launched.

At first sight, it might look as though signaling is relevant only to the epistemic state of the force receiving the signal and not necessarily to the signaling force's liability to defensive harm. But my claim is stronger than this. Consider a domestic case in which an assailant points an empty gun at my head and begins to squeeze the trigger. From my epistemic position, not knowing that the gun is empty, there is a considerable chance that I will be killed when the attacker squeezes the trigger. In an objective, fact-relative sense, the assailant does not threaten me with lethal harm. When he squeezes the trigger, nothing of

significance will happen. The assailant signals a threat without actually posing a threat. The assailant's signal affects my epistemic state and my evidence-relative justification for causing defensive harm—I can reasonably assume I am being threatened—but the signal does not constitute an actual threat.²⁸

This seems true in simple cases of a single attacker, but military conflict is a complicated endeavor. In military operations, signaling can constitute a threat even if the agent doing the signaling has no means of actualizing the threat. As the Allies prepared for the 1944 D-Day invasion, one important element of the invasion was the First US Army Group (FUSAG). The FUSAG was made up of dozens of subordinate units, each with its own elaborate patch and unit designation. By this time, the FUSAG's commander Lieutenant General George S. Patton was a world-renowned tactician and tank commander. This façade intentionally obscured the fact that the FUSAG had no tanks, no guns, and almost no people. The patches, unit designations, and the whole FUSAG constituted an elaborate ruse to convince the German Army that Calais was a possible—if not probable—infiltration point for the invasion force. In fact, Patton's army group consisted of "dummy landing craft, vehicles, camps and wireless communications." Indeed, these people and this equipment were provided by the American 3103rd *Signals* Service Battalion. Like the assailant in the hypothetical case above, Patton had no round in the chamber. And yet unlike the assailant, Patton's fictitious army helped to constitute the threat the Allies posed to the German Army in occupied France. One crucial difference between the assailant above and Patton's FUSAG is in the complexity of the threat.

Suppose a combatant participated in a similar ruse on the unjust side of a war. Would his participation in the signaling render him liable to defensive harm on a reductivist-

²⁸ Though I have simplified the case, I am drawing from the *Roulette* case first in Kimberly Kessler Ferzan, "Justifying Self-Defense," *Law and Philosophy* 24, no. 6 (2005): 711. Jeff McMahan, "Self-Defense and Culpability," *An International Journal for Jurisprudence and Legal Philosophy* 24, no. 6 (2005): 751. Ferzan and McMahan disagree as to whether the assailant is liable to be killed.

individualist account? In the spring of 1862, US President Lincoln asked General McClellan's army to advance south toward Richmond, the Confederate capital. McClellan refused the request on the grounds that his army lacked the strength to overcome the fortified confederate position at Manassas Junction with its 300 artillery pieces. Taking full advantage of the delay, the Confederate army retreated to the south. They left behind what turned out to have been "Quaker guns"—tree trunks painted and positioned to look like artillery pieces. These instruments of deception are ironically named after a religious tradition with deep pacifist roots.²⁹ If the Confederate war was an unjust war, then on a reductivist-individualist view, those who fought on the Confederate side were liable to be attacked. But what of the soldiers who felled, painted, and positioned the feigned "Quaker guns?" Do they constitute an objectively unjust threat merely by participating in the deception?

On my view, though Patton's army group held no function other than a signaling function, that signaling helped to constitute the Allied threat. Likewise, even if the Confederate soldiers who built the fake cannons never fired a shot or fixed a bayonet, their mere participation in the ruse constitutes participation in the actual threat. This is because in military operations, one side seeks to complicate the operational problem the adversary must face—military deception supports this aim. The Allies intended to cause the German Army to remain unsure about where the invasion would begin and therefore to have to respond to a more complex operational problem. Likewise, the Confederate soldiers at Manassas Junction did not believe they could use their Quaker guns to hold McClellan's army off forever—but just long enough to retreat and reposition. They complicated the operational problem facing McClellan by requiring him to spend precious time awaiting reinforcements. Both ruses were successful. In Patton's case, even as ships' guns attacked defensive positions

²⁹ *American Civil War: The Definitive Encyclopedia and Document Collection [6 Volumes]: The Definitive Encyclopedia and Document Collection (ABC-CLIO, 2013), 1587.* In one 1862 photograph, a Confederate soldier adds to the signaling by acting out the lighting of a Quaker gun fuse with a wooden stick. See "Quaker Gun, Centreville," The Library of Congress. And yes, "roots" is a tree pun.

in Normandy and the 6,000 ship armada was in sight, some in the German High Command were convinced that Normandy was a faint and that the real assault was yet to come at Calais. Patton's signaling—even without concomitant firepower—helped to constitute the Allied threat to German occupying forces. And the feint was an unequivocal success. Indeed, it was one of the reasons the German High Command was convinced the invasion would be at Calais and kept the aforementioned Panzer divisions in reserve, and in one commentator's words, "imprisoned" the German Fifteenth Army at Pas de Calais.³⁰

Both Patton's signal corps army and the Confederate soldiers at Manassas Junction were morally responsible for their participation in the threat. In Patton's case, it was a justified threat and in the Confederate case an unjustified one. Therefore, on most reductivist-individualist conceptions, the Confederate soldiers make themselves liable to attack for mere participation in the deception while Patton and his few subordinates remain immune to attack, despite their participation. Deception was constitutive of the threat, and deception is mere signaling. Signaling, therefore, can be a sufficient condition for participation in—and moral responsibility for—a threat. And if that threat is unjust, signaling in war can be a sufficient condition for liability to defensive harm.

Though deception is one instance, signaling in war is ubiquitous. Everything from wearing the uniform of one's own army to the red crosses and crescents of medical facilities are overt signals either that one is participating in hostilities or not. The white flag of surrender is a signal that, though one had been participating in hostilities, one is no longer participating.

Return now to the *New Rules of Engagement Case*. The challenge posed to the individualist is to justify the intuition that the fixed SA-5 operator is liable to defensive harm after the mobile SA-8 operator fired upon the US aircraft. The justification is grounded in

³⁰ Max Hastings, *Overlord : D-Day and the Battle for Normandy* (London: Pan Books, 2015), 172.

the SA-5 operator's signaling. The threat in that case was not solely constituted by the SA-8. Instead, the threat is more thoroughly understood as the entire integrated air defense system (IADS). The function of an integrated system is to foreclose options to the adversary and therefore to complicate the operational problem.

The same holds—as it must for a reductivist—in a non-combat context. Suppose two wrongful aggressors team up to try to kill me. The first holds a fully loaded gun, stands in the doorway and aims it at my head. As I begin to move toward the only other door in the room to make my escape, the second assailant stands in that doorway holding an unloaded gun and aims it at my head. The second attacker is—as an individual—merely signaling. His gun is unloaded and he has no means lethally to threaten; and if I were to run for it, I could bowl him out of the way and make my escape. But by standing in the doorway and signaling with his unloaded weapon, he is intentionally foreclosing my options and complicating the problem I face. He is a participant in the lethal threat. On the account presented here, he is liable to lethal defensive harm because his signaling helps to constitute the unjust, lethal threat. The same is true of the SA-5 operator. We need not make any claims about whether he is for or against the Iraqi cause; whether he plans to fire his weapon at the F-16 pilot if the F-16 comes near enough; nor even whether his command trailer is in fact connected to real missiles. If Patton is constitutive of the threat with his dummy tanks, and the Confederate soldiers are constitutive of the threat with their Quaker guns, then the SA-5 operator, by sitting in the SA-5 command trailer, is also constitutive of the Iraqi air defense threat.

The general rule that signaling one's participation in hostilities is constitutive of the threat applies across combat operations—to include those below the threshold of war. In one sense this is a return to the Walzerian position: by wearing the uniform of a political community's military that is engaged in hostilities, one contributes to the threat posed by

that military. But the explanation for why this is the case is a stark departure from Walzer's position. There is no ontological or metaphysical mystery in one's becoming "a dangerous man." Instead there is the very real, overt, and historically recognizable role of signals in combat. In combat, to signal participation in hostilities is to complicate the operational problem and thereby to participate in the threat.

It might seem as though adopting signaling as constitutive of an unjust threat might justify preemptive harm. Suppose, for example, that through a military buildup along the border with neighboring State B, State A signals an interest in committing an unjustified act of aggression at some point in the future. If signaling a threat partially constitutes the threat and if this buildup signals a threat, then perhaps State B is justified in causing preemptive harm to prevent the future attack. The two questions though—whether signaling can be constitutive of a threat and whether preemptive harm can be justified—are independent of one another. As I have argued here, signaling partially constitutes a threat only when there is, in fact, a threat. The Quaker guns constitute an unjust threat because the Confederate Army really did have artillery pieces and really did fire them at Union soldiers. Patton's First US Army Group really constituted a just threat because the Allies really were preparing to invade France. Justification for causing harm to those who participate in signaling decisively depends upon whether those participating in the signaling really do contribute to an unjust threat. The question, therefore, of whether one can be justified in causing harm preemptively to defeat a future threat is logically prior to the question of whether signaling can partially constitute that threat. If one is justified in causing harm to preempt a future attack, then one can be justified in harming those who signal that future attack. If one is not permitted to cause harm to preempt a future attack, then it is impermissible to harm those who merely signal the future attack. The argument I have made about signaling is agnostic as to whether

preemptive harm can be justified.³¹

Admittedly, my argument at times relies on convention. If military signals—uniforms, national flags, white flags, red crosses, etc.—are defined by convention, then is not the military principle of distinction likewise conventional? This charge, though, is misplaced. The fact that signals can constitute a threat does not rely on convention. In the domestic case above, when the assailant raises his unloaded gun and points it at my head, we would not say that I recognize his signaled threat by convention. We would say only that I recognize his act as a threat. In war, the interpretation of signals does indeed rely on convention. We know what red crosses and crescents, white flags, and state flags mean only because we have agreed in advance to those meanings. But this is a claim about what some signals mean and not about whether we can recognize signaling more generally. My normative claim is that in war signaling can constitute an unjust threat and that it is therefore sufficient for liability to defensive harm even if some signals and their meanings are agreed to by convention.

2.5. CONCLUSION

I first argued against an exceptionalist account of just war theory. Though the exceptionalist account is not logically inconsistent—that is, it is not an untenable position—it nevertheless generates two implausible implications. The first is in the asymmetry between the deontic power of orders given by policy-makers and those given by commanders. The second is that the exceptionalist must develop a new exception to ordinary morality for military operations below the threshold of war. I then argued for an individualist account of collectives in war. A person—even a person who poses no individual threat—can nevertheless be morally responsible for a threat if she participates by signaling. This is, in the general case, what combatants do.

³¹ I address imminent and non-imminent threats in the fourth paper, “Continuing Threats in War.”

This proposal—that in the combat context, merely signaling an unjust threat is sufficient for liability to defensive harm—addresses only one facet of the common disagreements between reductivist-individualists and exceptionalist-collectivists. Namely, it helps to explain why, on a reductivist view, many members of a military engaged in an unjust war are liable to be killed. Here, the laws of war and international convention do play an important normative role. When, for example, a chaplain or a medical provider marks her uniform, vehicle, or building with religious or medical symbol, she is overtly and intentionally signaling that she is not participating in hostilities. She is not signaling a threat and therefore, even if she is on the unjust side, she is not liable to defensive harm. Meanwhile, administrative and support personnel might participate in signaling and therefore partially constitute the threat. A military buildup in advance of an unjust attack might very well include administrative and support personnel. If it does, these combatants do indeed signal an unjust threat and are liable to defensive harm to defeat that threat. On this account of signaling as threatening, the set of people who are liable to be harmed and the set of unjust combatants overlap considerably.

3. Duty Killing and a New Moral Equality of Combatants

3.1. INTRODUCTION

In this paper, I argue that the responsibility account of liability to defensive harm is sensitive to the attacker's epistemic state in cases in which she justifiably believes she has a duty to cause harm. According to the responsibility account of liability, a person is responsible for wrongful harm in the relevant sense if and only if she voluntarily engages in a foreseeably risk-imposing activity and wrongful harm eventuates. I argue that, though theorists use the term "voluntary," the responsibility account depends in fact on optionality. An agent is responsible for wrongful harm in the relevant sense if and only if he engages in an optional activity that is foreseeably risk-imposing and wrongful harm eventuates. This transition from voluntariness to optionality is crucial because it enables a clearer connection between the responsibility account of liability and the distinction between brute moral luck and option moral luck. I first argue for the weaker claim that a person cannot become liable to defensive harm for committing morally obligatory actions. I then argue for the stronger claim that when a person is epistemically justified in believing he has a moral obligation to act, his action is not morally optional in the relevant sense. If this is right, then an agent might cause objectively wrongful harm and yet remain immune to defensive harm. And, by extension, on this modified responsibility account of liability, combatants on both the just side and the unjust side of a war might remain immune to attack and therefore be morally equivalent. This is an important implication because one of the crucial differences between the reductivist-individualist and the exceptionalist-collectivist accounts of just war theory is on the moral equality of combatants. As I argue here, in at least some cases, just combatants might meet unjust combatants on the battlefield as moral equals. That is, each retains his

right not to be killed.

If, as I argue in this paper, moral responsibility, and therefore liability, can decisively depend upon an agent's epistemic considerations, then under some circumstances, the responsibility account and the evidence-relative account of liability will overlap. On the evidence-relative account of liability, one becomes liable to defensive harm only if one lacks an evidence-relative justification for causing objectively unjust harm. As I shall argue, therefore, if a person causes objectively unjust harm and yet justifiably believes that he acts on an obligation of other-defense, he remains immune to attack on both the responsibility account and the evidence-relative account.

To apply this view to just war theory depends upon two prior steps. First, I must show that much killing in war is obligatory because it is other-defensive; not merely permitted or justified as in simpler self-defense cases. Then I must show that a combatant on the unjust side of a war who nevertheless justifiably believes her war is just, is not liable to defensive harming. One upshot of this account is that it takes seriously obligations of other-defense. One concern many theorists have over reductivist-individualist just war theory is that it fails to account for the moral significance of the fact that many who fight on behalf of an unjust war nevertheless do so as an act of service. The view for which I argue here is both faithful to the intuitions that underly the responsibility account of liability and sensitive to the fact that at least some unjust combatants might believe they are justifiably killing in defense of others.

I proceed as follows. In section 3.2, I develop an uncontentious case in which combatants who fight for a just cause kill combatants who fight for an unjust cause in defense of fellow combatants. Through this case, I intend to show only that at least some killing in war is other-defensive, and therefore any thorough account of the morality of killing in war ought to include other-defensive harm. Then I develop a case that appears to be merely self-

defensive to show that it is in fact other-defensive and the combatant has a moral obligation to cause harm. I call these acts “duty killings.” In section 3.3., I distinguish between the responsibility account of liability as it applies to duty killings and as it applies to self-defense. In this section I argue that, unlike self-defense, other-defense is, under some conditions, morally obligatory. Under these conditions, acts of other-defense are not optional in the sense required by the responsibility account of liability. Finally, in section 3.4, I build upon these claims to develop the *Principle of Justified Belief in Moral Obligations*. According to this principle, one cannot become liable to be harmed for doing what one is epistemically justified in believing that one is morally required to do. This principle, when combined with the conception of duty killing in war, generates a moral equality of combatants under some circumstances—specifically those in which unjust combatants justifiably, even if falsely, believe their war to be just. On my view, it is at least theoretically possible that there are some cases in which combatants on both sides of a conflict remain immune to defensive harm. The view I develop here helps to account for the moral tragedy of war. At times, combatants on both sides remain immune to defensive harm even though only one has a fact-relative justification, and indeed obligation, for killing.

3.2. OTHER-DEFENSIVE KILLING IN WAR

In November 2016, a US Air Force AC-130U Gunship, callsign “Spooky 43,” orbited overhead a Special Forces team of US and Afghan soldiers in Afghanistan.

Gunship: The ground team was caught in an ambush and was being attacked from multiple positions with small arms, heavy machine guns, and grenades. The team suffered 16 casualties in the first few minutes of fighting. The ground team’s air controller called for air-to-surface fires from Spooky 43. The 14-person aircrew fired 40 mm cannon and 105 mm Howitzer rounds in 19 different strikes in close proximity to friendly forces. The Air Force estimates that the Spooky 43 crew saved 50 American and Afghan soldiers’ lives.¹

¹ US Air Force, “The United States Air Force Presents: Portraits in Courage: Vol. X,” US Air Force. Throughout the paper I assume the *ad bellum* justice of United States’ wars in Afghanistan and in the Pacific

The Spooky 43 crew did not act in self-defense—there was no plausible threat to their lives. Assume for the sake of argument that these airborne combatants were fighting in support of a just war in Afghanistan against unjust enemy combatants on the ground. The Spooky 43 strikes were discriminate, proportionate, and necessary. With the information given, it seems that the Spooky 43 crew was justified in killing the enemy combatants. But whatever moral principle justifies this killing, it cannot be a principle of self-defense. The Spooky crew overflew the battlefield at 7,000-10,000 feet at night in an operating environment in which the enemy had very little surface-to-air capability. If the Spooky 43 crew is justified, it must be on grounds of other-defense.²

3.2.1. *Other-defense as a fact of war*

Though it deviates in important ways from the paradigm case of domestic other-defense, *Gunship* is something like a paradigm case of other-defensive killing in war. Consider first the domestic case.

Paradigm Other-Defense. Agatha culpably and lethally attacks innocent Violet. Violet is unable to defend herself. Theresa is in a position to defend Violet at no cost to herself, but Theresa's only means of defeating Agatha is by killing her.

When I say that Agatha culpably attacks Violet, I mean, not only that her threat is impermissible in the fact- and evidence-relative relative senses, but also that it is impermissible in the belief-relative sense.³ In *Paradigm Other-Defense*, Theresa is justified in

Theater during WWII.

² There is an ambiguity between the legal sense and moral sense of "self-defense." Article 51 of the United Nations Charter stipulates that member states have an "inherent right of individual or collective self-defense [against] armed attack." In practice, when one combatant engages in harm to defend another combatant, the legal justification under international humanitarian law is a "self-defense" justification in the sense envisioned in Article 51. Throughout this paper, I have in mind only the moral sense common to the defensive harming literature more generally. When one combatant justifiably defends another combatant, therefore, I will say that she engages in other-defense. "Charter of the United Nations," *The Yale Law Journal* 55, no. 5 (1946): 1303. For the AC-130 specifics and Taliban anti-aircraft capabilities, see Captain Robert Hornick, "AC-130 Employment" (USMC Command and Staff College, 2006).

³ Gerald Lang calls cases in which the attacker is culpable "canonical" in the sense that most philosophers agree that culpable attackers are liable to harm even if they disagree about the liability of non-culpable attackers. I will address the view that attackers are liable when they are responsible for unjust harms—whether or not they are culpable—in section 3.3. Gerald Lang, "Why Not Forfeiture?," in *How We*

killing Agatha, but she is also morally obligated to kill her. It would be impermissible for Theresa not to harm Agatha. There are, though, constraints on those harms. Most theorists agree that any such harm must be necessary and proportionate. The necessity requirement stipulates that Theresa's harmful actions are permissible only if they are the least harmful means of defeating the threat. The defensive harms must also be proportionate in both the narrow and wide senses. These conditions are met in the case.⁴ In *Paradigm Other-Defense*, Theresa's act is not just a permissible or justified killing. It is a duty killing.

Gunship reflects most of the features of *Paradigm Other-Defense*. Unjust combatants are trying to kill just combatants who are innocent with respect to the attack and the Spooky 43 crew can defend the ground force at little additional costs to themselves. Moreover, the harms the Spooky 43 crew cause to the enemy combatants fall within the relevant constraints. Killing the enemy combatants is a necessary condition for defeating the unjust threat; the Spooky 43 crew causes harms to which the unjust combatants are liable; and the attack poses no threat bystanders.

Gunship deviates from *Paradigm Other-Defense* in one way that raises an important question in combat cases. In the domestic case, the third party defender can be anyone who is in a position to defend the victim. The same is not true in *Gunship*. The Spooky 43 crew is made up of professional airmen who have not only signed a contract and are paid to do such things as defend their fellow combatants on the ground but have also made a commitment

Fight: Ethics in War, ed. Gerald Lang and Helen Frowe (Oxford: Oxford University Press, 2014), 47. For a discussion as to whether liability is grounded in culpability or mere responsibility, see Judith Jarvis Thomson, "Self-Defense," *Philosophy & Public Affairs* 20, no. 4 (1991); Quong, "Killing in Self-Defense."; Kimberly Kessler Ferzan, "Culpable Aggression: The Basis for Moral Liability to Defensive Killing," *Ohio St. J. Crim. L.* 9 (2011); Joanna Mary Firth and Jonathan Quong, "Necessity, Moral Liability, and Defensive Harm," *Law and Philosophy* 31, no. 6 (2012); Adam Hosein, "Are Justified Aggressors a Threat to the Rights Theory of Self-Defense?," in *How We Fight: Ethics in War*, ed. Helen Frowe and Gerald Lang (Oxford: Oxford University Press, 2014); Jeff McMahan, "Self-Defense against Justified Threateners," *ibid.*

⁴ Though wide proportionality is of little concern in this paper. See McMahan, *Killing in War*, 20-21. Additionally, many theorists hold that Theresa's defensive harms are justified only if Agatha's threat against Violet is imminent. I argue for rejecting imminence as a general requirement for justifiable defensive harms in section 4.3 of the next paper, "Continuing Threats in War."

and taken an oath to carry out those professional obligations. These institutional factors are significant because they apply to many cases of killing in war. They do not detract from the broader argument, however. Imagine that some civilian pilot is flying his aircraft in Afghanistan, permissibly carrying a weapon in the cockpit, and that he can defend the just combatants while meeting all the relevant constraints. If the civilian pilot does fire on the unjust combatants, it seems that he fulfills his duty of other-defense. The institutional factors might generate a number of moral constraints that bear on the Spooky 43 crew which are absent or reversed for the civilian pilot. The effect of these factors here is likely to be that the obligations of other-defense the Spooky 43 crew faces are even weightier than for the civilian pilot. For example, the institutional demands probably weaken the at-little-cost-to-themselves clause that obtains in *Paradigm Other-Defense*. Suppose there is some significant cost to the third party defender—there is a credible threat of being shot down. Such a cost would not absolve the Spooky 43 crew of their obligations. Institutional factors demand that combatants accept very great cost to defend others.

The institutional factors will have the opposite effect on the civilian pilot. In *Paradigm Other-Defense*, many hold that if a law enforcement officer is able to defend Violet, then Theresa is no longer obligated, and in fact may not be permitted, to harm Agatha in Violet's defense.⁵ The institutional factors that apply to the Spooky 43 crew are similar to those that apply to the law enforcement officer. Just as the law enforcement officer's presence might render the third party's defensive harms impermissible, so too might Spooky 43's presence render the civilian pilot's defensive harms impermissible. Whatever the effect of the institutional factors, then, they do not weaken the Spooky 43 crew's duty of other-defense—they might even strengthen it.

⁵ See, e.g., Cécile Fabre, "Mandatory Rescue Killings," *The Journal of Political Philosophy* 15, no. 4 (2007): 167-70. See also Fishback, "Necessity and Institutions."

Some will respond to *Paradigm Other-Defense* and to *Gunship* with the strong intuition that, though Theresa might be permitted or even justified in harming Agatha, she cannot be morally obligated to kill. Cécile Fabre has addressed this question at length. Fabre's case depends upon a number of sequential steps beginning with a case in which most people will intuitively hold that a potential rescuer has a moral obligation to rescue and in which the victim has a right to be rescued. Suppose, for instance, that a starving person needs food and I have food to spare. Surely the starving person has a right to be given some food and I have an obligation to give it. Suppose now that Agatha is about to be murdered and she can defend herself only if she borrows Theresa's gun. Fabre argues that, just as I have an obligation to give food to the starving person, Theresa has an obligation to lend Violet her gun. Finally, suppose the only way for Theresa to survive Agatha's unjustified attack is for Theresa to shoot and kill Agatha. Fabre argues that here, too, Theresa has a moral obligation to kill Agatha and that Theresa has a right to have Agatha defensively killed.⁶

One might attempt to bolster the intuition that one cannot have a moral obligation to kill by pointing to the potential psychological harm one might suffer for killing—even for killing someone who is liable to be killed.⁷ But, as Fabre argues, when we take those psychological costs into account, we include them in the total cost the third party defender would bear in defensively killing the attacker. Absent the institutional factors mentioned above, acts of other-defense are obligatory only in cases in which the third party defender can defend the victim at little cost to himself. It is therefore true that if the third party defender would bear a high psychological cost, then other-defensive killing would not be morally obligatory. But this would depend on the case and would not amount to the much stronger categorical claim that killing is never morally obligatory.

⁶ Fabre, "Mandatory Rescue Killings," 365-73.

⁷ I address the psychological cost of death in liability cases in section 5.5. of the final substantive paper in this thesis, "Reasons Not To Kill in War."

If the Spooky 43 crew has an obligation of other-defense, there are good reasons to think that many other-defensive wartime killings are also instances of duty killing. Artillery fire, snipers, cruise missiles, and myriad other weapons systems and tactics generate risk asymmetries so that combatants attempt to kill enemy combatants from outside the enemy combatants' effective range. Even at the most basic level of small unit tactics, killing is often other-defensive. For example, the act of "cover fire" consists in one soldier moving and exposing herself to the enemy's threat while another soldier fires upon the enemy from relative safety. The soldier doing the firing is not defending himself, but someone else. My goal in this section is not to catalog duty killings in war, but only to show that duty killing is commonplace in war. At this point, then, we should accept that some significant subset of justified killing in war, even if it can be justified by appeal to self-defense, also entails a moral obligation of other-defense. In the next section, I argue that even instances of justified killing in war that seem purely self-defensive are often instances of duty killing.

3.2.2. Other-defense as pervasive in war

Even if the Spooky crew in *Gunship* acts in defense of others, there seem to be numerous real-world cases of justified killing in war in which just combatants do have a self-defense justification for killing. Surely when combatants are squared off against one another in a firefight, the just combatant has a self-defense justification for killing unjust combatants who are trying to kill him. However, even in cases such as these, the just combatant's justification is often overdetermined. The just combatant might have an obligation of other-defense in addition to his right of self-defense.

To illustrate, in March of 1945, after US marines established a presence on Iwo Jima, US marine Sergeant William George Harrell defended his company's command post from a foxhole 20 yards away.

Foxhole: Harrell watched an enemy soldier jump into the foxhole, landing not three feet from him. ... When the enemy soldiers realized Harrell was alive, the one in the foxhole armed a grenade and set it next to Harrell's head. ... Harrell shoved the sputtering grenade toward the ... enemy soldier. The grenade exploded, killing the enemy soldier, obliterating the pistol, and blowing off Harrell's right hand.⁸

Did Sgt Harrell kill with a self-defense justification or from an other-defense obligation? At first glance, Harrell's action looks purely self-defensive. Indeed, Harrell did face a kill-or-be-killed forced choice that was imposed upon him by his enemies. Self-defense provides a *prima facie* exhaustive account of the morality of Sgt Harrell's actions in *Foxhole*, but there is more at stake in Harrell's case than self-defense.

To see the relevance of other-defense to Harrell's case, we must consider the obligation to retreat that arises in some self-defense cases. Consider Frowe's *Lucky Escape* case.

Lucky Escape: Agatha is shooting at Violet to try to kill her because she dislikes her. Agatha chases Violet to the edge of a cliff. Unbeknown to Agatha, Violet has both a gun and a parachute. She can thus save her own life either by jumping to safety, using no force against Agatha, or by shooting and killing Agatha.⁹

Most theorists interpret the necessity requirement to entail that if Violet chooses to defend herself, she must do so with the least harmful means available to her. Though theorists disagree as to whether Agatha is liable to being harmed in such a case,¹⁰ most agree that Violet ought to parachute to safety rather than shoot at Agatha. This is because both available options successfully defeat the threat, and the necessity requirement demands that Violet choose the defensive option that causes the least amount of morally weighted harm.

⁸ James R. Woodall, *Texas Aggie Medals of Honor: Seven Heroes of World War II* (College Station: Texas A&M University Press, 2010), 137. I have replaced some pronouns with names for readability. Otherwise, I have quoted the text exactly.

⁹ Frowe, *Defensive Killing*, 88. I have changed Frowe's naming convention to my own for consistency.

¹⁰ An internalist account builds necessity into liability so that Agatha is liable only to harms that are defensively necessary. An externalist account will admit that Agatha is liable to be killed in this case, but might still apply the necessity requirement to permissibility, all things considered. Thus, even if Agatha is liable to be killed, it is not permissible for Violet to kill her. This debate need not trouble us here, but see section 5.4.2. of the final substantive paper in this thesis, "Reasons Not to Kill in War." For the explanation of internalist and externalist accounts, see Frowe, *ibid.*, 88-94. For examples of an internalist and externalist account, see respectively McMahan, *Killing in War*, 9; Firth and Quong, "Necessity, Moral Liability, and Defensive Harm," 675.

Other-defense cases are more complicated than *Lucky Escape*. In *Lucky Escape*, Violet's retreat comes at some marginal cost. For example, suppose Violet has a right to stand atop the cliff. When Violet submits to the necessity requirement, her right to stand atop the cliff is violated.¹¹ This cost is trivial in *Lucky Escape*, but in other-defense cases, a third party's retreat might come at a very high moral cost. Consider a case that shares some similarities with *Lucky Escape*, but in which the agent is a third party faced with a duty of other-defense.

Mother and Daughter. Agatha stands near the edge of a cliff and is shooting at Violet to try to kill her. Theresa, Violet's mother, stands between Agatha and Violet and is thus also threatened by Agatha's bullets. Theresa has a parachute and a gun. Theresa can either jump to safety using no force against Agatha—in which case Theresa will live but Violet will be wrongfully killed—or Theresa can save herself and Violet by shooting and killing Agatha.

There are at least two deontic relationships at stake. By standing where she does, Theresa's life is threatened by Agatha's unjust actions. Theresa can defeat the threat to herself either by killing Agatha or by parachuting to safety. This time, however, Theresa has more than a mere liberty right to be where she is. She has a moral duty to defend Violet. If Theresa parachutes to safety, she allows her right to be violated, which is trivial, but she also fails to fulfill her duty to rescue Violet, whose right not to be killed is being threatened. Under purely self-defensive conditions, one's *pro tanto* reason to defend one's right to be where one is will often be outweighed by the countervailing reason to retreat. Under other-defensive conditions, however, the moral cost of retreating may be high because by doing so one fails to fulfill one's duty of other-defense.¹²

¹¹ McMahan argues that the duty to retreat is grounded, not in necessity, but in proportionality. This is, on McMahan's view, because though killing Agatha is proportionate to the threat against Violet's life, it is disproportionate to the threat against Violet's right to be where she is. See Jeff McMahan, "War as Self-Defense," *Ethics & International Affairs* 18, no. 1 (2004): 76-77. For an interesting response, see Fishback, "Necessity and Institutions," 279-80. McMahan explicitly claims that the cost of retreating in war can be very high. But his reference to "capitulation to aggression" suggests that he has in mind retreat as it pertains to *jus ad bellum* considerations. I argue here that the same relationship applies to *jus in bello* considerations.

¹² I have used a mother and daughter because there will be a strong intuition that Theresa indeed has a duty to defend her daughter. The reader can substitute any relationship in which the one has a moral obligation to defend the other. The case alludes to the distinction between vital interests (e.g., in one's life)

Sgt. Harrell's situation is relevantly similar to that which Theresa faces in *Mother and Daughter*. To see why this is so, consider the following account of the three US marine divisions tasked with taking Iwo Jima.

Marine Divisions: At 3 AM on ... February 19, the marines aboard the assault transports were roused from bunks by clanging gongs and loud-speakers blaring "Reveille, Reveille." A steak breakfast, the traditional meal before assaulting the beaches, was served to all hands. At 6:30 AM the order was given: "Land the landing force." ... Three marine divisions (3rd, 4th, and 5th) were poised to assault Iwo Jima.¹³

Sgt Harrell was a member of the 5th Marine Division. At time T_0 , when the marine divisions are preparing to assault the beach, no marine faces a threat to himself. Yet every marine knows that if he does assault the beach, Japanese soldiers will try to kill him, and he will have to shoot back in putative self-defense. Moreover, if the marines do not assault the beach, the Japanese soldiers will be unable to threaten them. If the justificatory burden for the foreseeable killing is borne by individual self-defense, then each individual marine aboard the assault transports has a moral obligation grounded in the minimal harm requirement to refrain from attacking Iwo Jima. They are obligated to retreat. They are, in so far as self-defense is concerned, like Violet in *Lucky Escape*—only instead of parachutes they have boats. The battle for Iwo Jima cost the lives of nearly 6,000 US marines and an estimated 18,000 soldiers of the Japanese Defense Force.¹⁴ How can it be the case that all those killings that took place at time T_1 can be justified in self-defense if each marine had the means to avert the threat by choosing not to attack at T_0 ?

Consider Sgt Harrell's specific case. At the moment at which the Japanese soldier placed the grenade (time T_1), Harrell is indeed defending himself. But at time T_0 , just before his division assaulted the Iwo Jima beach, there would have been very little justification-

and lesser interests (e.g., in standing where one likes). I address this distinction at length in section 4.3. of the next paper, "Continuing Threats in War."

¹³ For the *Marine Divisions* account, see Woodall, *Texas Aggie Medals of Honor*, 134.

¹⁴ Robert S. Burrell, *The Ghosts of Iwo Jima*, 1st ed., Texas A&M University Military History Series (College Station: Texas A&M University Press, 2006), 83.

relevant cost to Harrell in retreating.¹⁵ If the only defensive harm at stake is individual self-defense, choosing not to attack Iwo Jima at T_0 is the only course of action that meets the minimal harm requirement—it defeats the foreseeable attack against Harrell with the least amount of harm. If this is right, then all similarly situated just combatants should retreat at T_0 prior to contact with the enemy. But such a view treats individual battles as if they are causally and morally independent from one another and separable from the war. In the remainder of this section, I argue that we cannot understand Harrell’s deontic condition without situating his fight in the foxhole within the broader context.

What is at issue in the marine divisions’ attack on Iwo Jima is not simply a right or a permission, but instead an obligation of other-defense. In *Gunship* above, the fact that the Spooky 43 crew acted in other-defense is obvious. Just combatants on the ground were actively engaged in a firefight with unjust combatants. The Spooky 43 crew acted in their defense. But not all killing in war is like this. When one considers, not just individual battles, but campaigns and wars as a whole, one sees that when people go off to war as combatants, they do so to defend citizens at home. Justified killing in war is often in defense of noncombatants. If the US’s war with Japan was justified, that justification was not grounded solely in the defense of marines on Iwo Jima. It could have been justified only if it defended against the threat Japan posed to US persons more broadly.¹⁶ Just as cover fire consists in a voluntary distribution of the enemy’s threat from one combatant to another, the US’s entry into the war distributed the threat posed by the Japanese military from US noncombatants in, for example, Hawaii, California, or wherever the Japanese fleet would have attacked next,

¹⁵ Harrell’s own government might have imposed some significant cost on Harrell for retreating, e.g., imprisonment for dereliction of duty. Here we are concerned with the reasons that are relevant to Harrell’s justification for killing the Japanese soldier. I therefore set the punitive concerns to one side.

¹⁶ Seth Lazar puts similar concepts in terms of “specific micro-threats against individuals, and the macro-threat their state poses to its adversary.” I reject this terminology because it suggests that defense of noncombatants will be on a large scale and this is not necessarily the case. See Lazar, “The Responsibility Dilemma for Killing in War: A Review Essay,” 186.

to US combatants. The marine divisions have a moral obligation to assault the Iwo Jima beaches in defense of the people in the US whom the Japanese military threatened. If Sgt. Harrell's only justification was a self-defense justification, then he would indeed have had an obligation to retreat at time T_0 . But Harrell did not go to war to defend himself. He went to war to defend his fellow citizens.

Though I have focused on US entry into the war with Japan as an example, this voluntary redistribution of threats from noncombatants to combatants typifies the just resort to war. As Fabre puts it, "In a war of collective self-defence, combatants do not kill merely in defence of their lives; they also kill in defence of their comrades' lives, as well as in defence of the lives and other fundamental rights of non-combatants back on the home front."¹⁷ Harrell's is not a special case. A war is justified only if, among other things, the violence one side commits defends members of the political community from the unjust violence the other side threatens. In the general case, just combatants do not go to war solely, nor even primarily, to defend themselves. They go to war to defend members of a political community. Fabre's claim about wars of collective self-defense is equally true of other kinds of wars. If a civil war is a just war it is so because the rebels are justified in causing lethal harm to defend fellow-members of the oppressed group against the wrongful threats imposed by the state. If an armed humanitarian intervention is justified, it is so because the intervening power is justified in causing lethal harm to defend the rights of the victims that are being threatened. If a war against a non-state group is justified it is so because the victim state is justified in defending its citizens against the threat posed by the non-state group. In any case, a just war is a war in which the rights of some group are being threatened and the defense of those rights justifies the use of lethal force. And, historically, when the political community resorts to force, it is often the case that some members of the community will cause justified lethal

¹⁷ Cécile Fabre, *Cosmopolitan War* (Oxford: Oxford University Press, 2012), 55.

harm to defend the rights of other members of the political community.

Someone might object here that combatants often do kill in self-defense. Even if they also kill in other-defense, the objection might continue, there is a problem of overdetermination. If, for example, Harrell's justification is overdetermined, we have no way of knowing whether the relevant justification is grounded in self- or other-defense. This overdetermination problem need not trouble us though. When combatants on the just side commit themselves to war in defense of fellow-citizens, they expose themselves to the enemy's unjust threats and thereby gain a self-defense justification. Their justification for killing in war is therefore overdetermined. But this new self-defense justification does not vitiate their other-defense obligation. Thus, even if a combatant's justification is overdetermined, his moral obligation is uniquely grounded in other-defense.

In this section I have argued, not merely that some killing in war is other-defensive, but that in many cases just combatants have a moral obligation to kill unjust combatants. This is, so far, a banal claim. After all, war has always consisted in some people killing to defend some other people. And yet, this recognition of killing in war as obligatory has gone relatively unnoticed in a body of literature that has focused on the permissibility of killing in war. In the next two sections, I develop the implications of this view. Because duty killing is not morally optional, some combatants who fight for an unjust cause remain immune to attack. In these cases, combatants on both sides of a conflict retain their rights not to be killed.

3.3. THE RESPONSIBILITY ACCOUNT OF LIABILITY

In this section, I argue for a modified version of the responsibility account according to which moral luck can vitiate liability if it is brute moral luck but not if it is option moral luck. Therefore, central to the account is not whether an action is voluntary, but whether it is

morally optional.

3.3.1. *Moral luck*

The language of brute moral luck and option moral luck derives from Ronald Dworkin's use of brute luck and option luck in his theory of distributive justice.¹⁸ According to Dworkin, an unlucky person is responsible for her decisions and their outcomes so long as her bad luck was the result of a gamble. Dworkin offers the example of betting on the stock market. If a person voluntarily invests all of her retirement savings on a stock market bet, when that stock market bet fails, society does not owe her compensation. It would be different if, for example, her retirement savings had been stolen. In such a case, she would also be the victim of bad luck, but this luck would not depend upon her choice to engage in a risky activity. Dworkin calls luck of the former kind "option luck" and luck of the latter kind is "brute luck."

Michael Otsuka combined Dworkin's distinction between brute and option luck with the conception of moral luck put forward by Thomas Nagel and Bernard Williams. Suppose, as Otsuka does, that two people drive drunk. One of those people hits and kills a pedestrian, the other makes it home safely.¹⁹ We rightly judge the first driver's action more negatively even though he was the victim of bad moral luck—but only because it was bad option moral luck. Bad brute moral luck should not affect our moral judgments of an action. A person is

¹⁸ See Ronald Dworkin, "What Is Equality? Part 2: Equality of Resources," *Philosophy & Public Affairs* 10, no. 4 (1981); *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, Mass: Harvard University Press, 2000), 73-79. Jonathan Quong introduces this distinction saying, "Here we find the familiar and powerful luck egalitarian intuition that individuals ought to bear the costs for their own choices, but should not be held liable for the costs of brute luck." Jonathan Quong, *The Morality of Defensive Force* (Oxford: Oxford University Press, 2020), 26.

¹⁹ See, respectively, Thomas Nagel, "Moral Luck," in *Mortal Questions*, ed. Thomas Nagel (Cambridge: Cambridge University Press, 2012), 24-38; Bernard Williams, *Moral Luck: Philosophical Papers, 1973-1980* (Cambridge: Cambridge University Press, 1981), 20-39; Michael Otsuka, "Moral Luck: Optional, Not Brute," *Philosophical Perspectives* 23, no. 1 (2009). In that 2009 paper, however, Otsuka was interested in blameworthiness and not in liability. Though he admits there that the analogy is not perfect, he sees a considerable overlap between conceptions of brute and option luck in the welfare discussion and in blameworthiness.

the victim of bad brute moral luck if the bad moral luck she suffers is not the result of an optional decision.

Most of Otsuka's analysis in that paper focuses on actions that are impermissible—an assassin fails to kill his target; a drunk driver successfully drives home without hitting anyone. At the end, however, Otsuka does broach the subject of morally obligatory actions. Suppose, based on circumstances outside of his control, that a government official must gamble. In Otsuka's case, the official's fellow citizens are being wrongfully held captive. All peaceful alternatives have been exhausted, and the official must either send in special operations forces to rescue the captives or do nothing, in which case the hostages will certainly be wrongfully held and might even be killed. Both options available to the official are risky; he gambles whether he chooses to act or chooses not to. If we hold that he has a moral obligation to gamble, then even if he does order the special operations raid, and even if it does go terribly wrong, he is not blameworthy.

More recently, Otsuka has explicitly applied the language of brute moral luck and option moral luck to liability to defensive harm. He writes,

The person who tries to shoot someone who turns out to be innocent is morally unlucky in much the same way that someone who gambles on the stock market and loses is financially unlucky. The upshots of such gambles are not unfair because they are a matter of bad option luck rather than brute bad luck.²⁰

This application of the distinction between brute moral luck and option moral luck is crucial to the responsibility account's plausibility, but it also has important implications for cases of obligatory defensive harms.

3.3.2. Epistemic limitations and the responsibility account

To see why the distinction between brute moral luck and option moral luck is crucial to the

²⁰ "The Moral-Responsibility Account of Liability to Defensive Killing," in *The Ethics of Self-Defense*, ed. Christian Coons and Michael Weber (New York: Oxford University Press, 2016), 63-64.

responsibility account of liability, consider first one of McMahan's defensive harming cases.

Conscientious Driver. A person keeps his car well maintained and always drives cautiously and alertly. On one occasion, however, freak circumstances cause the car to go out of control. It has veered in the direction of a pedestrian whom it will kill unless she blows it up by using one of the explosive devices with which pedestrians in philosophical examples are typically equipped.²¹

On McMahan's view, the driver is liable to be harmed because he is responsible for the threat of unjust harm to the pedestrian. McMahan's claim is not that the driver acted recklessly or negligently, nor that he is culpable or blameworthy for the results of his actions. "The driver is liable because he voluntarily engaged in a risk-imposing activity and is responsible for the consequences when the risks he imposed eventuate in harms."²² On McMahan's view, the fact that the driver knew the risk of wrongful harm to be low does not vitiate his liability to defensive harm. There are two jointly sufficient reasons for the driver's liability in *Conscientious Driver*. He willingly and wittingly engaged in a risk-imposing activity and wrongful harm eventuated from that activity.

If either of the two jointly sufficient conditions is absent, on McMahan's view, the agent is not liable to defensive harm. To see that liability depends on the foreseeability of wrongful harm, consider McMahan's *Unwitting Detonator* case.

Unwitting Detonator. Agatha has secretly tampered with a man's cell phone in such a way that if the man presses the "send" button, he will detonate a bomb to which Violet has been tied by Agatha. Agatha has trussed Violet up so that she cannot escape or alert the man with the cell phone to her plight. But the villain has given Violet a weapon with which she can kill the man with the cell phone.²³

Those engaged in the defensive harming debates might disagree as to whether Violet in *Unwitting Detonator* is all things considered permitted to harm the cell phone operator. She might, for example, have strong agent-relative reasons to defend her life at his expense. But

²¹ McMahan, "The Basis of Moral Liability to Defensive Killing," 393. A very similar case also appears in *Killing in War*, 165.

²² "The Basis of Moral Liability to Defensive Killing," 393-94.

²³ McMahan does not give this case a name. *Unwitting Detonator* is my shorthand. I have changed "you" to "Violet" for consistency. Ibid., 397.

on the responsibility account of liability, the phone operator is not liable to defensive harming. McMahan's explanation in *Unwitting Detonator* is grounded in the phone operator's epistemic limitations. "The necessary ingredient of responsibility that is missing in this case is foreseeability."²⁴ That is, the cell phone operator is voluntarily engaging in an activity that he cannot reasonably foresee is risk-imposing. If that epistemic limitation were removed, say, because the cell phone operator is reliably informed that a sinister bomber had connected many of the city's cell phones to explosives, the foreseeability condition will have been met, and the cell phone operator will be morally responsible for the unjust harm and liable to defensive harming.²⁵

On McMahan's account, the liability asymmetry between *Conscientious Driver* and *Unwitting Detonator* is grounded in the difference between the foreseeability of the unjust harm that might result in the two cases. McMahan's responsibility account, therefore, already incorporates the claim that one's liability to defensive harm can decisively depend upon one's epistemic state. The cell phone operator in *Unwitting Detonator* remains immune to defensive harm because his belief that he is not engaged in a risk-imposing activity is an epistemically justified belief.

The open question is why we should accept the claim that the cell phone operator's epistemic limitation and the conscientious driver's epistemic limitation are relevantly dissimilar. The cell phone operator is permitted to press "send" in the evidence-relative sense. The driver is permitted to drive in the evidence-relative sense. Neither has any way of

²⁴ Ibid.

²⁵ Kimberly Kessler Ferzan is critical of McMahan on these grounds. "By employing foreseeability and risk criteria, McMahan oddly tries to straddle the objective/subjective divide. Doctrines like foreseeability and probability require that we select some epistemic stance, whereas objective justification does not. McMahan sometimes conjoins the two." McMahan's appeal to epistemic factors, on my view, does not warrant this criticism, but, as I argue here, it does open the door to the *Principle of Justified Belief in Moral Obligations*, and therefore to the new moral equality of combatants as I argue in section 3.4. See Ferzan, "Culpable Aggression: The Basis for Moral Liability to Defensive Killing," 681.

knowing that today will be the day that their otherwise benign behavior will threaten a person's life.

3.3.3. *Moral obligations and moral luck*

One way to capture the asymmetry between *Conscientious Driver* and *Unwilling Detonator* is by Otsuka's appeal to brute and option luck. The driver in *Conscientious Driver* is liable because, inter alia, he willingly engaged a foreseeably risk imposing activity. The fact that he now threatens the pedestrian is the result of bad moral luck, but it is bad option moral luck. The cell phone operator in *Unwitting Detonator*, on the other hand, engaged in an activity that is not foreseeably risk imposing. He, too, is the victim of bad moral luck. But his is bad brute moral luck rather than bad option moral luck.

Based on these two cases we can conclude that one way that an agent can fail to meet the threshold of moral responsibility required to make himself liable to defensive harm is if he fails to meet the epistemic threshold that is required for his action to be foreseeably risk imposing. If an agent cannot reasonably be expected to know that an activity is risk imposing, and if that activity is in fact risk imposing, then he is the victim of bad brute—rather than bad option—moral luck. There is a ready analogy with Dworkin's own example. A person is not the victim of bad option luck if struck by an unpredictable meteorite simply because she chose to stand on that spot. Though her action is voluntary, and indeed optional, she chose to stand on the spot without any way of knowing that it would be dangerous.²⁶

Now suppose someone acts, not with a mere permission, but from a moral obligation. Consider McMahan's case of the ambulance driver.

Ambulance Driver. An Emergency Medical Technician (EMT) is driving an ambulance to the site of an accident to provide emergency medical care to a victim who will surely die if not treated soon. The EMT is driving conscientiously and alertly but a freak event

²⁶ Dworkin, *Sovereign Virtue*, 73.

occurs that causes the ambulance to veer uncontrollably toward a pedestrian.²⁷

McMahan appeals to *Ambulance Driver* to distinguish between actions that are merely permissible and actions that are justified. In McMahan's terms, one has a moral justification to commit an act if one has a positive moral reason for acting. In *Conscientious Driver*, the driver has a mere permission to drive because, though there was no moral prohibition against her driving, she also did not have a positive moral reason to drive. In *Ambulance Driver*, McMahan claims that the EMT is justified in driving because she has a positive moral reason. Despite this distinction, however, McMahan holds that the EMT, like the driver in *Conscientious Driver*, is morally responsible for her risk-imposing activity and therefore liable to be defensively harmed by the pedestrian.

If the EMT is driving to rescue a person who will otherwise die, then I think McMahan is mistaken here.²⁸ The EMT does have a moral justification to drive, but she also has a moral obligation. In *Ambulance Driver*, an innocent person's life is at risk, the EMT is in a position to save him, and she can do so at little cost to herself by driving—a foreseeably risk-imposing activity. *Ambulance Driver* is relevantly similar to paradigm rescue cases in which a potential rescuer can rescue a drowning stranger at little cost to himself. The only morally relevant difference between the paradigm case and *Ambulance Driver* is that, to rescue the stranger in *Ambulance Driver*, the EMT must participate in a foreseeably risk-imposing activity. But the probability that the foreseeable risk will eventuate in wrongful harm is as low in this case as it was in *Conscientious Driver*. If the probability that wrongful harm will eventuate from driving in *Conscientious Driver* is low enough that the driver in that case is permitted to drive, then surely the probability of eventuating harm in *Ambulance Driver* is low enough that the EMT is obligated to drive.

²⁷ McMahan, *Killing in War*, 165.

²⁸ I have modified the case to make the victim's medical condition unambiguously life threatening. It is not clear in McMahan's original case whether the accident victim whom the EMT intends to rescue will die otherwise.

What, then, is the relationship between the EMT's moral obligation to drive and her liability to defensive harm when driving eventuates in wrongful harm? Her foreseeably risk-imposing activity is morally obligatory: it is not optional. And if it is not optional, she is not the victim of bad option moral luck. She is instead the victim of bad brute moral luck and, like the cell phone operator in *Unwitting Detonator*, she remains immune to defensive harm.

3.3.4. Counterarguments

I expect this account to spur a number of challenges. First, one might reject moral luck's relevance to liability to defensive harm in the first instance. On this line of thinking, the driver in *Conscientious Driver* and the EMT in *Ambulance Driver* are liable to defensive harm simply because they have engaged in foreseeably risk-imposing activity. The appeal to moral luck is, ex hypothesi, irrelevant to their liability. But this will not do. For, on this view, the driver in *Conscientious Driver* becomes liable to be killed the moment he turns the key in the ignition. This implies that all drivers become liable to defensive harm the moment they begin to drive whether or not they in fact threaten someone with wrongful harm. This would set the threshold for liability to be killed far too low.

One might instead accept that moral luck is decisive in *Conscientious Driver* but reject the distinction between option and brute luck as inapplicable in liability cases. On this view, the driver in *Conscientious Driver* is liable to be killed because he is the victim of bad moral luck simpliciter, whether it is option moral luck or brute moral luck. But if so, then the moral responsibility account collapses into the rights-based account of liability.²⁹ The rights-based account and the responsibility account disagree on what are sometimes called "innocent threats." Consider Nozick's thrown person case. "If someone picks up a third party and

²⁹ See especially, Thomson, "Self-Defense." For McMahan's response, see McMahan, "The Basis of Moral Liability to Defensive Killing," 387-89.

throws him at you down at the bottom of a deep well, the third party is innocent and a threat.”³⁰ The thrown person, by dint of his mass and velocity, represents a threat to you. But it is not because of anything he has done, instead it is because of something someone else has done to him. According to the rights-based account of liability, the thrown person threatens to violate your right not to be killed and has thereby become liable to be killed. On the responsibility account, the thrown person has not voluntarily—on my revision, optionally—engaged in a risk-imposing activity. And so, though he threatens you, he is not liable to defensive harm. But notice the implication of accepting moral luck without distinguishing between option moral luck and brute moral luck. If one insists that moral luck is relevant in *Conscientious Driver* but that the distinction between option and brute luck is irrelevant, then one must agree with the rights-based account that the thrown person is liable to be killed. For if anyone is the victim of bad moral luck it is Nozick’s thrown person. Of course, one important difference between the driver and the thrown person is that the former is the victim of bad option moral luck and the latter is the victim of bad brute moral luck. A responsibility account that recognizes the importance of moral luck, but not the distinction between option and brute moral luck, collapses into the rights-based account. But insofar as McMahan, Otsuka, and others have developed the responsibility account as an alternative to the rights-based account, this is a high price to pay. I suspect, therefore, that those who hold a responsibility account of liability will insist on retaining the distinction between option moral luck and brute moral luck.

McMahan employed the *Conscientious Driver* case in 2005 and again in 2009—simultaneously with Otsuka’s contribution on the distinction between brute and option moral luck. In both places, McMahan admits that because wrongful harm does eventuate, even though the ex ante probability was low, the conscientious driver is the victim of “sheer

³⁰ Nozick, *Anarchy, State, and Utopia*, 43.

bad luck.”³¹ Ferzan criticizes McMahan’s responsibility account by asking how we can distinguish between two parties who are both the victim of bad moral luck.

Among drivers who impose the same risks on each other and make the same choices, there is no principle by which to distinguish them except “moral luck,” which appears to be McMahan’s answer. Moral luck, however, is hardly an answer. Both of them are unlucky—why not say that the defender is unlucky instead of the driver? That is, without some principle that allows the defender to defend, it appears that the defender is the only one who is unlucky.³²

Otsuka’s distinction between option and brute moral luck is in a position to defend the responsibility account against Ferzan’s objection if, as I propose, it recasts voluntariness as optionality. On this view, if two drivers threaten one another, both become liable to defensive harm because both optionally engaged in a foreseeably risk-imposing activity. The voluntariness requirement distinguishes between cases like *Conscientious Driver* and, for example, falling or thrown person cases like Nozick’s case above.³³ On McMahan’s responsibility account, the thrown person is not liable to be killed because the threat was not the result of his voluntary action. On Otsuka’s account, he is not liable because he is the victim of bad brute moral luck rather than bad option moral luck. My proposal entails that it is optionality rather than voluntariness that is at stake in the responsibility account of liability. Thus, on the revised account, the falling person remains immune to defensive harm because she has not optionally engaged in a foreseeably risk-imposing activity.

My contribution here is to extend Otsuka’s distinction between brute moral luck and option moral luck to the question of morally obligatory actions. The EMT’s decision to drive

³¹ McMahan, “The Basis of Moral Liability to Defensive Killing,” 394, 404. See also *Killing in War*, 165-89.

³² Ferzan, “Culpable Aggression: The Basis for Moral Liability to Defensive Killing,” 678.

³³ For falling person cases, see e.g., Nozick, *Anarchy, State, and Utopia*, 43; Kai Draper, “Defense,” *Philosophical Studies* 145, no. 1 (2009): 72; Steinhoff, “Rights, Liability, and the Moral Equality of Combatants,” 346; Michael Otsuka, “Killing the Innocent in Self-Defense,” *Philosophy & Public Affairs* 23, no. 1 (1994): 85-86; Nancy Davis, “Abortion and Self-Defense,” *ibid.* 13, no. 3 (1984): 191; Jeff McMahan, “Self-Defense and the Problem of the Innocent Attacker,” *Ethics* 104, no. 2 (1994): 265; Quong, “Killing in Self-Defense,” 520; Thomson, “Self-Defense,” 287. For drugged person cases, see, e.g., Otsuka, “Killing the Innocent in Self-Defense,” 75; Thomson, “Self-Defense,” 284; Draper, “Defense,” 71-72; Cheyney C. Ryan, “Self-Defense, Pacifism, and the Possibility of Killing,” *Ethics* 93, no. 3 (1983): 511; Uwe Steinhoff, “Self-Defense as Claim Right, Liberty, and Act-Specific Agent-Relative Prerogative,” *Law and Philosophy* 35, no. 2 (2016): 204.

in *Ambulance Driver* is not morally optional, but morally obligatory. She is not, therefore, the victim of bad option moral luck but of bad brute moral luck. If so, she is not morally responsible for the resulting wrongful harm to the pedestrian nor is she liable to defensive harm. Recall that Otsuka's politician is faced with only two choices—he can order a high-risk military raid or do nothing in which case there is also a high level of risk. The action, Otsuka suggests, is obligatory.³⁴ The EMT is relevantly similar to the politician in that both are duty-bound to engage in the foreseeably risk-imposing activity. And, if so, neither is the victim of bad option moral luck because, though both voluntarily engaged in an activity that was foreseeably risk-imposing, in neither case was that activity morally optional. We are now in a position to respond to Ferzan's concern. If two conscientious drivers threaten each other, both are victims of bad option moral luck, and so both are liable to defensive harming. But not all cases will have this kind of reciprocity. If the conscientious driver and EMT who is on her way to save a life both experience freak accidents that cause their vehicles to go out of control and, ultimately, lethally threaten each other, the conscientious driver becomes liable to defensive harm and the EMT does not. This is because the EMT had a moral obligation to engage in a foreseeably risk-imposing activity. She is the victim of bad brute moral luck while the conscientious driver is the victim of bad option moral luck. The conscientious driver meets the threshold for moral responsibility and therefore liability to defensive harm. The EMT does not.

3.4. JUSTIFIED BELIEF IN A MORAL OBLIGATION

In some cases, a person might be epistemically justified in believing he causes harm from a duty of other-defense even though that belief is objectively mistaken. In this section I argue that in cases such as these, as long as the belief in the moral obligation to harm is epistemically

³⁴ Otsuka, "Moral Luck: Optional, Not Brute," 383.

justified, the person remains immune to defensive harm.

3.4.1. *Duty killing and liability*

Because McMahan's view is grounded in responsibility for objectively unjust harm, rather than culpability or responsibility for subjectively unjust harms, an agent's epistemic limitations about perceived threateners are at most excusing and never justifying conditions.

McMahan's *Resident Self-Defense* case includes an epistemic limitation of this kind.

Resident Self-Defense. The identical twin brother of a notorious murderer is driving during a stormy night in a remote area when his car breaks down. Unaware that his brother has recently escaped from prison and is thought to be hiding in this same area, he knocks on the door of the nearest house, seeking to phone for help. On opening the door, [Resident justifiably believes the harmless twin is the murderer. Resident has been warned by the authorities that the mass murderer will certainly attack anyone he meets on sight, and so Resident] lunges at him with the knife.³⁵

On the responsibility account, the resident in *Resident Self-Defense* is the victim of bad moral luck but is still liable to defensive harm. He justifiably believes himself to be acting in justified self-defense against an unjust aggressor. The resident is, however, mistaken about the facts. He therefore violates the twin's right not to be attacked and if the twin responds with self-defensive harm, the twin does not wrong the resident. In *Conscientious Driver*, the driver was the victim of bad moral luck in that the small but foreseeable risk of unjust harm eventuated in actual harm. In *Resident Self-Defense*, the resident is the victim of bad moral luck in that the available evidence led him to misunderstand the threat or lack thereof and therefore to misinterpret the liability relationships.

It is not merely the case, though, that the resident's action is voluntary. It is also morally optional. Now consider *Resident Other-Defense*. Everything remains the same as in *Resident Self-Defense* except that now the resident's children are cowering inside the house and

³⁵ McMahan, "The Basis of Moral Liability to Defensive Killing," 387. Jonathan Quong helpfully adds the bracketed text in his version of the case to strengthen the plausibility of the claim that Resident's false belief is justified. See Quong, *The Morality of Defensive Force*, 33.

the resident kills the twin, not just in self-defense, but in defense of his children.³⁶ In this case, the fact that the resident acts in other-defense decisively affects his liability to defensive harm. Unlike *Resident Self-Defense*, in this case, the resident's harmful action is not morally optional. He justifiably believes himself to have a moral obligation to harm the twin in defense of his children and is not liable to defensive harm.

This case raises two questions. The first is about the relationship between fact-relative and evidence-relative moral judgments.³⁷ Even if the resident in *Resident Other-Defense* justifiably believes himself to have a duty to harm the twin, and therefore has an evidence-relative obligation, he causes unjust harm in the fact-relative sense. The question is what role his justified belief in a moral obligation to cause defensive harm plays in the fact-relative moral judgment. The second question is the now familiar question about the distinction between actions that are voluntary and those that are morally optional and their relationship to moral luck.

I hold that the resident in *Resident Other-Defense* is relevantly similar to the EMT in *Ambulance Driver*. He is the victim, not of bad option moral luck, but of bad brute moral luck. He is therefore not morally responsible for the wrongful harm that eventuates, nor is he liable to defensive harm.

There is one obvious, if only *prima facie*, disanalogy between the two cases. The EMT in *Ambulance Driver* has a moral reason in fact to rescue the injured person and in acting on that moral reason he inadvertently causes wrongful harm to the pedestrian. The resident in *Resident Other-Defense*, however, has no such moral reason in fact. He is justifiably mistaken about whether or not he has such a reason. One might think, therefore, that he is more like

³⁶ I first heard this case from McMahan. Jeff McMahan, (paper presented at the Manuscript Workshop: Jonathan Quong's 'The Morality of Defensive Force', University of Warwick, 16 February 2018). McMahan received the case from participants in a previous workshop as a challenge to his responsibility account.

³⁷ See Parfit, *On What Matters: Volume 1*, 150-51.

the driver in *Conscientious Driver* who engages in a foreseeably risk-imposing activity without a moral obligation.

This argument has *prima facie* force, but there are two problems. First, it relies upon an implausible—and possibly ad hoc—categorization of permissible and obligatory actions. The two-fold claim that the EMT has, on the one hand, a moral obligation to drive to rescue the victim, but on the other, that he will wrongfully threaten the pedestrian’s life are mutually exclusive. They both appear to be true only because there is an ambiguity in fact-relative and evidence-relative judgments. Based on the facts of the case, the injured person will die if she does not get to a hospital. And were it not for the unforeseen wrongful harm to the pedestrian, the EMT would have a fact-relative obligation to rescue the injured person. But if the EMT had known that on this particular day she would lose control of her vehicle and threaten to kill one innocent person in an effort to save another innocent person from dying, she would know that she is not, in this case, obligated to drive. Indeed, she is not even permitted to drive. Killing one non-labile person to save one non-labile person is impermissible. A truly omniscient person, therefore, would know that in this particular case, the EMT does not have a moral obligation to drive in fact.

This distinction between fact-relative and evidence-relative judgments in *Ambulance Driver* poses a problem, not just for my own argument against liability in cases of moral obligation; it poses a problem for the responsibility account of liability on the whole. For the responsibility account relies upon a conception of “foreseeably risk-imposing activity.” On my reading, this use of “activity” refers to a generalizable set of actions and is distinct from a single “act” with a constrained set of real-world facts. For instance, on McMahan’s account, the relevant activity in *Conscientious Driver* is not “driving on this particular day with this particular set of outcomes,” but rather, “driving.” Bolinger challenges McMahan’s responsibility account on precisely these grounds. If liability decisively depends upon fact-

relative judgments about responsibility for wrongful harm, then surely the driver in *Conscientious Driver* is liable to defensive harm. So too is the EMT in *Ambulance Driver*. But, as Bolinger points out, so is the cell phone operator in *Unwitting Detonator* because he, too, caused wrongful harm and his act was impermissible in the fact-relative sense. That is, pressing “send” on the text message in *Unwitting Detonator*, as Parfit puts it, “would be wrong in the ordinary sense if [the cell phone operator had known] all of the morally relevant facts.”³⁸

McMahan rejects a charge like the one Bolinger offers by appealing to the standard of reasonable foreseeability. One does not, on McMahan’s responsibility account, become liable to defensive harm every time one is causally responsible for wrongful harm. One becomes liable to defensive harm only when wrongful harms eventuate from one’s action when that action falls into the category of activities that are foreseeably risk imposing. If driving conscientiously eventuates in wrongful harm, the driver is liable because he knew *ex ante* that he engaged in a risk-imposing activity. Driving conscientiously is a permissible activity because the probability that wrongful harm will eventuate is sufficiently low. Driving while drunk is an impermissible activity not simply because it is foreseeably risk imposing, but because the probability that it will result in wrongful harm is sufficiently high. But notice that McMahan’s responsibility account is safe from Bolinger’s criticism only if it appeals to types of action—activities—that are permissible as a category: driving, operating a cell phone, acts of self-defense. These activities are permissible in the general case even though there will be individual cases in which they are impermissible in the fact-relative sense.³⁹

³⁸ For the quoted text, see *ibid.*, 150. For Bolinger’s challenge, see Renée Bolinger, “Mistaken Defense and Normative Conventions” (Dissertation, University of Southern California, 2017), 11-15.

³⁹ Some hold that self-defense is not merely permissible, but also justified. For example, some hold that one is permitted to give greater weight to one’s own interests, and therefore, one has a positive moral reason to save one’s own life independent of the attacker’s liability. This is a debate that need not concern us here. If you think that one has a positive moral reason to defend oneself independent of the attacker’s liability, then you can replace “permissible” with “justifiable” here, and my argument remains the same.

If this categorization holds for permissible activities it must also hold for obligatory ones. The activity of “driving” is not sufficiently descriptive for us to determine whether it is a permissible activity in the general case. Driving conscientiously is permissible. Driving while drunk is impermissible. But if we are to insist on generalizable sets of activities—as the responsibility account requires—then a minimally sufficient description of the activity must include its telos. Though I disagree with McMahan about whether the EMT in *Ambulance Driver* is merely justified or obligated to drive, McMahan recognizes that whether driving is merely permissible or justified depends upon the agent’s reason for driving. Driving for one’s own purposes is merely permissible. Driving to save a life is, on McMahan’s view, justified. As I argued above, I hold that driving to save a life is, under some circumstances, morally obligatory.

If this is right, then it is not enough to say that the resident in *Resident Other-Defense* is engaged in the activity of lunging at a person with a knife—a foreseeably risk-imposing activity. Instead, just as we distinguish between driving for one’s own purposes and driving to save a life, we must distinguish between lunging at a person with a knife for self-defensive reasons and lunging at a person with a knife for other-defensive reasons. Again, we return to an analogy between the EMT in *Ambulance Driver* and the resident in *Resident Other-Defense*. Each is engaged in a foreseeably risk-imposing activity that is morally obligatory despite the fact that it is foreseeably risk-imposing. The EMT has a moral obligation to drive when doing so is required to save a life in the general case. The resident in *Resident Other-Defense* has a moral obligation to lunge at a person with a knife when doing so is required to save the lives of his children in the general case. Unlike the driver in *Conscientious Driver* who has a mere permission, the EMT and the resident in *Resident Other-Defense* have a moral obligation to participate in this activity, so defined. Their participation in this activity is obligatory and therefore not morally optional. When they are victims of bad moral luck, therefore, they are

victims of bad brute moral luck and not bad option moral luck. Therefore, like the cell phone operator in *Unwitting Detonator*, they remain immune to defensive harm.

In both *Resident Self-Defense* and *Resident Other-Defense*, the resident is justifiably mistaken about the morally relevant facts about the world. The difference is that in *Resident Self-Defense*, the resident justifiably but mistakenly believes that he is merely permitted to harm the twin. In *Resident Other-Defense*, the resident justifiably but mistakenly believes that he is morally obligated to harm the twin. This difference raises questions about fact-relative and evidence-relative moral judgments and about brute moral luck and option moral luck that I address in the next section.

3.4.2. The Principle of Justified Belief in Moral Obligations

Consider first the implications of moral luck on the relationship between evidence-relative and fact-relative moral judgments. The asymmetry between mistaken self-defense and mistaken other-defense cases reflects the asymmetry between morally optional actions and morally compulsory ones. As we have seen, the responsibility account admits that moral luck can play a role in the outcomes that eventuate from a person's decisions. When the responsible moral agent engages in a foreseeably risk-imposing activity, and when the probability of harm is low as in *Conscientious Driver*, the agent is the victim of bad moral luck. But the asymmetry between morally optional actions and morally compulsory ones suggests the distinction between option moral luck and brute moral luck.

The resident in *Resident Other-Defense*, however, faces a different set of circumstances. The harm he is epistemically justifiably in believing he ought to cause to the twin is not morally optional and he is thus not the victim of bad option luck. He threatens the twin not merely because he may, but because—in the evidence-relative sense—he must. He is therefore the victim of bad brute moral luck and not bad option moral luck. On the revised

responsibility account I offer here, bad option luck does not prevent liability, but bad brute luck can.

With these two considerations in mind, namely the resident's non-optional action and his bad brute moral luck, I propose the following principle:

The Principle of Justified Belief in Moral Obligations: One cannot become liable to defensive harm for doing what one is epistemically justified in believing that one is morally required to do.⁴⁰

A responsible moral agent who acts according to a moral obligation she is justified in believing she has does not commit a morally optional action. She is therefore the victim of bad option moral luck and fails to meet the conditions for liability to defensive harm.

Before proceeding we must recognize one crucial distinction. The *Principle of Justified Belief in Moral Obligations* applies to epistemic limitations on facts about the world. When the resident in *Resident Other-Defense* is confronted with the twin, he justifiably believes the twin is an unjust attacker. According to the *Principle of Justified Belief in Moral Obligations*, this epistemic limitation on the resident's knowledge of the relevant facts about the world is a necessary condition for his immunity to defensive harm. The *Principle of Justified Belief in Moral Obligations* does not entail that a person who is mistaken about the moral principles involved will be similarly immune to harm. Suppose, for example, that in a new variation of the case, the resident is not mistaken about the twin's identity, but instead believes that he has a moral obligation to harm innocent people. This error about moral principles might generate a belief-relative obligation for the resident to harm the twin, but not an evidence-relative one. I hold, though I do not argue for it here, that though one can be mistaken about moral principles (someone might believe, for example, that he has a moral obligation to commit genocide), one cannot justifiably hold such a belief. Thus, in practice, the *Principle of Justified*

⁴⁰ McMahan has offered a more restrictive version of this principle in which the epistemic threshold is not what one is justified in believing but what one is required to believe. McMahan, unpublished.

Belief in Moral Obligations applies only to epistemic limitations on one's beliefs about facts about the world, not one's belief about moral principles.⁴¹

3.4.3. *Implications*

If killing in war is other-defensive, then there may be some cases of killing in war that are relevantly similar to *Resident Other-Defense*. If State A unjustly attacks State B, and if combatants of State B kill combatants of State A in other-defense, then, according to the responsibility account of liability, combatants of State B are not liable to defensive harms. But if combatants of State A justifiably believe that they are acting according to their moral obligations of other-defense, then they do not engage in morally optional behavior and are therefore also not liable to defensive harm. Combatants on both sides, then, remain immune to defensive harm.

Other-defense justifications for killing in war combined with the *Principle of Justified Belief in Moral Obligations* yield the correct answers even in some difficult cases. Walzer's moral equality view has difficulty explaining someone like Erwin Rommel. Walzer goes just far enough to admit "misgivings" about the case, but insists that "Rommel was a servant, not a ruler, of the German state. ... By and large we don't blame a soldier, even a general, who fights for his own government." This is a counterintuitive position. Rommel, as a member of the inner circle and a Field Marshall in the German army during World War II, can reasonably be expected to have known that the war was not defensive and he prosecuted it anyway. That is, Rommel voluntarily killed in support of a war that we can reasonably expect him to have known was unjust. On Walzer's view, Rommel is liable to be harmed not because he has done anything blameworthy, nor specifically because his war is unjust, but because he

⁴¹ I am grateful to Aidan Penn for raising this concern.

is a combatant simpliciter—one who has been turned into a “dangerous man.”⁴²

The common reductivist view seems to provide the intuitive answer in Rommel’s case, but not in the case of some German conscripts. McMahan argues against Walzer’s position on Rommel, claiming that even if Rommel is excused on the grounds that he fought an unjust war in accordance with *in bello* standards, his acts of killing were not justified in either the fact-relative sense nor the evidence-relative sense.⁴³ But on the reductivist view, even more junior German soldiers who believed they were acting in support of a just cause acted impermissibly in the fact-relative sense and are therefore liable to defensive harm.

I suspect that many will share an intuition that a German soldier under these epistemic limitations might be justified in a way that Rommel cannot be. On Walzer’s view, both Rommel and the German soldier are liable because all combatants are liable. A reductivist just war theory that incorporates the responsibility account of liability holds that both Rommel and the German soldier are liable because they are both responsible for unjust harms in support of the war’s unjust aims—though even on the responsibility account, Rommel might be liable to greater harm if he is culpable as well as responsible. On this view, if the German soldier believes he fights for a just cause, he might be excused, but he cannot be justified. According to the *Principle of Justified Belief in Moral Obligations*, the German conscript—to the degree that he justifiably believes he acts on his obligation of other-defense—does not commit a morally optional act and therefore does not make himself liable to defensive harms. Rommel has no such evidence-relative obligation and therefore remains liable to defensive harms.

One can imagine, certainly in theory and perhaps also in history, conflicts in which combatants on both sides of a conflict justifiably believe themselves obligated to kill in

⁴² Walzer, *Just and Unjust Wars*, 39, 145.

⁴³ McMahan, *Killing in War*, 112.

defense of others. Those on one side are factually mistaken while those on the other side might be correct. Combatants on both sides are evidence-relative obligated to harm one another; and yet neither the combatants on the just side nor those on the unjust side are liable to attack. These combatants are morally equivalent not because, as on Walzer's view, all of these combatants are liable to attack. Instead it is because, on this view, neither of them are.

Under these epistemic conditions, neither the combatants on the just side nor those on the unjust side are liable to defensive harms. And yet, combatants on the just side are all things considered justified in killing those on the unjust side. This is a moral tragedy. I call these cases morally tragic because liability and immunity to harm do not reflect the best possible distribution of goods and harms. Instead, the distribution is unjust, and yet, the person who is responsible, or at least partially responsible, for the unjust harm remains immune to defensive harm. This tension is, on my view, reflective of the moral tragedy that often obtains in war.

Imagine a military campaign carried out by combatants fighting a just war. Suppose that during this campaign, none of the combatants violate any *jus in bello* principles. Finally, suppose that some of the unjust combatants who are killed are immune to being killed because they have an epistemically justified belief that they kill in other-defense in support of a just war. On the view presented here, the deaths of those unjust combatants must be included in the wide, rather than the narrow, proportionality calculus. In the proportionality calculus, their deaths are of equal moral weight as the deaths of non-labile noncombatants. Defensive wars against unjust combatants who justifiably believe their war to be just will therefore be more difficult to justify. In such cases, *jus ad bellum* proportionality in the wide sense must include, not just non-labile noncombatants who will be wrongfully killed but also the unjust combatants who justifiably believe their war to be just, because they, too, are non-

liable.

In one sense, this looks like a radical view. In fact, however, it overlaps to a significant degree with both the culpability account of liability and the evidence-relative account of liability. According to the culpability account of liability, a person is liable to defensive harming only if she is culpable for the wrongful harm she causes. On this view, if an unjust combatant non-culpably believes she acts in other-defense, she remains immune to attack. Meanwhile, the just combatant remains immune to attack. The two, therefore, justifiably harm each other even though neither is liable to be harmed.⁴⁴ Likewise, on an evidence-relative view of liability, one cannot become liable to defensive harms if one is epistemically justified in believing one acts permissibly. Those who hold this view will agree with the conclusion that parties on both sides of a conflict may conceivably harm each other even though neither is liable to harm.⁴⁵

3.5. CONCLUSION

My contribution here has been to show that in some epistemic circumstances, the responsibility account of liability generates the same result in the case of unjust combatants who have justifiable epistemic limitations. One shortcoming of the culpability account is that in cases like *Conscientious Driver*, no one is liable to defensive harm. One upshot of the view

⁴⁴ Kimberly Kessler Ferzan makes this claim explicitly, if briefly, when she says of two people who responsibly, though non-culpably, threaten each other: "It is still possible that both sides may *permissibly* act in their own defense, though neither is liable." On my view, under some circumstances, we arrive at the very same conclusion even on the responsibility account of liability. See Ferzan, "Culpable Aggression: The Basis for Moral Liability to Defensive Killing," 683. For further discussion of the culpability view, see, e.g., McMahan, "The Basis of Moral Liability to Defensive Killing," 389-94; Strawser, "The Bounds of Defense," 50-52; Quong, *The Morality of Defensive Force*, 23-25.

⁴⁵ For the evidence-relative view, see, e.g., Strawser, "The Bounds of Defense," 84-85; "Revisionist Just War Theory and the Real World: A Cautiously Optimistic Proposal," in *Routledge Handbook of Ethics and War: Just War Theory in the Twenty-First Century*, ed. Fritz Allhoff, Nicholas G. Evans, and Adam Henschke (London: Routledge, 2013), 537-38. The distinction between Strawser's evidence-relative view and the simple culpability view is subtle. Someone might non-culpably commit an unjust action even though she knows it is an unjust act. If, for example, someone commits an objectively unjust act under excusable duress, she might non-culpably commit an act that is evidence-relative unjustified.

presented here is that the *Principle of Justified Belief in Moral Obligations* is triggered only in cases in which the agent justifiably believes that she has a duty to harm, rather than a mere permission or justification and the responsibility account still explains liability in cases like *Conscientious Driver*. The set of cases that will result in the kind of moral tragedy in which non-liable parties attempt to harm each other is smaller on my modified responsibility account than on the culpability or evidence-relative accounts.

Important questions remain. For example, do these kinds of epistemic circumstances ever occur in the real world? Many will likely agree that combatants can be mistaken about their moral obligations in war. The question at stake here is about the plausibility of the claim that they can justifiably be mistaken about their duty to kill. McMahan argues that, though epistemic limitations can serve as excusing conditions in theory, the threshold for justifiable epistemic limitations is sufficiently high that epistemic excuses for unjust killing in war are rare in practice. According to the position for which I have argued here, some factors McMahan considers to be epistemic excuses can in fact render a person immune to defensive harm. The frequency with which these kinds of cases occur in the real world, however, is a question that falls outside the scope of this paper.

4. Continuing Threats in War

4.1. INTRODUCTION

Shortly after Lucy Pevensie arrives in Narnia, she is befriended by a faun named Mr. Tumnus—or so she thinks. Tumnus lures her into his home and delivers on his promises of tea and a warm fire. Lucy, unaware, is not his guest but his prisoner. Tumnus' apparent acts of hospitality are in fact stalling tactics as he awaits the arrival of the White Witch who will undoubtedly kill Lucy. In a moment of contrition and on the verge releasing his prisoner, Tumnus confesses to Lucy.

“I’m a kidnapper for her, that’s what I am.” ...

“Well,” said Lucy rather slowly, ... “that was pretty bad. But you’re so sorry for it that I’m sure you will never do it again.”

“Daughter of Eve, don’t you understand?” said the Faun. “It isn’t something I *have* done. I’m doing it now, this very moment.”¹

Tumnus' confession presents a puzzle. What can he mean when he says that he is now, at this very moment, in the act of kidnapping? Was he in the act of kidnapping when he built the fire and put on the kettle? In this moment, even as Tumnus confesses to Lucy, she is nevertheless his prisoner. In one sense, Tumnus continually violates Lucy's right not to be kidnapped—the harm he poses is a continuing harm. Moreover, in this moment, Tumnus also poses a continuing threat of harm, for, at each moment, he is about to imprison her even longer and thereby to harm her even further. Suppose Lucy's only means of escaping is by stomping on Tumnus' hoof, temporarily disabling him. If she does harm him, it will be a defensive harm that thwarts his threat. The harm Tumnus causes and the threat he poses

¹ C. S. Lewis, *The Lion, the Witch and the Wardrobe*, 7 vols., vol. 1, *The Chronicles of Narnia* (New York: Collier Books, 1970), 16. *Emphasis in original*.

are temporally coextensive—his is a continuing harm and a continuing threat. He is right both about the harm and the threat when he says he is “doing it now, this very moment.”

One of the debates among contemporary just war theorists is about the distinction between imminent and non-imminent threats. While this two-fold distinction has value, just war theory is incomplete if it fails also to account for on-going threats like the one Tumnus poses to Lucy. I call these “threats of continuing harm.” Reductivist just war theory considers justified killing in war to be an instance of justified defensive harming. This might be easy to conceptualize in a firefight, for example, in which unjust combatants wrongfully threaten to kill just combatants. Just combatants have self-defense justifications for shooting and other-defense obligations to shoot back.² But the experience of war is often characterized by the perennial waiting that takes place between the firefights—the “months of boredom punctuated by moments of terror.”³ Can just combatants be justified in seeking out and engaging unjust combatants even while the unjust combatants are merely in the midst of this waiting? It would be counterintuitive, perhaps even paradoxical, to hold that just combatants are justified in going to war and justified in returning fire during the firefight and yet not justified in seeking out enemy combatants to defeat them. If a reductivist approach to just war theory is the right one, it must explain why just combatants can be justified in killing unjust combatants who pose no obvious imminent threat. Can harm such as this plausibly be construed as defensive harm? Here, I argue that a thorough answer to this question must include a conception of continuing threats of harm.

In section 4.2, I introduce the category of continuing threats and compare it to imminent and non-imminent threats. I then raise a few cases that pose *prima facie* problems

² I discuss killing in war as other-defensive and obligatory in the third paper of this thesis, “Duty Killing and a New Moral Equality of Combatants.”

³ A Young British Officer, “The Baptism of Fire,” in *New York Times Current History of the European War* (New York: The Times, 1914), 979. J. Glenn Gray puts it this way: “For everyone knows that war can be the most excruciatingly boring of all human activities.” J. Glenn Gray, *The Warriors: Reflections on Men in Battle* (Lincoln, Neb.: University of Nebraska Press, 1998), 12.

for common conceptions of imminent and non-imminent threats and lesser and vital interests. These are *The Sleeping Soldier*, Rodin's *Bloodless Invasion*, and the US government's defense of its killing of Anwar al Aulaqi. The first two cases appeal both to the distinction between lesser and vital interests and to the absence of an imminent threat to vital interests. The Anwar al Aulaqi case does not appeal to a distinction between vital and lesser interests but does raise important questions about imminent and non-imminent threats. In section 4.3 I investigate the distinctions between imminent and non-imminent threats and between lesser and vital interests to show that both distinctions fail fully to account for threats in some important cases. Then in section 4.4 I develop the third category—threats of continuing harm—and show that the proportionality requirement as it applies to defense against threats of continuing harm is sensitive both to the magnitude of the unjust harm as well as its duration. In section 4.5 I show that the conception of threats of continuing harm I have developed equally applies to cases outside the military context, and therefore that it conforms to the reductivist thesis that the morality of war reduces to morality more broadly. In closing, I return to the seemingly problematic cases introduced in section 4.2 to show that threats of continuing harm can explain just combatants' justifications in at least two of those cases. I also gesture toward a few important implications of this three-fold taxonomy of threats on a few historical cases as well as the US's asymmetric wars of the twenty-first century.

4.2. THE PROBLEM OF CONTINUING THREATS

There are two distinctions that demonstrate the importance of continuing threats in the ethics of defensive harming. The first is the distinction between imminent threats of harm and non-imminent threats of harm. The second is the distinction between vital interests and lesser interests. In this section, I introduce each of these distinctions and then pose three

problematic cases.

4.2.1. *A three-fold distinction*

First consider the distinction between imminent and non-imminent threats.

Paradigm Defensive Harm: Agatha culpably threatens Violet with imminent, lethal harm. Violet can defeat the threat only by killing Agatha.

The threat Agatha poses to Violet is a threat of imminent harm. Or, at the very least, it is a threat that can be defended against only if Violet acts immediately to cause defensive harm. But in war, just combatants often attack unjust combatants who do not pose an imminent threat. The unjust combatant in the lull between battles does not pose an imminent threat but will undoubtedly attack in the future—he poses a non-imminent threat of unjust harm. One subset of the non-imminent threats unjust combatants often pose is the conditional threat: If attacked by just combatants, unjust combatants will most likely return fire. The fact that unjust combatants are often killed while they do not pose imminent threats raises questions about necessity. If an unjust attack is not imminent or if defending oneself and others against it is not immediately necessary, can defensive harm plausibly meet the necessity requirement? One option available to the reductivist just war theorist is simply to reject imminence as a necessary condition for defensive harming. While it might be true that imminence is not a necessary condition for justified defensive harming, this view still fails to account for the continuing threat an unjust combatant might pose. As I show in the next three subsections, even if one holds that an imminent threat is not a necessary condition for defensive harming, there are still some problematic cases. Later in section 4.4 I argue that a thorough account of the unjust combatant's liability to defensive harm must take into account both non-imminent threats and continuing threats.

A second distinction that is relevant to continuing threats is David Rodin's

distinction between vital and lesser interests.⁴ A vital interest is an interest the defense of which can justify lethal harm. The unjust combatant who waits between battles does not pose a threat of imminent harm to any person's life; but he might pose an imminent threat to the lesser interests of the victim state's citizens. Perhaps by participating in the unjustified invasion, he poses an imminent threat to the victim state's citizens' lesser interests in personal freedom or political autonomy—even if he does not imminently threaten anyone's life.

The distinction between vital and lesser interests raises questions about proportionality. Can a lethal defensive harm plausibly be considered a proportionate defense against a threat to lesser interests? While this distinction enables a fuller account of the unjust combatant's liability, it fails to account for the duration of the continuing threat. As I argue in section 4.4., the duration of the unjust combatant's continuing threat—along with the importance of the interests he threatens—are relevant to the just combatant's proportionality calculus.

By “continuing threat,” I mean one in which an attacker continuously violates a victim's right and one that can be thwarted. I add this stipulation because there are some cases in which the harm continues even though the attacker cannot be harmed to stop it. Consider Singer's case in which a “torturer has set in motion machinery that will, unless we intervene, continue to inflict pain on the victim, he then committed suicide, and so can neither torture anyone else, nor enjoy his victim's suffering.”⁵ Though this is a case of continuing harm, it is not a case of a continuing threat. Because the torturer has committed suicide, he no longer threatens his victim. Moreover, even if the victim might be able to escape, he is not able to cause defensive harm to the torturer. In this case, the harm and the threat are not temporally coextensive. There might also be cases in which an attacker causes

⁴ David Rodin, “The Myth of National Self-Defence,” in *The Morality of Defensive War*, ed. Cécile Fabre and Seth Lazar (Oxford: Oxford University Press, 2014), 80-81.

⁵ Peter Singer, “Bystanders to Poverty,” in *Ethics and Humanity: Themes from the Philosophy of Jonathan Glover*, ed. N. Ann Davis, Richard Kershen, and Jeff McMahan (Oxford: Oxford University Press, 2010), 195.

both an imminent threat and an imminent harm that also result in continuing harms. For instance, if an attacker unjustly amputates my arm, I will suffer some immediate harm—pain, for example—but the deprivation of the use of my arm will also amount to a continuing harm for the rest of my life. Here, too, the threat is not temporally coextensive with the harm. In this paper, by “continuing threats,” I mean only those threats that are temporally coextensive with continuing harms. I use “continuing threat” and “threat of continuing harm” synonymously. According to this definition, kidnapping victims, hostages, and those unjustly imprisoned are all victims of continuing threats.⁶

If we fail to account for continuing threats of this kind, we also fail to account for the role that the duration of the relevant harm can play in the proportionality calculus. One is undoubtedly permitted to cause more harm to keep from being wrongfully imprisoned for a year than one is permitted to cause to keep from being wrongfully imprisoned for a day. To explain this difference, we must appeal not just to imminent threats and non-imminent threats but specifically to continuing threats. One upshot of this three-fold distinction, as I shall argue, is that it will add nuance to Rodin’s distinction between vital and lesser interests.

In sections 4.2.2. through 4.2.4. I point to three cases that pose challenges that the reductivist account must overcome and which the category of continuing threats might be able to address.

4.2.2. Problematic case: the sleeping soldier

The sleeping soldier raises concerns for any reductivist account of just war theory that includes an imminent threat as a necessary condition for justified defensive harming.⁷

⁶ There are also justified continuing threats. If someone is justifiably placed in prison, for example, she faces a justified threat of continuing harm. If she kills to defeat that threat, she does so unjustifiably.

⁷ Lazar suggests that, though imminence was once commonly thought to be a necessary condition for justified defensive harming, “most now agree that it is no more than a useful proxy to overcome uncertainty over whether a threat will eventuate.” Seth Lazar, “National Defence, Self-Defence, and the Problem of Political Aggression,” in *The Morality of Defensive War*, ed. Cécile Fabre and Seth Lazar (Oxford:

Consider this adaptation of Robert Graves' account from the First World War.

The Sleeping Soldier: I saw a German ... through my telescopic sights. He was [sleeping] in the German third line. ... I handed the rifle to the sergeant with me. 'Here, take this. You're a better shot than I am.' He got him; but I had not stayed to watch.⁸

If Graves' sergeant has a self- or other-defense justification for killing the sleeping soldier, against what threat does he defend? If the sleeping soldier poses a threat to someone's life, it cannot be a threat of imminent harm. Throughout the paper, by "imminent," I mean that an attacker will harm the victim immediately. The time available for the defender to react is so brief that her defensive options are drastically reduced. In Kimberly Kessler-Ferzan's words, "an imminent threat is one that will happen 'in an instant' or 'at once.'"⁹ If the presence of an imminent threat is a necessary condition for defensive harming, then it does not seem justifiable to kill the sleeping soldier. And if killing the sleeping soldier is not justified, then we should doubt the justification of any number of other harms caused in war. Combatants eating, combatants repositioning, combatants in their tents, or even combatants returning from a patrol seem to be immune to defensive harming if the sleeping soldier is. If the sleeping soldier is not liable to be killed then, on the reductivist view, the combatants liable to be killed are only those unjust combatants who are actively engaged in fighting. But, of course, if this is true, then just combatants are never justified in starting a firefight in the first instance. On the common two-fold distinction between imminent and non-imminent threats, if one is justified in killing the sleeping soldier it must be either because one is, in fact, justified in killing to defeat a non-imminent lethal threat or because one is justified in

Oxford University Press, 2014), 24-25.

⁸ Walzer employs a series of real world cases in which combatants on one side refused to kill combatants on the other side while they were engaged in distinctively human activities. He calls this general phenomenon "the naked soldier" based on Robert Graves' actual account. I have changed it to the sleeping soldier because in Walzer's examples, it is not clear whether the relative intuitions are about justification for killing or psychological resistance to it. The sleeping soldier adaptation isolates questions about justification. I deal with the psychology questions in the fifth paper, "Reasons Not to Kill in War." See Robert Graves, *Goodbye to All That*, Penguin Twentieth-Century Classics (London: Penguin, 2000), 112; Walzer, *Just and Unjust Wars*, 140.

⁹ Kimberly Kessler Ferzan, "Defending Imminence: From Battered Women to Iraq," *Arizona Law Review* 46 (2004): 229.

killing to defeat an imminent threat to lesser interests, for example, political autonomy. One plausible solution is simply to reject imminence as a necessary condition for justified defensive harming. Though I think this is right, I also think there is more to the sleeping soldier's threat and a conception of continuing threats ought to inform our moral judgment in the case. I return to these questions in section 4.3.

The next case, *The Bloodless Invasion*, is something like the sleeping soldier case, but it raises questions about *jus ad bellum* justification, rather than *jus in bello* justification.

4.2.3. Problematic case: the bloodless invasion

In March of 2014, BBC Correspondent John Simpson attempted to pass from the mainland of Ukraine into the Crimean Peninsula. In the preceding weeks, the Russian government had steadily increased the Russian military presence on its bases in Crimea—bases it was permitted to use under bilateral agreement with Ukraine. By the first of March, Russian forces had established a new checkpoint at Armyansk and armed men in fabricated Ukrainian army and police uniforms detained Simpson and his colleague at the checkpoint while they searched the reporters' equipment and confiscated much of it. When the two men were allowed to pass through the checkpoint, a man in a Ukrainian police uniform called out "Welcome to Russia!" Simpson writes,

The Annexation of Crimea was the smoothest invasion of modern times. It was over before the outside world realized it had even started. And until Tuesday 18 March [when one Ukrainian was killed and another injured] it was entirely bloodless.¹⁰

The idea of a bloodless invasion was a useful thought experiment long before the Russian invasion of Crimea. It is a useful philosophical case because it separates individual citizens'

¹⁰ John Simpson, "Russia's Crimea Plan Detailed, Secret and Successful," *BBC News*, 19 March 2014. Seth Lazar admits that the bloodless invasion thought experiment might be strictly hypothetical without any real-world instance. But he also presciently suggests that "states like Russia and China, which have long-simmering territorial disputes with their neighbors, [might] take advantage of the opportunity to settle those disputes through bloodless invasion." The chapter in which he wrote these words was published just one month before the Russian invasion of Crimea. Lazar, "The Problem of Political Aggression," 24.

rights to life and the state's putative right to territorial integrity. Most unjust invasions in the real world involve threats both to territorial integrity and to people's lives. In these cases, reductivist accounts of just war theory can justify killing invading combatants on individualist defensive harming grounds. The aggressors threaten the defenders' rights not to be killed and defenders justifiably and defensively kill aggressors, independent of any appeal to putative rights of the political community writ large.

Here is a generic version of the case.

The Bloodless Invasion. Soldiers of the state of Northland unjustly invade the democratic republic of Southland. The Northlandic soldiers are heavily armed and tell the people of Southland that they intend only to replace the Southlandian government with their own officials and autocratic institutions. They do not intend physically to harm any Southlandian citizens. But if Southlandian citizens or soldiers resist, the Northlandic soldiers will use lethal force to subdue them.

At first, *The Bloodless Invasion* might seem like a fabricated, philosophical case. But there are reasons—even apart from the 2014 Russian action in Crimea—to think it is plausible. The fact that the threat of harm to vital interests is conditional is one such reason. The invading force tells would-be defenders that they will be harmed only if they resist. It might be the case that a great many unjust invasions throughout history would have been bloodless had they not been resisted. Richard Norman writes that, “In some cases the aggressors will kill only because they are resisted. If there were no resistance, they could invade without having to take any lives.” Likewise, Seth Lazar says of invaders that “mayhem is not their end, but their means; their goal is to attain some degree of political control of a territory and its population. They kill only because they have to; if their victims would submit at the outset, no blood would be shed.”¹¹ It is at least theoretically possible that many unjust invasions would be bloodless were it not for the resistance of the victims.

The soldiers of Northland violate Southland's territorial integrity and political

¹¹ Respectively, Richard Norman, *Ethics, Killing, and War* (Cambridge: Cambridge University Press, 1995), 135; Lazar, "The Problem of Political Aggression," 19.

sovereignty. According to international law and to collectivist accounts of just war theory, Northland's violation of Southland's state rights amounts to a just cause to wage a defensive war against Northland. This war will undoubtedly include, not only lethal harms to Northland's soldiers, but also the unintentional deaths of numerous noncombatants, perhaps on both sides of the conflict. In *The Bloodless Invasion*, at first glance, it looks as though the reductivist must conclude that killing the bloodless invaders violates the principle of proportionality. If Southlandian soldiers kill Northlandic soldiers to defend their rights of, say, political autonomy, that lethal harm will ex hypothesi violate the proportionality principle in the narrow sense. The bloodless invasion thought experiment pressures reductivists either to admit that states have no rights of political autonomy and territorial integrity or that if they do have those rights, they are not justified in causing lethal harm to defend them. In Rodin's words, "The argument from bloodless invasion is designed to show that defending the lives of citizens is not a necessary condition for national-defense."¹² Just as Graves' sergeant had to decide whether he was justified in killing a soldier who does not pose a threat of imminent, lethal harm, Southlandians must decide if they are justified in waging a war to defeat an enemy that does not pose a threat of imminent, lethal harm.

We can apply the same two distinctions to *The Bloodless Invasion* that we applied in *The Sleeping Soldier*. First, we can determine whether the Northlandic threat is imminent or non-imminent. Second, we can determine whether the interests Southlandians defend are lesser or vital interests. Vital interests are those interests that one may defend with lethal harm. Lesser interests may also be defended, and indeed one may still cause harm to defend them,

¹² David Rodin, *War and Self-Defense* (Oxford: Oxford University Press, 2002), 131. The bloodless invasion also presents a challenge for Walzerian just war theory in that it marks the limits of the domestic analogy. As Richard Norman puts it, "in attempting to justify a war of self-defence, what we have to justify is, again, *literal* killing, the taking of hundreds, thousands or even millions of human lives. According to the self-defence analogy, however, what are being defended are not literally lives, but their collective analogues, the life (and liberty) of the community." Though I see this as an important challenge to the exceptionalist account, I do not pursue it here. Norman, *Ethics, Killing, and War*, 134. See also Walzer, *Just and Unjust Wars*, 58-63.

but one may not cause lethal harm in their defense.¹³ By invading Southland and taking over its political institutions, Northlandic soldiers do in fact violate the Southlandian citizens' rights to political autonomy. In addition, they pose a conditional threat—one instance of a threat of non-imminent harm—against the Southlandian citizens' lives. The first question is about necessity. Is killing Northlandic soldiers the least morally weighted moral harm Southlandian soldiers can cause to defeat the threat? If so, then it might be the case that Southlandian soldiers are permitted to kill Northlandic soldiers in *The Bloodless Invasion*. The second question is about proportionality. Is it permissible for Southlandian soldiers to kill Northlandic soldiers, not in defense of their rights to life, but in defense of their rights to political autonomy? In other words, may soldiers on the defensive side kill to defend a *prima facie* lesser interest? *The Bloodless Invasion* is problematic for reductivist just war theory because it suggests that, whatever rights states have to territorial integrity, they are not justified in waging war to defend those rights. Though this may turn out to be the right conclusion, it is antithetical to common sense intuitions about the rights of states as well as long-standing international norms.¹⁴ These are questions to which I will return in later sections.

4.2.4. Problematic case: *Anwar al Aulqi*

The third problematic case is the Obama administration's defense of its 2011 attack on

¹³ Along these same lines, McMahan calls an invasion that includes only threats to lesser interests "lesser aggression" and an invasion that involves violations of vital interests "major aggression." He also refers to "losses of wealth, employment, property, or political liberty or self-determination" as "lesser harms." Without using "vital interests" explicitly, he says that "there are ... some harms that are non-lethal and even non-physical that it can be permissible to prevent by killing the person who would inflict them, such as enslavement or captivity for a significant or indefinite period." See, respectively, Rodin, "The Myth of National Self-Defence," 80-81; McMahan, "War as Self-Defense," 77-79; "What Rights May Be Defended by Means of War?," in *The Morality of Defensive War*, ed. Cécile Fabre and Seth Lazar (Oxford: Oxford University Press, 2014), 126.

¹⁴ These norms are codified International Law. For example, Article 2(4) of the United Nations Charter prohibits states from "the threat or use of force against the territorial integrity or political independence of any state." Under Article 51 of the Charter, the only exception to the prohibition on unilateral use of force is that states may act in individual or collective "self-defense if an armed attack occurs." Presumably, an invading force that poses a conditional threat of harm—if armed—meets the Article 51 conditions. United Nations, "Charter of the United Nations."

Anwar al Aulaqi in Yemen. The case has received significant attention most notably because Aulaqi was a US citizen—a fact that raises important questions about citizenship in political philosophy and in US law. But there are other facts about the Aulaqi case that pertain to threats of continuing harm. The public was originally made aware of Aulaqi's online presence, pro-al Qaeda views, and propagandist role after reports that Aulaqi had exchanged emails with Nadel Malik Hasan prior to Hassan's 2009 attack on Fort Hood. Shortly thereafter, however, the US Government claimed that Aulaqi was no mere propagandist and was in fact a member of al Qaeda and an operational leader within that organization. Specifically, the US Government claimed that Aulaqi recruited, trained, and directed Umar Farouk Abdulmutallab, the so-called "Underwear Bomber" whose attempt to bring down a Detroit-bound airliner was thwarted on Christmas Day, 2009.¹⁵

The Obama administration's official position was that Aulaqi was a legitimate military target because, in his role as an operational leader within al Qaeda, he posed a "continuing and imminent threat" of violent attack against US persons and interests. Suppose that from the use of "violent attack" we can infer that al Aulaqi threatened American citizens' vital interests. What can it mean for a threat to be both imminent and continuing? Though it is not with reference to the al Aulaqi case, Ferzan insists that "always imminent" is a contradiction in terms. If so, the same contradiction must obtain in the supposed "imminent and continuing" threat Aulaqi posed. Indeed, one criticism of the Obama Administration's position has been that Aulaqi was originally placed on the list of terrorists who ought to be targeted in April of 2010 on the grounds that he posed a "continuing and imminent threat," but he was not killed until September of the following year. If an imminent threat is one that will cause harm "in an instant" or "at once," how is it possible that Aulaqi posed an imminent

¹⁵ Michael Epstein, "The Curious Case of Anwar Al-Aulaqi: Is Targeting a Terrorist for Execution by Drone Strike a Due Process Violation When the Terrorist Is a United States Citizen," *Mich. St. U. Coll. LJ Int'l L.* 19 (2010): 725; Robert Chesney, "Who May Be Killed? Anwar Al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force," *Yearbook of International Humanitarian Law* 13 (2010): 9.

threat for a year and a half? As I will argue in section 4.4., once threats of continuing harm are properly understood, it is plausible that an unjust combatant can simultaneously pose some combination of threats of imminent harm, threats of non-imminent harm, and threats of continuing harm.¹⁶

This case is problematic for reductivist just war theory because Anwar al Aulaqi is relevantly similar to unjust combatants in general. Like the sleeping soldier, at the time Aulaqi was killed, he was not actively engaged in a firefight. If the sleeping soldier is liable to be killed it must either be on the grounds that he poses a lethal, though non-imminent, threat or that he is actively engaged in threatening lesser interests. Likewise, if Anwar al Aulaqi was liable to be killed, it must have been either because he posed a lethal, though non-imminent, threat or because he was actively engaged in threatening lesser interests. In any event, a satisfactory explanation of either case requires a more thorough investigation of continuing threats.

In the next two sections, I develop the category of continuing threats and apply it to these three problematic cases.

4.3. IMMINENCE AND INTERESTS

A three-fold distinction between threats of imminent, non-imminent, and continuing harm enables a more thorough account of the difficult cases and of wartime threats more generally. On-going acts—that is, acts that seem neither to be strictly imminent nor strictly in the future—are mentioned in the just war literature but have not yet received the attention they

¹⁶ For the US government's use of "continuing and imminent," see Office of Legal Counsel, "Memorandum for the Attorney General Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations against Shaykh Anwar Al-Aulaqi," ed. U.S. Department of Justice, OLC Memo (Washington, DC, 2010); Eric Holder, "Attorney General Eric Holder Speaks at Northwestern University School of Law," ed. Department of Justice (Chicago, IL: Office of Public Affairs, 2012). For the Ferzan quotation, see Ferzan, "Defending Imminence," 229. For the factual claims about the Aulaqi case, see Epstein, "The Curious Case of Anwar Al-Aulaqi," 2; Beth Van Schaack, "The Killing of Osama Bin Laden and Anwar Al-Aulaqi: Uncharted Legal Territory," *Yearb. Int. Human. Law* 14 (2011): 6. Scott Shane, *Objective Troy: A Terrorist, a President, and the Rise of the Drone* (New York: Seal Books, 2016).

deserve. For example, Walzer considers the case of a soldier behind enemy lines. Walzer suggests that perhaps the soldier in his tent is “smoking his morning cigarette, [and] thinking only of the coming battle and of how many of his enemies he will kill. He is engaged in war-making just as I am engaged in writing this book; he thinks about it all the time or at the oddest moments.” Walzer goes on to reject this notion on the grounds that most combatants do not approach war in this way. Even if this description of the soldier in his tent is the right one, though, the fact that the soldier is wholly devoted to his cause probably bears on his culpability, but it is not clear that by thinking about his next battle he is somehow engaged in a threat of harm. McMahan uses similar language in his response to Rodin’s conception of the bloodless invasion. “War involves threats that consist of activities organized in phases over extended periods of time. A soldier sleeping in invaded territory has already attacked and is engaged in attacking in the same way that I am engaged in writing this essay even while I pause to make a cup of tea.”¹⁷ This is a better analogy. It is not that the sleeping soldier is thinking a lot about the next battle, but that he is engaged, not just in discrete battles, unrelated to one another, but in a war. And on these grounds we can be confident that he will cause harm again in the future. But this description leaves the category of threats of continuing harm out completely. In this section, I argue that the simple distinction between threats of imminent and of non-imminent harm by itself fails to account for continuing threats; and that the simple distinction between vital and lesser interests is more complicated once threats of continuing harm are taken into account.

4.3.1. Threats of imminent and non-imminent harm

Defensive harm is always preventive. A defensive harm is justified only with reference to the

¹⁷ Walzer makes these comments about the naked soldier. Again, I have altered them slightly to sidestep questions about psychological resistance to killing. Walzer, *Just and Unjust Wars*, 143; McMahan, “War as Self-Defense,” 76. It strikes me that both authors compare academic writing to war. Though the comparison might be strained, having completed this thesis, I can sympathize.

harm it aims to avert. In George Fletcher's well-known terms, "legitimate self-defense must be neither too soon nor too late."¹⁸ Recall *Paradigm Defensive Harm* in which Agatha culpably threatens Violet with lethal, imminent harm. Most theorists agree that Violet has a self-defense justification for killing Agatha. The harm Violet will cause to defend herself against Agatha's threat is proportionate and is the minimal harm she can employ to defeat the threat. Moreover, Agatha is liable to be killed. In *Paradigm Defensive Harm*, the threat Agatha poses is one of imminent harm.

Some hold that imminence is a necessary condition for justifiable defensive harming. For example, Ferzan argues that "imminence serves as the *actus reus* for aggression." Similarly, Christopher Finlay claims that "imminence [is] part of the moral structure of the right of self-defense" and that, therefore, the right of self-defense does not obtain in the absence of a threat of imminent harm.¹⁹ If this is the right understanding of the role of imminence in defensive harming, then a defender lacks a self- or other-defense justification for causing harm to defeat a non-imminent threat. At first, this view might seem like the right one and it appears to explain the prevailing intuition in cases in which an attacker threatens non-imminent harm.

Threat of Non-imminent Harm. Agatha credibly informs Violet that she is going to kill her unjustly in one week. Violet is armed and is able to kill Agatha on the spot.

There will be a widely held intuition in *Threat of Non-imminent Harm* that Violet is not permitted to kill Agatha, and one might think that the absence of an imminent threat fully explains the absence of a self-defense justification for Violet. But this is not necessarily the

¹⁸ George P. Fletcher, "Domination in the Theory of Justification and Excuse," *University of Pittsburgh Law Review* 57 (1995): 556. This is what Larry Alexander means when he says, "self-defensive force is always preemptive." Though theorists do not always agree on the definitions of "preventive" and "preemptive," the general principle is agreed upon: In Alexander's words, "we employ self-defensive force before the attack we fear has fully materialized." Larry Alexander, "A Unified Excuse of Preemptive Self-Protection," *The Notre Dame Law Review* 74, no. 5 (1999): 1476. Likewise, Ferzan puts it this way, "It is the possibility of future harm that triggers the right to act in self-defense" Ferzan, "Defending Imminence," 220.

¹⁹ See Ferzan, "Defending Imminence," 217; C. J. Finlay, "Legitimacy and Non-State Political Violence," *Journal of Political Philosophy* 18, no. 3 (2010): 289.

case. The intuition in *Threat of Non-imminent Harm* might be grounded, not in the absence of imminence, but in the violation of necessity. For instance, in the week between the threat and the imposition of lethal harm, perhaps Violet can go tell the police, request a restraining order, or otherwise evade Agatha. Each of these, if successful, would be a less harmful means of defeating the threat, and therefore Violet is not justified in killing Agatha because doing so is not necessary.²⁰ Neither *Paradigm Defensive Harm* nor *Threat of Non-imminent Harm* is of much help in determining whether an imminent threat is a necessary condition for defensive harming.

To determine whether the imminence of the threat is decisive to a defender's self- or other-defense justification, we are in need of a case in which the harm threatened is a non-imminent harm and yet the necessity and proportionality requirements for defensive harm have been met. Consider this case of two hikers.

Hikers: Two hikers, Violet and Agatha, engage in a ten-day race across the desert. The only source of water in the desert is a single water hole approximately halfway to the finish line. As day five begins, both hikers are almost out of water and will die if they do not replenish their water at the water hole that evening. As Agatha passes Violet on the trail that morning, Agatha holds up a box of rat poison and says to Violet, 'I'm going to kill you. I'll beat you to the water hole, get my water, and poison the rest.' Violet is not able to beat Agatha to the water hole, but she is able to shoot and kill Agatha on the spot.²¹

In *Hikers*, if Violet defensively kills Agatha, that harm will be proportionate to the threat and it will be the minimal harm possible to avert the threat. Moreover, Violet must act immediately if she is successfully to avert the threat. But in *Hikers*, the threat Violet poses to Agatha is not a threat of imminent harm, but a threat of non-imminent harm. There is a strong intuitive sense according to which Violet is justified in defensively killing Agatha just

²⁰ Ian Fishback goes so far as to argue that the intuition that an imminent threat is a necessary condition for justified defensive harming is usually grounded in the context of developed, western states in which citizens can safely rely upon effective law enforcement mechanisms. See Fishback, "Necessity and Institutions."

²¹ This is an abbreviated version of a Schopp et al. case. I have changed the names for consistency. Robert F. Schopp, Barbara J. Sturgis, and Megan Sullivan, "Battered Woman Syndrome, Expert Testimony, and the Distinction between Justification and Excuse," *Univ. Ill. Law Rev.*, no. 1 (1994): 567-68.

as in *Paradigm Defensive Harm*. If this is right, then an imminent threat is not a necessary condition for justifiable defensive harming and the relevant constraint on justifiable harm is instead the necessity requirement.²²

Some legal theorists have in fact argued that an imminent threat is not a necessary condition for justified defensive harming but instead that the defensive harm must be “immediately necessary.”²³ Violet is justified in killing Agatha in *Paradigm Defensive Harm*, on this view, not because she poses a threat of imminent harm—though she does—but because a successful defense is immediately necessary. In *Threat of Non-imminent Harm*, Violet is not justified in harming Agatha because it is not immediately necessary. Finally, in *Hikers*, even though Agatha threatens Violet with non-imminent harm, Violet is justified in killing Agatha because it is immediately necessary for her to kill Agatha in order to defeat the threat. The “immediately necessary” view also conforms to Fletcher’s claim above that defensive harm must be neither too early nor too late. In other words, even though Agatha does not threaten Violet with imminent harm, the defensive harm Violet imposes upon Agatha is neither too early nor too late.

This distinction between “imminence” and “immediate necessity” dissolves the tension in only one of the three problematic cases above. The transition from the imminence requirement to the immediate necessity requirement might help to justify the US’s killing of

²² There is an ambiguity in “threats of non-imminent harm.” It might be that the harm threatened is non-imminent. This is the case in *Threat of Non-Imminent Harm* above. But it could instead be that the threat is non imminent. Suppose, for example, that an aggressor is planning to threaten her victim with immediate harm, but she will not issue the threat until next week. From this point forward, I use “threat of non-imminent harm” to refer to cases like *Hikers* in which the harm is to be imposed in the future but the threat is applied now.

²³ This distinction between an “imminence” requirement and an “immediately necessary” requirement is reflected in The Common Law and The Model Penal Code, respectively; though most states within the US have maintained the “imminent threat” requirement. See Alexander, “A Unified Excuse of Preemptive Self-Protection,” 1477; Schopp, Sturgis, and Sullivan, “Battered Woman Syndrome, Expert Testimony, and the Distinction between Justification and Excuse,” 66-29; Richard Rosen, “On Self-Defense, Imminence, and Women Who Kill Their Batterers,” *North Carolina Law Review* 71 (1993): 373-74. For a rejection of the “immediately necessary” standard, see Ferzan, “Defending Imminence.” Though Ferzan maintains that imminence is a necessary condition for justifiable defensive harming, she also admits that the unjust harm an attacker threatens might be inevitable even when it is not imminent.

Anwar al Aulaqi. Though at the time he was killed he posed no imminent threat, perhaps the time he was killed was the only time at which the US could successfully target him and also meet the wide proportionality requirement. But even if this is so, it does not seem that the immediate necessity requirement does much work in the other two cases. The just combatant can conceivably target the sleeping soldier at any time before he wakes up—perhaps at any time that he sleeps between now and his next unjustified attack. It is thus not plausible that killing sleeping unjust combatants meets the immediate necessity requirement. This is even more obvious in *The Bloodless Invasion*. The immediate necessity requirement provides no more plausible explanation than the imminent threat requirement. That is, on both the imminent threat view and the immediate necessity view, the conclusion is the same in *The Bloodless Invasion*. Neither condition is met and so Southlandian soldiers are not justified in lethally harming unjust Northlandic invaders. I return to these cases in the next section and here suggest only that both the imminent threat requirement and the immediate necessity requirement seem unable to account for common intuitions in two of the three problematic cases.

4.3.2. *Threats to vital and lesser interests*

The second distinction that often arises in discussions about the problematic cases is that between threats to vital interests and threats to lesser interests. According to Rodin,

[Vital interests are] those centrally important interests, the unjust threat to which can justify lethal force in [the] context of self-defense. These are in broad terms: threat to life, substantial threat to bodily integrity (including loss of limb, torture, and rape), profound attacks on liberty such as slavery, and permanent or long-standing displacement from one's home.²⁴

At its core, the distinction between vital and lesser interests is a descriptive mechanism for proportionality in defensive harming cases. Whether an interest falls into the lesser or the

²⁴ Rodin, "The Myth of National Self-Defence," 80.

vital category depends upon what one may do to defend it. An interest is vital just if one can, under some circumstances, be justified in killing to defend it.

This distinction can help inform our understanding of the two remaining problematic cases. In *The Bloodless Invasion*, the Northlandic soldiers threaten both vital and lesser interests. The Northlandic soldiers' threat to Southlandian vital interests is a conditional threat of non-imminent harm and their threat to lesser interests seems to be a threat of imminent harm. Killing Northlandic soldiers to defend the lesser rights of, say, political autonomy of Southlandian citizens is *prima facie* disproportionate. The same is true in the *The Sleeping Soldier*. Even if, by his mere presence in unjustly occupied territory, he is in the act of harming lesser interests, it is not at all clear that he may be defensively killed on those grounds.

The two reigning distinctions in the just war and defensive harming literatures—imminent and non-imminent threats and vital and lesser interests—are incomplete because there are threats of harm in war that resist the binary distinction between imminent and non-imminent threats and that show that the distinction between vital and lesser interests is more nuanced than it first appears. In the next section, I argue that including threats of continuing harm in the analysis of threats posed during war will make sense of the problematic cases and will also clarify the distinction between lesser and vital interests.

4.4. THREATS OF CONTINUING HARM

Accepting threats of continuing harm as a third category of threat has important implications for proportionality calculations. In *Paradigm Defensive Harm*, the defender is justified in killing the attacker because the attacker threatened to kill the victim. The proportionality calculus is straightforward because the threatened unjust harm and the defensive harm are easy to compare: defensively killing one liable person is justified to prevent one non-labile person from unjustly being killed. But when the quality of the threatened harm and the defensive

harm are dissimilar, it is much more difficult to determine whether the defensive harm is proportionate. Derek Parfit describes this kind of relationship as one of “imprecise comparability.”²⁵ It is not necessarily the case that the two kinds of harm are incomparable; only that any comparison between them will be imprecise. In the defensive harming literature, we are often asked to compare a broken leg with a broken toe, or a broken finger with paralysis. These harms are generally similar in kind; in Parfit’s terms, they contribute to “badness of the same hedonic kind;” but they vary in magnitude. This imprecise comparability is exacerbated in cases of justified lethal harm to defeat threats of continuing harm. That the comparability is imprecise, however, does not entail that no comparison can be made.

Proportionality comparisons in war often rely upon relations of imprecise comparability. For example, a report conducted by AirWars and Amnesty International found that the US-led coalition’s 2017 campaign to drive the so-called Islamic State from its stronghold in Raqqa, Syria resulted in more than 1,600 civilian casualties. There is some considerable disagreement over that number. The US military has estimated that the coalition caused 318 civilian casualties.²⁶ In either case, the civilian casualties are the unfortunate results of a military operation with a putatively justified aim—to liberate Raqqa from Islamic State control. Even if we accept the Amnesty claim of more than 1600, the open question is whether the civilian casualties meet the wide proportionality requirement. The Amnesty report’s authors conclude that the coalition violated the principle of proportionality and that such a violation constitutes a war crime. But whether coalition military action in Raqqa violated the proportionality requirement depends upon a comparison of the weighted moral

²⁵ Parfit, *On What Matters: Volume 1*, 132; *On What Matters: Volume 2*, ed. Samuel Scheffler (Oxford: Oxford University Press, 2011), 558.

²⁶ While the disparity between the two estimates is striking and worthy of attention, it falls outside the scope of this discussion. AirWars Amnesty International, “War in Raqqa: Rhetoric Versus Reality,” (2019); Elias Groll and Robbie Gramer, “How the U.S. Miscounted the Dead in Syria,” *Foreign Policy*, 25 April 2019.

costs with the moral good to be achieved. How many innocent lives is the liberation of Raqqa worth? This is a relationship of imprecise comparability. As one US Air Force pilot has put it, conducting proportionality calculus “is like asking what’s bigger, the width of this room or the weight of this chair?”²⁷

In this section, I argue that, despite the difficulty in cases of imprecise comparability, there is nevertheless a threshold beyond which defenders are justified in using lethal force to defeat a continuing—and therefore non-lethal—unjust threat, and that this threshold is sensitive both to the magnitude and to the duration of the continuing harm.

4.4.1. Threats of continuing harm in the literature

Disentangling the three kinds of threat is challenging in part because threats of continuing harm are often accompanied by threats of imminent and non-imminent harm. Consider two cases from the reductivist just war theory literature, beginning with Frowe’s *Trolleyology* case.

Trolleyology: Imagine that I ... lock you up in your house for an indefinite period, perhaps the rest of your life. I force you to practice a particular religion. ... I make you dress in army camouflage, read only the collected works of Frances Kamm, spend hours enacting moral dilemmas using a toy train set, and start every day with a rousing rendition of what I like to call the Trolley Anthem. I credibly threaten to kill you if you try to force me out of the house or otherwise resist the imposition of my regime.²⁸

Frowe’s own intuition in *Trolleyology* is that her victim is indeed permitted to kill to defeat the threat she asks us to imagine. But which of the myriad hypothetical harms Frowe imposes on her victim are sufficient to justify defensive killing? Is the victim justified in defense of his right to autonomy each time Frowe imminently threatens his autonomy? Or is he justified because she poses a conditional threat of non-imminent harm if he resists? Or is he justified on the grounds that she has locked him up in the first place, and thereby continually violates his right to personal freedom? Or is it that the threats are independently insufficient to justify

²⁷ Daniel Sieben, "Kim Garcia’s Drone: A Panel Discussion with Garcia and Three Predator/Reaper Pilots," *Academy Speakers Program* (US Air Force Academy, CO, 2017).

²⁸ Frowe, *Defensive Killing*, 140-41.

lethal defensive harm, but jointly sufficient? In other words, it is unclear whether the threat of continuing harm by itself is doing the work in the intuitive response to the case.

Fabre's *Home Invaders* case avoids the additional threat of imminent harm, but still includes an conditional threat of non-imminent harm that is independent of the threat of continuing harm.

Home Invaders: Suppose that your house is wrongfully invaded by a group of individuals who intend to stay there permanently and who use coercive force against you if you dissent with whatever decision they make with respect to your house. ... [And suppose that the home invaders coerce you into living a less than minimally decent life]. You have a choice between fully complying with wrongdoers' demands or killing them.²⁹

If the victim dissents from the invader's wishes the invaders will physically harm the victim. In this case, too, there is both the conditional threat of non-imminent harm as well as the threat of continuing harm. I agree with Fabre's conclusion that the victim has a right defensively to kill the invaders, provided the home occupation will continue for some significant period of time, but because the victim faces two kinds of threat, it is not clear whether either threat is independently sufficient to justify defensive killing.

In each of these cases we are left wondering which, if any, of the harms imposed is sufficient to justify defensive killing.

4.4.2. *Threats of continuing harm and duration*

To determine whether threats of continuing harm are sufficient to justify lethal defensive harm, we are in need of a case in which the attacker threatens the victim with continuing harm only and not with imminent or with non-imminent harm.

Pleasant Detention: Agatha, for reasons we do not know, wants wrongfully to abduct and imprison Violet. Agatha gently takes Violet prisoner in Violet's sleep and deposits her into the detention facility, cut off from the outside world. The locks on the windows and doors are state of the art and even if Violet tried with all her might and cunning, she would be unable to escape. Within the detention facility, however, she is well fed, warm, generally well provided for, and she is free to do more or less as she pleases. Agatha,

²⁹ Fabre, *Cosmopolitan War*, 69.

again for unknown reasons, has rigged the locks to a pulse monitor on Agatha's own wrist. If she dies, the locks will open. Violet, by mere happenstance, finds a gun in the detention facility and is able to shoot and kill Agatha in the adjacent building in which Agatha lives whenever she chooses.

During Violet's imprisonment, the harm with which Agatha threatens Violet seems neither imminent nor strictly non-imminent. Even if we conceive of continuing threats as consisting in a combination of threats of imminent and non-imminent harm, the justificatory role each plays in a defensive harming case like *Pleasant Detention* is not obvious. The defensive harm that Violet may proportionately cause to Agatha seems to depend upon the duration of her captivity. To be denied one's freedom for an hour or a day might not justify lethal defensive harm. But cutting Violet off from the rest of the world for the rest of her life seems to reach the proportionality threshold for lethal defensive harm.³⁰ Defensive killing—at least in cases like *Pleasant Detention*—can be permissible against threats of continuing harm to interests such as personal freedom, if the duration is sufficiently lengthy.

There is an important implication here regarding the common use of “vital interests” and “lesser interests.” Rodin's widely accepted distinction between these two categories is grounded in the proportionate harm one may cause to defend them. The categories themselves are therefore sensitive to the duration of threats of continuing harm. For example, it is not sufficient to say that one's interest in not being killed is a vital interest while one's interest in not being imprisoned is a lesser interest. For, as is the case in *Pleasant Detention*, whether or not one may kill to defend one's interest in not being imprisoned depends in part upon the duration of the imprisonment. This is why those who offer lists of exemplar vital interests often include interests in not being enslaved or kidnapped. Rodin includes in the set of vital interests “profound attacks on liberty such as slavery, and

³⁰ My own intuition about others' intuitions in this case is that many readers will agree that pleasant detention for an hour or a day does not justify defensive killing while pleasant detention for a lifetime does. There is probably wide disagreement, however, as to whether pleasant detention for, say, a month or a year can justify defensive killing.

permanent or long-standing displacement from one's home." Likewise, in summarizing Rodin's position, Frowe includes slavery in her list. Lazar includes one's interest in not being kidnapped. Fabre argues that one may kill to defeat threats of kidnapping and enslavement. McMahan holds that in some cases one may kill to prevent "enslavement or captivity for a significant or indefinite period."³¹ The reason so many theorists hold that it can be proportionate to kill in defense against kidnapping and enslavement points to the moral significance of the continuing threat. One's interest in not being kidnapped or enslaved is a vital interest only if the harm that is threatened in these cases is a continuing harm of a sufficient duration.

Though Norman does not use the "lesser" and "vital" naming convention, he does suggest that "someone might be entitled to kill an attacker who threatens to ... kidnap her, or enslave her, but [it is doubtful] whether the justification would be thought to extend much further than this." Norman's explanation for why some right violations justify lethal defensive harm is insufficient and helps to emphasize the crucial difference between rights and interests in the context of continuing threats. Norman claims that

Kidnapping or enslaving are extreme threats to a person's liberty, but there are many other freedoms which, though certainly desirable, are a great deal more trivial. A farmer who blocks a right of way across his field, and thereby prevents me from enjoying a favourite country walk, may be unjustifiably restricting my freedom, and I may find this intensely annoying, but to shoot him and declare that I am 'defending my freedom' would be absurd.³²

Norman is surely right to say that both of his examples include the violation of a person's right to freedom. But there is a normative asymmetry at work in the different intuitions. It is not, in fact, the case that there is a concrete set of rights the defense of which can justify

³¹ See, respectively, Rodin, "The Myth of National Self-Defence," 80; Frowe, *Defensive Killing*, 125; Lazar, "The Problem of Political Aggression," 15; Norman, *Ethics, Killing, and War*, 128; McMahan, "War as Self-Defense," 78; Fabre, *Cosmopolitan War*, 69. Not all theorists use the "vital" and "lesser" nomenclature. But each one cited here appeals to a distinction between those attacks against which one may kill to defend and those attacks against which one may not kill to defend. I use Rodin's "vital" and "lesser" umbrella terms as convenient shorthand.

³² Norman, *Ethics, Killing, and War*, 128.

killing and another set the defense of which cannot justify killing. This is because, while the categories of vital and lesser interests are sensitive to duration, the category of rights is not. My right not to be unjustly killed is of greater moral significance than my right not to be unjustly imprisoned and this claim is true independent of the duration of my imprisonment. But I have a much stronger interest—indeed a vital interest—not to be imprisoned for a decade than my lesser interest not to be imprisoned for a day.³³

An appeal to rights only cannot explain why, in *Pleasant Detention*, Violet is justified in killing Agatha if Agatha will hold her indefinitely but unjustified in killing Agatha if Agatha will hold her only for an hour. In both cases Agatha violates Violet's right to freedom or autonomy. Because the threshold between lesser and vital interests depends upon the harm one may cause to defend the interest, then whether a particular interest is vital or lesser can depend upon whether the unjust harm threatened is continuing, and if so, for how long.

4.4.3. *Threats of continuing harm and magnitude*

Above, I argued that the proportionality calculus in defensive responses to threats of continuing harm is sensitive to duration. Here, I argue that it is also sensitive to the magnitude of the unjust harm that is caused. By "magnitude," I mean the amount of harm one suffers at any given moment. Suppose someone suffers a mild headache for four hours and someone else suffers an acute migraine for four hours. Though the duration is the same in both cases, the magnitude of the suffering is much higher in the migraine case. Suppose now that one person has an acute migraine for two hours and another has a migraine of the same magnitude for four hours. Surely the harm the second person suffers is more severe than the first. This is owing to the extended duration of the suffering. The task at present is to show

³³ There is also an important difference in the magnitude of harm caused in kidnapping and in blocking someone's favorite walk. I address this concern in section 4.4.3.

that this same relationship can obtain when there is a threat of continuing harm. To see that this is so, consider a case in which the magnitude of the harm is relatively low.

Beethoven: A super villain has the power to control a victim's every move. Rather than confining the victim, violating his right to political autonomy, or restricting his freedom of movement, he ensures only that any time the victim tries to listen to the music of Beethoven, he will not be able to hear it. This victim loves to listen to Beethoven, so this constraint is harmful. The victim's only means of defending against the threat of continuing harm is to kill the villain, which he is able to do because he alone knows the villain's one mortal weakness.

It is not clear—even if the super villain continued to prevent the victim from listening to Beethoven for the rest of his life—that he is justified in killing the villain. At first, one might want to dismiss *Beethoven* as a case in which an attacker poses discrete threats of non-imminent harm. This might be the case if the villain prohibited the victim from hearing Beethoven only once or twice. But if the restriction continues indefinitely, the harm the victim suffers does not consist in several discrete violations, but in the continual violation of the victim's right to listen to Beethoven—the villain violates his right at all times. The victim in *Beethoven* is like a victim unjustly imprisoned. We do not generally say of the unjustly imprisoned that her right to personal freedom is violated only in those moments that she longs to be free. Her right to freedom is violated continually, just as the victim in *Beethoven* is continually prevented from listening to Beethoven.³⁴

Even though the threat in *Beethoven* is a continuing threat, intuitions in *Beethoven* are probably quite different from in *Pleasant Detention*. Given that the duration is the same in both cases, it seems that the magnitude of the unjust harm threatened is relevant to the proportionality calculus. Perhaps Violet's interest in going where she pleases and interacting with people as she chooses is weightier than the victim's interest in listening to the music he

³⁴ I was once (justly) imprisoned in a simulated prisoner of war camp. For some time, I resisted the urge to push on the cell door on the grounds that until I did so, and felt the locked door's resistance, I wouldn't feel imprisoned. I eventually did push on the locked door and at that moment, I began to feel imprisoned. But it would be wrong to say that my imprisonment began only when I attempted to open the door.

prefers in *Beethoven*. This is an unsurprising conclusion. After all, we are already familiar with proportionality's sensitivity to the magnitude of harm in cases of justified defense against threats of imminent and non-imminent harm.

The moral weight of the continuing harm—some combination of the objective badness of the victim's suffering and the wrongfulness of the right violation—is sensitive both to the magnitude of harm and the duration of harm.³⁵ For proportionality, then, what is at issue is something like the “area under the curve” in integral calculus. A less significant harm can justify greater defensive harm if continuous over a long period of time while a more significant harm over a shorter period of time can justify that same defensive harm.

4.4.4. *Intertemporal aggregation*

Having taken continuing threats of harm into account, reductivist just war theory is in a better position to respond to concerns raised by *The Bloodless Invasion*. There are two ways in which previous accounts of reductivist just war theory have responded. The first is by appeal to escalation and the second is by appeal to interpersonal aggregation. McMahan develops an account of a reductivist response to *The Bloodless Invasion* by appealing to escalation, though he ultimately rejects the account. When the Northlandic soldiers unjustly and bloodlessly invade Southland, they threaten Southlandian citizens' lesser interest but also pose a conditional threat of non-imminent harm against their vital interests if they resist. Suppose Southlandian soldiers do resist with non-lethal harm that is proportionate to the threat against their lesser interests at time T_1 . When they do, the Northlandic soldiers will follow through on their conditional threat and cause unjust lethal harm at time T_2 . At T_2 , Southlandian soldiers will be justified in causing lethal defensive harm because it is

³⁵ I address the question of how moral badness and wrongfulness ought to be weighed in the fifth paper of this thesis, “Reasons Not to Kill in War.”

proportionate to the new unjustified lethal threat. Because Northlandic soldiers are responsible both for the initial unjust threat to lesser interests and to the subsequent unjust threat to vital interests, on this argument, the lethal defensive harm Southlandian soldiers cause is proportionate and therefore justified.³⁶

There are problems with this approach. Even if Southlandian soldiers voluntarily and spontaneously decided to resist with non-lethal harm at T_1 , they would do so knowing that they might be killed in response. If the risks Southlandian soldiers voluntarily accept were the only relevant variable, such a response might be justified. After all, Southlandian soldiers are permitted to sacrifice their own lives for a cause they believe to be worthwhile. But civilians as well as soldiers are killed in war and Southlandian soldiers can foresee that this is the likely outcome if they resist. Though the Southlandian non-lethal escalation might meet the demands of narrow proportionality—because by unjustly escalating to lethal violence, Northlandic soldiers make themselves liable to be killed—it will fail to meet the wide proportionality requirement. The Southlandian soldiers are not permitted voluntarily to accept the unjust threat that will be posed to their fellow citizens—though this concern would abate in cases in which the citizens consented to this increased risk of wrongful harm.

The second reductivist response to *The Bloodless Invasion* appeals to interpersonal aggregation. On this line of thought, even if a Southlandian soldier would be unjustified in killing to defend her own lesser interest, she acts not merely for herself but on behalf of her fellow citizens. Once aggregated across members of the political community, the sum of the Northlandic soldiers' violations of lesser interests against which Southlandian soldiers defend on this view meets the proportionality requirement in both its narrow and wide senses.³⁷

There are concerns, however, about this argument as well. One problem is that if the

³⁶ McMahan defended this view in his earlier work. In more recent work, he provides a helpful and clear account of the argument from escalation, but ultimately rejects it. McMahan, "Innocence, Self-Defense and Killing in War," 195-96; "What Rights May Be Defended by Means of War?", 147-48.

³⁷ For an example of this kind of argument, see Frowe, *Defensive Killing*, 139-43.

Southlandians do go to war with Northland, many Northlandians will be killed—perhaps noncombatants in addition to combatants. These harms must also be aggregated in the proportionality calculus. In other words, if the number of Southlandians who will be harmed weighs on one side of the proportionality calculus, surely the number of Northlandians who will be harmed must weigh on the other side.

Seth Lazar offers a more fundamental critique when he argues that aggregating deontic considerations—namely, aggregating the violation of interests across persons—seems antithetical to reductivist-individualist just war theory. Reductivist-individualists rely on the deontic conception of the rights of individual persons. One common deontic critique of consequentialist systems is that they fail to take seriously the “separateness of persons.”³⁸ Lazar’s concern is that aggregating across persons likewise fails to take seriously the separateness of persons. In his own words, “I wonder whether this move to aggregation is consistent with the core thesis of reductionism. I cannot think of any other cases, outside of war, where ... a large number of aggregated lesser interests can justify killing innocent people in self-defence and collateral harm.” There is a reductivist defense against this attack. Frowe, for example, responds by saying that the core thesis of reductivist just war theory is that the morality that governs war must be the same morality that governs daily life. And, as so many trolley problems have shown, the number of rights violations in a given case is relevant to what one may or should do to prevent them. Frowe claims that “there’s nothing in reductivism that prohibits caring about the numbers.”³⁹

My intention here is neither to endorse nor decisively to respond to any of these arguments, but rather to suggest that the account of continuing threats I offer here allows us

³⁸ See, most notably, Rawls, *A Theory of Justice*, 27. In contrast, many have defended consequentialism against this charge. See, e.g., Alastair Norcross, “Two Dogmas of Deontology: Aggregation, Rights, and the Separateness of Persons,” *Social Philosophy and Policy* 26, no. 1 (2009).

³⁹ For the “separateness of persons” critique, see Lazar, “The Problem of Political Aggression,” 32. For Frowe’s response, see Frowe, *Defensive Killing*, 139.

to sidestep both the escalation problem and the interpersonal aggregation problem. *The Bloodless Invasion* constitutes a continuing denial of persons' rights to political autonomy over a long period of time. It might be permissible for a single person justifiably to kill to defeat this long-term, continuing threat by appealing to the net harm over time that a single person would face if she does not use lethal defensive force. This would not be the same kind of interpersonal aggregation as in Frowe's argument above, but instead intertemporal aggregation. By appealing to intertemporal aggregation, the argument presented here can justify lethal harms to defeat the bloodless invasion without exposing itself to the criticism that it fails to take seriously the separateness of persons.

One final note of clarification about intertemporal aggregation of harms is in order. On the surface, it looks as though intertemporal aggregation of harm and intrapersonal aggregation of harm are synonymous. Intrapersonal aggregation is not aggregation across persons, but within a single person's life. But normally, the intrapersonal aggregation of harm refers to the additive harm a single person suffers if she is the victim of multiple discrete harms over time. As Frowe puts it, additive harm is aggregated interpersonally if I break lots of different people's arms. The additive harm is aggregated intrapersonally if I break the same person's arm lots of times. But the kinds of continuing harms I have in mind—kidnapping, imprisonment, enslavement—are dissimilar from Frowe's case of a repetitive series of discrete harms to the same person. In between discrete acts of arm-breaking, I do not threaten the victim. But kidnapping, enslavement, and imprisonment cases, in addition to any discrete threats of harm, also include both the threat of denying, and the actual denial of, the victim's freedom.⁴⁰

It is possible to preserve the conceptual distinction I apply here if we consider

⁴⁰ For Frowe's description, see *Defensive Killing*, 140. For a recent discussion of the role of interpersonal aggregation in proportionality, see Victor Tadros, "Past Killings and Proportionality in War," *Philosophy & Public Affairs* 46, no. 1 (2018).

intertemporal aggregation to be a species of the broader genus of intrapersonal aggregation. This is etymologically appropriate given that the continuing harm measured over time is harm caused to the same person. The point I make here is only that causing continuing unjust harm and causing repetitive unjust harm should remain conceptually distinct.

4.5. CONTINUING HARMS IN THE REAL WORLD

Because reductivist just war theory grounds justified killing in war in justified defensive harming more broadly, it is important to recognize that the distinction between the three kinds of threat applies even outside the combat context. In this section I apply the conception of threats of continuing harm to a non-combat case of justified killing in defense against a threat of continuing harm.

4.5.1. *A real-world non-combat case*

Consider this real-world case of abuse victim, Judy Norman.

Domestic Abuse: Judy Norman was tortured and beaten by her husband for years and threatened with death and mutilation if she attempted to escape or obtain outside help. She finally killed her sleeping husband. Denied a self-defense instruction [by the court], she was convicted of manslaughter and sentenced to six years imprisonment.⁴¹

There is a widely held intuition that Judy Norman was justified in killing her abuser, and yet her case is substantively different both from *Paradigm Defensive Harm*, and from *Hikers* above. Unlike the paradigm case, Norman did not face the threat of immediate harm. Her abusive husband was in no position—at least not while he slept—to cause imminent harm. But Norman's case also differs from *Hikers*. In that case, though the harm with which Agatha threatened Violet was non-imminent, Violet's window to act defensively to prevent that harm was momentary. Judy Norman, by contrast, had a period of time during which she could

⁴¹ This quotation comes from Richard Rosen, "On Self-Defense, Imminence, and Women Who Kill Their BATTERERS," 372. Norman's abuse is catalogued in greater detail in Fletcher, "Justification and Excuse," 555; and Ferzan, "Defending Imminence," 233-34.

harm her husband to prevent unjust harm and it is therefore not immediately necessary. In fact, it might be the case that Judy Norman could have defeated the threat by killing her husband while he slept on the night in question, or on any number of other nights that followed. Judy Norman's abuser, after all, threatened her with death and mutilation "for years." It is not clear from the case that she believed that she would have been killed the next morning. Ferzan puts it this way: "It is not hard to believe that [her abuser] never planned to kill his captive, and why would he? He had a slave whose life ... he could dominate."⁴² If Judy Norman was justified in defensively killing her abuser, it cannot be because he posed an imminent threat, nor can it be because it was immediately necessary defensively to kill him.

The intuition that Judy Norman was justified in killing her abuser stands in contrast to the common legal requirement either that a justified defensive harm must be immediately necessary or that defensive harm is justified only against imminent threats. This conflict between moral intuition and legal standards is reflected in the conflicting legal decisions on the case. The district court initially denied a self-defense instruction to the jury and Norman was convicted. The appellate court, however, reversed the decision arguing that the district court erred and that the jury should have been given a self-defense instruction. Later, the Supreme Court of North Carolina reversed again, arguing that the self-defense instruction was not available to Judy Norman precisely because the imminence requirement had not been met. One plausible—if partial—explanation for these conflicting legal interpretations is that threats of continuing harm make up a morally significant category that is not reflected in the law.⁴³

⁴² Ferzan, "Defending Imminence," 254.

⁴³ Ibid., 235. This disagreement among legal professionals is much deeper than Judy Norman's case. For example, the English legal system retains imminent threat as a necessary condition for a self-defense justification but has considered some cases of victims killing their abusers in non-confrontational situations as cases of provocation, and therefore treats abuse victims who kill their abusers more leniently. Australia, by contrast, has abandoned the imminent threat as a necessary condition in cases in which the abuse victim who

My own view is that Judy Norman was justified in killing her abuser and that this justification is not dependent upon the threat to her life. Judy Norman was not the victim solely of physical torture but she was also, in Fletcher's words, made to be a prisoner in "this gulag she called home."⁴⁴ It is for this reason—the fact that she was imprisoned without any reasonable hope of being released—that neither imminence nor immediate necessity is a necessary condition for defensive harming. Norman's justification for defensively killing her husband instead is grounded, at least in part, in the threat of continuing harm—what Ferzan calls "the kidnapping paradigm."⁴⁵ At the moment Judy Norman killed her husband, he posed a threat of non-imminent harm in that he had previously threatened to kill and mutilate her; but he also posed a threat of continuing harm in that he made her—even at that moment—a prisoner in her own home.

4.5.2. *Parallels in the combat and non-combat contexts*

As in the *Trolleyology* and *Home Invaders* cases, *Domestic Abuse* generates puzzling questions about whether each individual kind of threat—threats of imminent, non-imminent, or continuing harm—is sufficient to justify defensive killing. For example, Ferzan claims that the kidnapping paradigm is sufficient in Judy Norman's case to justify defensive killing. By imprisoning Norman in her home, Ferzan claims, Norman's abuser is "continually invading the victim's rights." But Ferzan's argument for this claim is ambiguous.

Judy Norman married J. T. Norman when she was ... but fourteen years of age. She could never escape him. During her time in captivity, she was 'forced into prostitution'—that is, Judy Norman was repeatedly raped. ... There was not an imminent or inchoate

kills is diagnosed with "Battered Woman Syndrome" (BWS) and Australia has recognized BWS as part of a self-defense legal strategy. Finally, the varied jurisdictions in the United States have adopted different positions. Some retain imminent threat as a necessary condition for justified defensive harming and others have rejected it. George Fletcher went so far as to say as early as 1996 that "the central debate in the theory of self-defense for the last decade has been whether we should maintain a strict requirement of imminence in assessing which attacks trigger a legitimate defensive response." See, respectively, Christine M. Belew, "Killing One's Abuser: Premeditation, Pathology, or Provocation," *Emory Law Journal* 59 (2009); Fletcher, "Justification and Excuse," 567.

⁴⁴ Fletcher, "Justification and Excuse," 556.

⁴⁵ Ferzan, "Defending Imminence," 253.

threat of death. There was an ongoing and continuing denial of life. ... If it is in fact the case that the battered woman can show that she is a hostage and cannot escape her husband, this alone should be sufficient for the exercise of deadly force.⁴⁶

There seem to be two distinct claims in this quotation. The first is that the repeated, violent, and life-denying attacks that Judy Norman's abuser imposed upon her and would continue to impose upon her were sufficient to justify killing in self-defense. The second is that the imprisonment alone—the fact “that she is a hostage and cannot escape”—is sufficient to justify killing in self-defense. Following the threefold distinction between kinds of threat introduced above, Ferzan is here claiming that the many instances of threats of imminent, though non-lethal, harm are sufficient to justify Judy Norman's defensively killing her abuser. At the same time, Ferzan also claims that the threat of continuing harm—the fact that “she is a hostage and cannot escape”—is sufficient to justify Judy Norman's defensively killing her abuser. These intuitions about sufficient conditions for lethal defensive harm are similar to the intuitive responses to *Trolleyology* and *Home Invaders*. We have a strong intuition that defenders may defeat the aggression, but it is not clear which kind of threat is doing the justificatory work. But I appeal to Judy Norman's case not as further evidence that threats of continuing harm are independently sufficient to justify defensive killing. That is too much to demand from a case in which more than one kind of threat is present. I instead appeal to Judy Norman's case as a point of application. If threats of continuing harm can justify defensive killing—as in *Pleasant Detention*—then they can also justify defensive killing in cases that include multiple kinds of threat—as in *Domestic Abuse*. Depending on the circumstances, and especially on the magnitude and duration of the imprisonment, the continuing threat is independently sufficient to justify lethal defensive harm.

⁴⁶ Though I have provided just a short quotation here, these two distinct claims are present throughout Ferzan's description of the kidnapping paradigm. See *ibid.*, 253-55. The preceding Ferzan quotations are also taken from these pages.

4.5.3. *A potential objection*

Someone might respond here that this conception of threats of continuing harm generates at least one implausible implication. Consider again *Pleasant Detention* and let us suppose that Violet is justified in defensively killing Agatha to defeat the continuing harm of long-term imprisonment. It seems that the longer Violet waits to kill Agatha, the less plausible her justification will be on the grounds that the harm against which she defends decreases over time. Call the time at which Violet is imprisoned T_0 and the time at which Agatha planned to release her—some decades in the future— T_2 . For the sake of argument, I stipulate that the continuing harm Agatha would cause to Violet from T_0 to T_2 justifies Violet's defensively killing Agatha. Defensive harming is still forward-looking, even in cases of defense against threats of continuing harm. Therefore, if Violet defensively kills Agatha at some time, T_n , the net harm against which she defends is not the total harm between T_0 and T_2 , but only the harm Agatha will impose on her from T_n to T_2 . Because the threat Agatha poses is not of imminent harm, nor is Violet's defensive response immediately necessary, there is a period of time during which Violet is justified in killing Agatha. There is some time, T_1 , at which Violet's killing of Agatha is proportionate, but just barely. If she kills Agatha before T_1 , she is justified. If she kills Agatha after T_1 , she is not. This seems like an implausible implication because the minimal amount of harm Violet may impose upon Agatha depends upon the duration of the threat that would remain after T_n . If this is true, it means that as Violet gets closer to T_2 , the harm she is justified in defensively imposing on Agatha decreases.

This implication might be counterintuitive, but it is not implausible. The harm that Agatha imposes on Violet justifies lethal defensive harm only if the combination of the magnitude of harm and the duration reach a proportionality threshold that justifies defensive killing. After Violet reaches the end of the window during which lethal defensive harm is justified, it is right to say that she is no longer justified in killing Agatha. From T_0 to T_1 , the

necessity and proportionality conditions are both met, even though the harm against which Violet defends is steadily decreasing toward equilibrium with her lethal defensive harm. After that equilibrium is reached, Violet is no longer justified in killing to defeat the threat of continuing harm. Though killing Agatha would still meet the necessity requirement, it would fail to satisfy the narrow proportionality requirement. Even in defense against threats of continuing harms, Fletcher's dictum holds. As long as Violet kills Agatha within the window between T_0 and T_1 , the harm she causes is not too early—the unjust harm has already begun. But it is also not too late—she is still justified in killing Agatha and will successfully defend against the harm that remains.⁴⁷

4.5.4. *Revolution*

If long-term, continuing violations of a person's right to autonomy can amount to a violation of a vital interest, then the threshold for political violence can be lower than one might otherwise suspect. The proportionality calculus in such cases is based on the duration as well as the magnitude of the harm. Some have argued that the American Revolutionary War was unjustified because the harms the colonists imposed in war were disproportionate to the mere violations of freedom the British Empire imposed upon the colonists. "The Americans were not an oppressed people," Gordon Wood writes. "They had no crushing imperial shackles to throw off. ... The Americans' response was all out of proportion with the stimuli."⁴⁸ This might be the case. But, as I have argued above, it would be a mistake to

⁴⁷ Those with strong retributivist intuitions might hold that Violet's justification for harming Agatha is partially constituted by a backward-looking justification based on the time she has already been Agatha's prisoner. This might be right, but I take no stand on that question here. If it is right, then the backward-looking justification is probably sensitive to Agatha's culpability. If she is a minimally responsible unjust threatener, then the backward looking justification is probably also minimal. It might also be the case that the magnitude of harm Violet suffers at the end of her imprisonment might depend upon how long she has already been imprisoned. If so, the continuing harm over time is non-linear, but there is still some time, T_1 , at which killing Agatha is disproportionate. I am grateful to Jeff McMahan for pointing this out.

⁴⁸ Gordon S. Wood, "Rhetoric and Reality in the American Revolution," *The William and Mary Quarterly* 23, no. 1 (1966): 5.

ground the proportionality of the American Revolutionary War solely in the magnitude of the unjust harms against which they defended. Whether or not the colonists were justified in killing to defend their interest in political autonomy depends in part upon how long that interest would have been violated. There are good reasons to think that colonists' rights to political autonomy would have been violated in perpetuity.

A thorough analysis falls outside the scope here, but we might consider one vignette. After having served the British government in the French and Indian War as an officer in the Virginia Militia, George Washington turned his attention to local politics. In 1761, he was elected to Virginia's House of Burgesses. By 1768, British Parliament had passed the Townshend duties, a series of taxes on imported British goods. Acts such as these, taxes levied by a distant government, unappreciative of local constraints, led to the rallying cry that would eventually unite the colonies: "no taxation without representation." The Burgesses responded to the Townshend duties with the Virginia Resolves, which, among other things, prohibited any body other than the Burgesses from taxing Virginians. To settle the apparent stalemate, the Royal Governor of Virginia responded to the Burgesses—a legislative body that had been recognized by the British Empire for a hundred and fifty years—with the following: "You have made it my duty to dissolve you and you are dissolved accordingly."⁴⁹

The House of Burgesses reflected the broader social injustices of the day. Only white men with sufficient land holdings could be elected. Even so, the arbitrary dissolution of that government body does seem to be a denial of political autonomy, at least for those who were not already excluded from the political system for other arbitrary reasons. Washington biographer, Ron Chernow, suggests that it was likely the events of 1768-1769 that "converted George Washington from a rich, disaffected planter into a rabid militant against British

⁴⁹ For Washington's election to the Burgesses, the Townshend duties, and Lord Botetourt, see Ron Chernow, *Washington: A Life* (New York: Penguin Books, 2011), 129, 45-46. For the history of the Burgesses, see Kate Langley Bosher, "The First House of Burgesses," *The North American Review* 184, no. 612 (1907).

policies.” The final result of disenfranchising that privileged class was “the historical anomaly of a revolution inaugurated by affluent, conservative leaders.”⁵⁰ If the American Revolutionary War was proportionate, a complete explanation of that proportionality must include threats of continuing harm. Though perhaps motivated by financial concerns, the grievances were about the violation of political autonomy that promised to continue indefinitely.

Including threats of continuing harm in the proportionality calculus ought not to be limited to traditional military conflict. The British suffragettes of the early twentieth century also committed violent acts to secure their political autonomy. Fully half of Britain’s voting-age population was denied political autonomy because they were women. By 1912, suffragettes of the Women’s Social and Political Union, led by Emmeline Pankhurst had “engaged in widespread window smashing, placing bombs in empty buildings, arson, vandalizing art treasures, pouring acid on golf courses and destroying mail in letter boxes.” In a 1913 speech to Americans in Connecticut, Pankhurst put her organization’s violent acts in martial terms. “I am a soldier who has temporarily left the field of battle in order to explain ... what civil war is like when civil war is waged by women.” The structural similarities of the denial of Washington’s political autonomy and the denial of Pankhurst’s is clear enough, but Pankhurst draws the analogy directly. She reminded her American audience that “your forefathers decided that they must have representation for taxation. ... They went on until they had won the independence of the United States of America.”⁵¹

Political autonomy—the ability to participate in one’s own political governance—is

⁵⁰ Chernow, *Washington: A Life*, 144, 36.

⁵¹ For the description of the suffragettes’ actions, see June Purvis, “Reassessing Representations of Emmeline and Christabel Pankhurst, Military Feminists in Edwardian Britain: On the Importance of a Knowledge of Our Feminist Past,” in *New Frontiers in Women’s Studies: Knowledge, Identity and Nationalism*, ed. Mary Purvis Maynard, June (London: Taylor and Francis, 1996), 77. For the Pankhurst quotations, see Emmeline Pankhurst, “Great Speeches of the 20th Century: Emmeline Pankhurst’s Freedom or Death,” *The Guardian* 2007, 1.

not the same thing as personal freedom. It may be that Agatha prohibits Violet from voting in *Pleasant Detention*, but she does much more than this. The mere unjust exclusion of a person from the political process does not amount to enslavement nor even to imprisonment. Even as we consider the duration of the unjust continuing harm, we must also consider its magnitude. Some might think that the denial of a person's political autonomy, even if it does persist indefinitely, fails to meet the proportionality threshold for lethal defensive harm. For example, Seth Lazar argues that even if a person responsibly but non-culpably keeps a victim from voting in every election that comes to pass, it "seems wrong [for the victim] to harm [the unwitting aggressor] in order to get to the polling station."⁵² But then, the denial of political autonomy in Washington's and Pankhurst's cases are more severe than this. Even if a person is blocked from getting to the polling place, there is a system in place by which she can appeal and seek justice. This seems to be precisely what was withheld from Washington and Pankhurst. Pankhurst describes the violation of political autonomy this way.

But let the men of Hartford imagine that they were not in the position of being voters at all, that they were governed without their consent being obtained, that the legislature turned an absolutely deaf ear to their demands, what would the men of Hartford do then? ... they would have to make a choice of two evils: they would either have to submit indefinitely to an unjust state of affairs, or they would have to rise up and adopt some of the antiquated means by which men in the past got their grievances remedied.⁵³

My own sense is that both Washington and Pankhurst were justified in their resort to force—lethal force in Washington's case. But it is difficult to account for this justification without incorporating continuing harm into the taxonomy of threats.

4.6. CONCLUSION

At different times, unjust combatants can pose one or more of the following kinds of threat: an imminent threat; a non-imminent threat; and a continuing threat. For example, when

⁵² Lazar, "The Problem of Political Aggression," 20.

⁵³ Pankhurst, "Freedom or Death."

soldiers on patrol discover opposing soldiers, they will pose a threat of imminent harm to those soldiers. Threats of conditional, non-imminent harm are more common. In fact, most combatants pose a conditional threat of non-imminent harm most of the time. Almost any combatant in the theater of combat operations—even non-combat troops such as maintenance, supply, or communications soldiers—will return fire if fired upon. But unjust combatants also pose threats of continuing harm when they are in the act of violating either civilians’ or just combatants’ rights. Whether defenders are justified in causing lethal defensive harm depends upon, *inter alia*, the magnitude and the duration of the continuing harm imposed.

With the three-fold distinction in view, the three cases introduced in section 4.2. are less problematic. The just combatant’s justification for killing the sleeping soldier is not grounded in a threat of imminent harm. Even a justification grounded in the soldier’s threat of non-imminent harm seems implausible if either imminence or immediate necessity is a necessary condition for justified defensive harm. But by participating in an unjust invasion, the sleeping soldier is in the act of violating, or attempting to violate, the rights of liberty and political autonomy. The significance of these violations may seem trivial, but there are open questions about their duration. If the sleeping soldier’s state had intended to affect permanent change—that is, to violate rights of political autonomy indefinitely—then the sleeping soldier is relevantly similar to Agatha in *Pleasant Detention*. The same is true of *The Bloodless Invasion*. If the Russian soldiers in 2014 intended, not only to invade Crimea, but also to keep it indefinitely, it is plausible that they violate the rights of Ukrainian citizens—at least of the non-separatists—and that they intend to do so indefinitely.

There might be some outlying cases in which violent resistance to unjust invasion violates narrow proportionality. One thinks, for example, of the Soviet Union’s annexation of Finland during the Second World War. Imagine—even if doing so gives Stalin more credit

than is due—that the Soviet Union had every intention to use Finnish territories unjustly as a buffer to deter German aggression only temporarily and to return the territories to Finland after a few years. The Soviet Union might have intended only a bloodless invasion. “Do you want matters to lead to a conflict,” the Soviet Foreign Minister asked Finnish negotiators. In the face of Finnish implacability, the same Minister closed the negotiations by saying “we civilians can see no further in the matter; now it is the turn of the military to have their say.”⁵⁴ The annexation of Finnish territories, therefore, has all the hallmarks of a bloodless invasion including the conditional threat of lethal harm. The Finns responded with defensive force and the Winter War had begun. Surely the Soviet annexation of Finnish territory was unjustified and Soviet soldiers posed a threat of continuing harm to the Finnish people’s rights to freedom, political autonomy, and property even before they posed threats of lethal harm. But suppose the duration of those violations was temporally limited. Suppose it would only have been for a couple of years, or even a couple of months. It is at least theoretically possible that the Soviet annexation of Finland—had it not been resisted with violence—would have failed to reach the magnitude and duration thresholds to justify lethal defensive force.

Even if it is the case that Finland’s violent resistance to Soviet invasion in 1939 violated the proportionality principle in the narrow sense—and this claim is dubious—cases like this one are exceedingly rare. Invading forces often violate persons’ rights to political autonomy and to property and threaten to do so for a very long period of time. If, as Brian Orend puts it, “war is ... a struggle between groups over governance,”⁵⁵ then demands for changes in governance are not likely to be demands only for a temporary change. And if the invasion—bloodless though it may be—threatens a permanent violation of otherwise lesser

⁵⁴ Todd S. Sechser, "Goliath's Curse: Coercive Threats and Asymmetric Power," *International Organization* 64, no. 4 (2010): 645-47.

⁵⁵ Orend, *The Morality of War*, 3.

interests, then just as Violet is justified in killing Agatha in *Pleasant Detention* so are defenders justified in warding off the bloodless invasion with lethal harm.

The Aulaqi case is different in important ways. From the available evidence, it seems that Aulaqi did plan to conduct violent, lethal operations against US citizens within the US. His threat is not of imminent harm but of non-imminent harm. Unlike *The Sleeping Soldier* and *The Bloodless Invasion*, however, Aulaqi has not unjustly invaded the territory of a political community and therefore does not seem to pose a threat of continuing harm. Once the threat of continuing harm is incorporated into the taxonomy of threats, the reductivist and the exceptionalist can come to similar conclusions on *The Sleeping Soldier* and *The Bloodless Invasion* cases. Aulaqi, though, is different. If the US was engaged in a justified war with al Qaeda and if Aulaqi was a combatant on al Qaeda's side, then the exceptionalist will conclude that he is liable to harm by virtue of his membership in al Qaeda's military organization.⁵⁶ Most unjust wars include threats to life and to political autonomy. *The Bloodless Invasion* is a helpful case because it includes the latter but not the former. Al Aulaqi's case is different in that it includes the former but not the latter. It might be the case that long-term threats to political autonomy do much of the work in justifying the resort to defensive war. The conception of threats of continuing harm for which I have argued might cast doubt on *jus ad bellum* justifications in any cases in which the enemy does not credibly threaten political autonomy—and more specifically, in 21st century US and coalition asymmetric wars against transnational terror organizations. But a thorough investigation into this question falls outside the scope of this paper.

⁵⁶ There are open questions about the degree to which al Qaeda in the Arabian Peninsula (AQAP), the organization for which Aulaqi worked, and bin Laden's original branch of al Qaeda are closely associated with one another. See, e.g., Michael Ramsden, "Targeted Killings and International Human Rights Law: The Case of Anwar Al-Awlaki," *Journal of Conflict & Security Law* 16, no. 2 (2011): 397.

5. Reasons Not to Kill in War

5.1. INTRODUCTION

Outside the chapel at Oxford's Magdalen College, the college members who fought and died in the First World War are memorialized in stone. Two names stand out. The first is that of Egraf von Francken Sierstorpff who was killed near Rouvroy-Ripont, France in 1915. The second belongs to Ernst Stadler who was killed in Zandvoorde, Belgium a year before. These names stand out against the others who fought and died in defense of Great Britain because Francken and Stadler fought against Great Britain in the German army. There are many reasons that the names of the dead ought to be memorialized after a war, but this paper is not about how we ought to remember war.¹ It is instead about how we are to weigh the moral costs of war. If an unjust combatant is liable to be killed, is his death constitutive of the moral costs of war? Is the death of a just combatant morally worse than the death of an unjust combatant? On the one hand, the death of human persons in war—even those who are combatants on the unjust side—seems like a weighty moral cost. On the other hand, the moral cost of dead unjust combatant does not seem to weigh very heavily in the proportionality calculus. What is the relationship between this apparently discounted badness of death of unjust combatants on the one side and the sense of moral cost that nevertheless seems to accompany those deaths on the other?

On my view, the moral badness of death is not discounted in the proportionality calculus as some have argued—not even in liability cases. As I argue in this paper, when a

¹ I am indebted to the archivists at Magdalen College of the details on both of these former Magdalen scholars—especially to Charlotte Berry, Ben Taylor, David Roberts, and Richard Sheppard. For their comprehensive account of Magdalen scholars during WWI, see Magdalen College, "The Slow Dusk." For an excellent account of how we ought to remember war, see Cécile Fabre, *Cosmopolitan Peace* (Oxford: Oxford University Press, 2019), 281-306.

defender kills with a liability-based justification, she imposes a significant moral cost even when that cost is ultimately outweighed by other relevant factors, specifically, the defense of others. Even in cases in which the defense of others serves as a countervailing reason to kill a liable attacker, the badness of death persists as a lesser reason not to kill. On this view, liability-based justifications and lesser-evil justifications for defensive harming are structurally similar. When defensive killing is justified, it is so because a countervailing reason outweighs the strong moral prohibition against killing; a prohibition, I will argue, that retains its force even for those who are liable to be killed. In liability-based justification cases, as in lesser-evil justification cases, there is a remaining moral cost for justifiable killing in war. The obvious question this claim raises is about the specific role the forfeited right not to be killed plays in liability-based justification cases. My aim in this paper is to develop an account of the moral costs of justified killing that incorporates both the objective moral badness of death and any infringements or violations of rights.

One upshot of the view I present here is that it helps to explain recent findings in moral psychology. The puzzling finding in empirical psychology is that defenders can suffer moral injury even for defensively killing those who are liable to be killed. Psychologists suggest that one can suffer moral injury if one witnesses or participates in acts that transgress deeply held moral beliefs. If there is nothing morally wrong with killing an unjust attacker who is liable to be killed, then there is no obvious explanation for why defenders can suffer moral injury. On my view, just as the wrongfulness of infringing a person's right is a moral cost that must be borne in lesser-evil justification cases, the objective badness of death is a moral cost that must also be borne in liability-based justification cases. The proportionality and minimal harm requirements in defensive harming and in just war theory must therefore take into account any infringement of rights as well as the objective badness of death. My account explains why killing with a liability-based justification can also cause moral injury.

This argument relies on a number of arguments, each of which must be developed in turn. First, in section 5.2., I develop the moral significance of the badness of death in liability cases. In section 5.3., I look at two cases, one of killing and one of allowing someone to die, and show that there is an asymmetry in the rights relations in the two cases. The best explanation for this asymmetry is by appeal to the distinction between doing and allowing. But there are important implications of this explanation. In section 5.4., I develop those implications. On any reasonable explanation of the objective badness of death, the account I present here should affect how we conceive of the military profession; the necessity requirement in defensive harming; and the recent discoveries in moral psychology. I outline each of these implications in section 5.5.

5.2. THE BADNESS OF DEATH AND THE PROFESSION OF ARMS

Killing, and therefore death, is central to the profession of arms. Reductivist just war theory identifies harms caused in war as a species of defensive harms more broadly. This is right, but there is something distinctive about war in comparison with many other defensive contexts in that most of the harms caused in war are—or are at least intended to be—lethal. The reductivist just war literature frequently makes use of hypothetical cases in which a defender must decide between causing some small harm (e.g., a broken finger) and causing some greater harm (e.g., a broken leg). The necessity requirement can indeed function in this way. If the defender can successfully defeat the threat by breaking the attacker's finger or by breaking the attacker's leg, the defender should break the finger because it is the minimal amount of harm necessary to defeat the threat.² Wartime cases are not often of this kind.

² For a small sample, see e.g., McMahan, *Killing in War*, 161; Draper, "Defense," 80; Firth and Quong, "Necessity, Moral Liability, and Defensive Harm," 689; Helen Frowe, "Lesser-Evil Justifications for Harming: Why We're Required to Turn the Trolley," *The Philosophical Quarterly* 68, no. 272 (2018): 477; Jonathan Parry, "Defensive Harm, Consent, and Intervention," *Philosophy & Public Affairs* 45, no. 4 (2017): 380; Quong, *The Morality of Defensive Force*, 99. See also section 4.4. in "Continuing Threats of War" in this thesis.

Instead, it is often the case that successful defensive harm consists in killing enemy combatants. Though lesser harms might result, the intended harm is death. This distinction is reflected in international legal norms. The UN, for example, encourages member states to develop the full range of escalatory options in domestic law enforcement contexts to “include the development of non-lethal incapacitating weapons.” The weapons review process mandated by Additional Protocol I to the Geneva Conventions, however, does not include the distinction between lethal and non-lethal weapons.³ The broad assumption in international humanitarian law is that combatants on both sides will set out to kill one another. If we are fully to capture the moral significance of the badness of death in war, we should look both at the available accounts of the badness of death and to the relationship between killing and war. I address both in the next two sub-sections.

5.2.1. Various accounts

The three accounts I summarize here represent recent scholarship on the badness of death as well as the broad spectrum of available accounts. They are Broome’s “life comparative account;” McMahan’s “time-relative interest account;” and Bradley’s “partial welfare subject view.” Each account attempts to reconcile the following widely held intuitions about the badness of death. First, though it may seem obvious, there is something bad about death. It is not immediately obvious whether that badness is mere personal badness—bad only for the person who has died—or general badness—bad for the universe, humanity, or bad “full stop.”⁴ Most theorists agree, however, that the badness of death is grounded in the fact that

³ Though the International Committee of the Red Cross guide to the Article 36 review process does insist that the Article 36 process applies to “weapons of all types - be they anti-personnel or anti-materiel, ‘lethal,’ ‘nonlethal,’ or ‘less lethal.’” See “Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,” in *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, ed. Secretariat (New York: The United Nations, 1990), 113; “A Guide to the Legal Review of New Weapons, Means, and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977,” (Geneva, 2006), 937.

⁴ John Broome, “The Badness of Death and the Goodness of Life,” in *The Oxford Handbook of Philosophy of Death*, ed. Ben Bradley, Fred Feldman, and Jens Johansson (Oxford: Oxford University Press,

death deprives the victim of her future life and that future life would, in most cases, have been good for her.⁵ Second, there is a widely held intuition that the badness of death depends in part upon some facts about the person who has died. For example, many have a strong intuition that the death of a healthy twenty-year-old is objectively worse than the death of a human life immediately following the moment at which the human becomes a person. Moreover, some hold that the death of an elderly person at the extreme of human life expectancy, though bad, is not as bad as the death of a healthy twenty-year-old.

According to Broome's life comparative account (LCA), the badness of death is grounded in the difference between the total well-being of a life which ends in premature death and the total well-being of that same life had it not been cut short.⁶ Suppose Violet is twenty years old when she is killed in a car accident. Suppose further that had she not been killed in that accident, she would have lived to the age of eighty. According to the life comparative account, the badness of Violet's death is equivalent to the goodness of Violet's life between the ages of twenty and eighty. The badness of her death is equal to the goodness of which she would be deprived if she dies at twenty. One difficulty with the life comparative account is that it represents a linear decrease in badness over time. Because the badness of Violet's death is equal in magnitude to the counterfactual goodness of which she is deprived, we can conclude that, bad though it may be, Violet's death at age twenty is all things considered better than her death would have been at age eighteen. It is all things considered worse than it would have been if Violet had died at twenty-two. On the life comparative account, to die later is better.

This linearity generates counterintuitive conclusions in cases in which a person dies

2012), 228; Jeff McMahan, *The Ethics of Killing : Problems at the Margins of Life*, Oxford Ethics Series (Oxford: Oxford University Press, 2002), 106.

⁵ McMahan, "The Comparative Badness for Animals of Suffering and Death," in *The Ethics of Killing Animals*, ed. Tatjana Višak and Robert Garner (New York: Oxford University Press, 2016), 70.

⁶ Broome, "The Badness of Death and the Goodness of Life."

very early in life. Suppose, for instance, that Violet dies immediately after obtaining personhood.⁷ Though such an event would be bad, it does not seem intuitively to be worse than Violet's death would be at age twenty. The LCA has trouble accounting for this asymmetry. It cannot reconcile the theoretical claim that the badness of death decreases linearly over time and the widely shared intuition that a person's death at twenty is objectively worse than a person's death immediately after obtaining personhood. In fact, according to the LCA as I have summarized it here, the death of the person immediately after obtaining personhood is the objectively worst death because it deprives a person of more life than would death at any other time.

The badness of death on McMahan's time-relative interest account (TRIA), in contrast, is non-linear over time. According to the TRIA, the badness of death depends upon two independent variables. The first it has in common with the LCA: the remaining life of which the person is deprived. The second is the person's psychological connection to the interests of which she is deprived at the time of death.⁸ For example, if Violet dies when she is sixty years old, then when she dies she will have a strong psychological connection to her interests when she dies. She will have plans for herself in the coming years. It is not merely the case that she has an interest in those years, but she will have a strong psychological connection to those interests. When those interests are frustrated in death, it will be particularly bad for her. The same would be true if Violet were to die at age twenty. One important difference on McMahan's view is that if Violet dies immediately after obtaining personhood, she will have no—or at most, very little—psychological connection to her interests in the future. On this view, the badness of death is very significant for adults and much less significant for unborn and very young persons. This view has important

⁷ There is disagreement as to when this might take place. I have in mind some point during Violet's mother's pregnancy.

⁸ McMahan, "The Comparative Badness for Animals of Suffering and Death," 70.

implications for real-world cases of progressive dementia. As McMahan puts it, the patient at the onset of some disease such as Alzheimer's ought rationally to be "intensely egoistically concerned" with the exacerbation of his illness. However, he "may rationally be only minimally egoistically concerned" with what will happen in the final stages of his dementia. For, on the TRIA, the patient's psychological connection with the interests he will have when his dementia is at its most significant are minimal.⁹

Ben Bradley is critical of the TRIA on the grounds that it fails to explain the badness of death for very young, postpartum children.¹⁰ Bradley expresses an intuition that death is really bad for adults and for children of, say, two years of age; but much less significant immediately after obtaining personhood. He argues that the two-year-old will also have little psychological connection to interests in the future, and therefore, on the TRIA, the death of the two-year-old is relevantly like the death of the unborn person and relevantly unlike the death of the adult. Bradley therefore suggests the partial welfare subject view, according to which either personhood is a scalar concept in that it develops over some period of time; or if personhood does have a definitive starting point, we cannot know what it is. Therefore, we should err on the side of caution and treat developing persons during the indeterminacy period as though they are partial welfare subjects. On this view, adults, two-year-olds, and infants above a certain age are persons in the relevant sense. Very young infants and fetuses are partial welfare subjects. And zygotes are not persons and therefore not welfare subjects. The end result, Bradley supposes, is a curve that—unlike the curve generated by the TRIA—conforms to our intuitions about the badness of death for zygotes, young infants, two-year-olds and adults.

Each of these three views is an attempt to explain the badness of death at what

⁹ *The Ethics of Killing: Problems at the Margins of Life*, 495; "Early Death and Later Suffering," in *Saving People from the Harm of Death*, ed. Espen Gamlund and Carl Tollef Solberg (New York: Oxford University Press, 2019).

¹⁰ Ben Bradley, "A Gradualist View About the Badness of Death," *ibid.*

McMahan calls “the margins of life”—for the very young and the very old. Each asks what is the moral cost of death and whether it is any different for young people and for old people. What is noteworthy for our purposes is that the three views agree about the objective badness of death for healthy young adults who, as the idiom suggests, have their whole lives ahead of them. In fact, each of the three views is grounded in the strong intuition that it is really bad, for example, for a healthy twenty-year-old to die. This is especially important for the badness of death in war because, generally, combatants in war tend to be healthy young adults. Though there are outliers—child soldiers in the Sudan or the ancient Greek phalanx consisting in men of every age group—the general rule is that wars are fought by young adults in the prime of life. The trend is at least as old as Herodotus who recognized that “in war fathers bury their sons.”¹¹

To take two prominent examples of modern combatants as young adults, 91 percent of active duty military members in the United States are under the age of 41 and the average age of the UK’s regular military forces is just 31.¹² According to each of the three accounts of the badness of death introduced here: Death is bad; death is particularly bad for young people; combatants who are killed in war are often young people; therefore the death of combatants in war are always bad, and are often particularly bad. My purpose here is not to adjudicate between the available conceptions of the badness of death, but only to show that on many of the available accounts, the demographics from which many combatants are drawn fall squarely into the set of people whose deaths are objectively quite bad.

5.2.2. *Death and the military profession*

¹¹ See respectively, Marisa O. Ensor, “Child Soldiers and Youth Citizens in South Sudan’s Armed Conflict,” *Peace Review* 24, no. 3 (2012); Victor Davis Hanson, *The Western Way of War: Infantry Battle in Classical Greece* (New York: A.A. Knopf, 1989). Herodotus, *The Histories*, trans. Aubrey De Sélincourt, Revised ed., Penguin Classics (London: Penguin, 2003). Book I, Chapter 87

¹² “2015 Demographics: Profile of the Military Community,” (Department of Defense, 2015); “UK Armed Forces Biannual Diversity Statistics,” (National Statistics, 2017).

The combatant occupies a role that is largely defined by its relationship with death. In a recent exchange, Jesse Kirkpatrick and Rob Sparrow debated the relationship between the role of the combatant and the act of making a decision with life-and-death consequences. Sparrow claims that there is nothing unique about the life-and-death significance of the combatant's decisions. Though combatants are faced with these kinds of decisions, so are "ambulance drivers, pharmacists, surgeons, paramedics, police, and rescue workers." According to Sparrow, "members of these professions must also make life-or-death decisions."¹³ But the mere fact of decisions with life-and-death consequences fails adequately to capture the combatant's role. What separates the combatant from the medical professional, fire fighter, and law enforcement officer is that while many of these professionals set out to save people, the combatant sets out to kill people. Except in extreme circumstances, in the doctor's, fire fighter's, and police officer's cases, when someone dies, something has gone terribly wrong. Under many martial circumstances, however, the combatant intends to kill the enemy. There are certainly outliers. Executioners set out to take human lives. Police special weapons and tactics (SWAT) teams might also, at least in some cases, set out to take the life of a hostage-taker or someone in the act of harming innocent people. These exceptions, though, are fairly narrow. In a more general sense, the profession of arms on the whole is devoted to taking the lives of others. It might be just this facet of the profession of arms—that it has death as its telos—that distinguishes it from most other professions and vocations.

For these reasons, though death is but one kind of harm, it is the kind most closely associated with war in practice. Though the defensive harming literature must take seriously

¹³ Rob Sparrow, "War without Virtue?," in *Killing by Remote Control*, ed. Bradley Jay Strawser (Oxford: Oxford University Press, 2013), 94. See also Jesse Kirkpatrick, "Drones and the Martial Virtue Courage," *Journal of Military Ethics* 14, no. 3-4 (2015); Robert Sparrow, "Martial and Moral Courage in Teleoperated Warfare: A Commentary on Kirkpatrick," *ibid.*; Jesse Kirkpatrick, "Reply to Sparrow: Martial Courage – or Merely Courage?," *ibid.*

the full spectrum of harms to individuals—death is a worse harm than a broken leg and a broken leg is a worse harm than a stubbed toe—in war, the relevant harm in the general case is death. For these reasons, the objective badness of death, even as it stands in comparison with the objective badness of other physical harms, is particularly applicable to justified harms in war and to the military profession.

5.3. REASONS TO KILL AND REASONS NOT TO

Just combatants in particular, and people who engage in defensive harming in general, are faced with two seemingly conflicting reasons for acting. On the one hand, a just combatant has either a self- or other-defense justification for killing the unjust combatant.¹⁴ On the other hand, the objective badness of death obtains in spite of that justification and in spite of the unjust combatant's liability to be killed. This tension is an important feature of justified killing in war even though it is often the case that the self- or other-defense justification outweighs the objective badness of death in liability cases.

5.3.1. *Badness and wrongfulness in war*

The objective badness of death seems at first to be irrelevant in the paradigm case of justified killing in war. Suppose a just combatant, Jason, kills an unjust combatant, Ursula, who is liable to be killed and suppose that Jason does so within the bounds of the other *jus in bello* requirements. According to most conceptions of just war theory, though Jason harms Ursula, he does not wrong her. Even if we consider the objective badness of Ursula's death, it is not clear that it carries much moral weight, and it certainly is not sufficiently weighty to make it impermissible for Jason to kill her. The strong intuition is that, whatever the objective

¹⁴ I hold that justified killing in war is almost always other-defensive and therefore often not merely justified but also morally obligatory, but I do not argue for that position here. See the third paper of this thesis, "Duty Killing and a New Moral Equality of Combatants."

badness of Ursula's death, it is significantly outweighed by Jason's moral reasons for killing her. The general principle appears to be that the moral reason for killing unjust combatants combined with their liability to be killed, makes it the case that the objective badness of their deaths is negligible in the ethical analysis. This is true even if we increase the number of unjust combatants who will be killed. Consider Ship Captain.

Ship Captain: Ursula and Umberto fight for an unjust cause and have crept aboard a civilian cargo ship to get a better shot at one of Jason's fellow combatants. The ship's captain, Nicholas, is justifiably unaware of the plot and is not liable to defensive harming. Jason is a crack shot and can either shoot and kill Ursula and Umberto before they fire upon their target or he can shoot and kill Nicholas. If he kills Nicholas, Ursula and Umberto will remain safe, adrift, and well fed on the ship until the end of hostilities. Thus, Jason can defeat the threat and prevent Ursula and Umberto from committing future unjust attacks either by killing both Ursula and Umberto or by killing Nicholas.

Just war theory and international law are broadly agreed that the principle of distinction prohibits Jason from killing Nicholas because Nicholas is not liable to be killed. If Jason is to defend his fellow combatant, he must instead kill Ursula and Umberto.

The morally significant features of the case fit into two categories: the badness of death and the wrongfulness of unjust killing. If Jason kills Nicholas, he imposes the objective badness of death on Nicholas and also violates his right not to be killed. If Jason kills Ursula and Umberto, he imposes the badness of death upon them, but doing so is not wrongful. If we accept the strong intuition that Jason is justified in killing Ursula and Umberto and is not permitted to kill Nicholas, it must be true in this particular case that Jason's reasons not to kill Nicholas wrongfully are stronger than his reasons not to kill Ursula and Umberto. That is, in this case, the wrongfulness of violating Nicholas's right not to be killed is a sufficient moral reason for Jason to kill two people who will not have their rights violated.

When constrained to cases of killing, this intuition hardly seems noteworthy: Of course just combatants should refrain from targeting noncombatants who are not liable to be killed. As we shall see in the next section, however, this intuition is at odds with a strong intuition in some rescue cases. A closer look at the deontic relationships in both cases will

show just how significant this tension can be.

5.3.2. *Badness and wrongfulness in a rescue case*

Unlike in Jason's case above, in some cases rescuers' reasons to avoid the badness of death are stronger than their reasons to avoid rights violations. That is, in some cases, the objective badness of death is a sufficient moral reason for rescuers to allow someone's right not to be killed to be violated. Consider this adaptation of one of Jonathan Parry's cases.

Rock Rescue: Theresa is taking a walk at the bottom of some cliffs when she spots two rocks falling from the cliff tops. The first rock has been blown by the wind and will land on two innocent people, killing both of them. The second rock has been deliberately and maliciously pushed by Agatha in an attempt to crush and kill Violet. Luckily, Theresa has her ray gun with her and has time to vaporize one rock before it lands, but not both.¹⁵

Should Theresa save two people from being killed by a natural event or save one person from being murdered? The rock pushed by the wind will indeed kill the two people below. But it will not wrong them because rocks cannot violate rights.¹⁶ The second rock, though, is a murder weapon. The wind-blown rock will result in the badness of two deaths. Agatha's rock will result in the badness of Violet's death and the wrongful killing of Violet.

Parry anticipates, as I do, a widely held intuition that in this case, Theresa ought to save the two rather than the one. If this intuition is the right one, it must be the case that the badness of death is of greater moral significance than the wrongfulness of being unjustly killed. Put differently, it must be the case that the badness of death is a stronger reason for Theresa to act than preventing the violation of Violet's right not to be killed. However strong our intuitions might be about the wrongfulness of murder in the abstract, the badness of death—at least in Theresa's case—seems to outweigh it. This is clear if we compare the

¹⁵ Parry, "Defensive Harm, Consent, and Intervention," 380. In Parry's case, the wind-blown rock will kill one person and break a second person's leg. I have changed it so that the rock will kill two people. I have also changed the names for consistency.

¹⁶ See, e.g., Firth and Quong, "Necessity, Moral Liability, and Defensive Harm," 681; Fabre, *Cosmopolitan War*, 56.

results of both rocks. In the wind-blown rock case, the result is the death of one person and the death of another person. In the pushed rock case, the result is the death of one person and the violation of that person's right not to be killed. In a pure comparison of moral weight, the badness of death for one person can be subtracted from both sides of the equation. What remains is the badness of death for the second person in the wind-blown rock instance and the wrongfulness of the violation of Violet's right not to be killed in the pushed rock instance.

Even if Theresa were faced with a choice between saving one murder victim and saving one victim from the natural threat, it is not clear how heavily the right violation should weigh. It would seem odd to claim that, though the two would-be victims are otherwise equivalent in every morally relevant sense, Theresa ought to save the one from being murdered precisely because preventing murder is morally superior to preventing deaths that are not murders. Parry goes so far as to say that, in such a case, Theresa should instead flip a coin to ensure that each would-be victim has the same chance of being saved.

If Theresa morally ought to save the two rather than the one, it must be the case that, at least from Theresa's perspective, the moral weight of the badness of death for the second person in the wind-blown rock case exceeds the moral weight of the wrongfulness of the right violation in the pushed rock case. In Parry's words, "the justification for preventing unjust aggression is largely grounded in the importance of preventing harm, rather than preventing wrongs." Victor Tadros makes the same point about a similar case when he says "the fact that the one person is being wrongfully [killed] can carry some weight in determining what I must do, but it is much more important that I save two lives rather than one."¹⁷ Though the significance of wrongfulness is intuitively high in the abstract—murder is really bad—as far as Theresa's ability to rescue is concerned, the moral significance of the

¹⁷ Parry, "Defensive Harm, Consent, and Intervention," 381. Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law*, Oxford Legal Philosophy (Oxford: Oxford University Press, 2011), 106.

badness of death for one person is greater than the moral significance of wrongfulness of the violation of one person's right not to be killed.

The subject of Parry's inquiry is different from my own. He distinguishes reasons to prevent injustice from reasons to prevent harms to show that if reasons to prevent injustice are insufficient to justify saving a life—as in Theresa's case—then they cannot be sufficient to justify taking a life—as in some armed humanitarian intervention cases. Parry is therefore concerned with the relative weights of the badness of causing harm to an attacker and the wrongfulness of that attacker's unjust attack on her victim. Questions of liability, therefore, fall almost entirely outside the scope of Parry's paper.¹⁸ In this paper, by contrast, I am concerned with the relative weights of the badness of causing harm to an attacker and the wrongfulness—or lack thereof—of defensively harming that same attacker. Though we have different aims, Parry and I agree that in *Rock Rescue* the badness of death significantly outweighs the wrongfulness of unjust killing in so far as the moral judgment of Theresa's actions are concerned.

At first, it might seem that *Ship Captain* and *Rock Rescue* are not relevantly similar because *Ship Captain* involves liability to harm and *Rock Rescue* does not. Theresa, some might argue, must take more seriously the badness of death precisely because she cannot distribute harms based on liability—surely if Theresa could distribute the harm to the murderer he would be liable to that harm, and that would be what Theresa ought to do. But the two cases are relevantly similar. This is because, in spite of the liability asymmetry, the rights relationships in the two cases are relevantly symmetrical. And the concept of liability is only of moral significance in that it helps to describe the relevant rights relations.

To see that the rights relationships are symmetrical in the two cases, we must take a

¹⁸ In fact, Parry says in his introduction that he “will say almost nothing about liability.” Parry, “Defensive Harm, Consent, and Intervention,” 356.

closer look at liability. What is at stake in both cases is the potential violation of one person's right not to be killed—the murder victim in Theresa's case and the ship captain in Jason's. When we say that the potential murder victim in Theresa's case is not liable to be killed, we mean only that he has not given up his right not to be killed—that he remains immune to being killed. Likewise, when we say that a person is immune to some harm, we mean only that she is not liable to that harm. Liability to harm and immunity to harm are important moral concepts only in so far as they describe the status of a person's right not to be harmed. When Theresa saves the two rather than the one, the one's right will be violated because she is not liable—she is immune—to Agatha's wrongful attack. If Theresa were to save the one rather than the two, the two would die, but their rights would not be violated. Questions of immunity and liability simply do not apply to the two potential victims of the wind-blown rock because there is no agent violating their rights. This claim is, perhaps, counterintuitive. Some might respond by saying that the two deaths in Theresa's case would be tragic and this must be because they were killed in spite of the fact that they were not liable to be killed. But this assumption begs the original question. Indeed, the two deaths are bad in a moral sense; but because there is no right violation in the wind-blown rock case, the liability or immunity of the two victims is irrelevant, and the moral badness is explicable in terms of the badness of death independent of liability considerations in particular and of rights considerations in general. In both Theresa's case and Jason's, there are two potential deaths without any rights violations and one potential death accompanied by a right violation. Though there is a superficial liability asymmetry, there is no substantive asymmetry in the rights relationships.

5.3.3. Dispensing with the discounting thesis

Some might claim that the two cases are dissimilar in that Jason has a liability-based justification for killing Ursula and Umberto, but there is no liability-based justification

available to Theresa. But this objection is grounded in a terminological misunderstanding about what is sometimes called a “liability justification.” When “liability justification” is used in the literature, it is often used as a shorthand for a “justification grounded in liability,” or as I have referred to it here, a “liability-based justification.” Liability, by itself, does not give defenders a positive moral reason for acting, and is therefore insufficient to generate a justification.¹⁹

Dispensing with the idea that liability is central to the normative asymmetry is crucial because, on one plausible account, the moral weight of the objective badness of death is discounted in liability cases. Seth Lazar, for example, says that a liable attacker’s interests are discounted in comparison to the interests of victims and defenders. McMahan also holds that harms caused to those liable to suffer them are discounted, but he restricts this discounting to proportionality and does not mention necessity.²⁰ We might expand this notion to a “discounting thesis” according to which Jason should kill the two combatants rather than non-liable Nicholas, not because the badness of death does not obtain in that case, but because the moral weight of Ursula’s and Umberto’s deaths are discounted relative to the moral weight of Nicholas’ death. In Theresa’s case, by contrast, none of the three potential victims is liable to be killed and therefore the badness of death is not discounted for any of the potential victims. Theresa must save the two because in the absence of discounting, the badness of death is more significant than the wrongfulness of murder.

It does seem to be the case that Jason must weigh the wrongfulness of unjust killing

¹⁹ For uses of “liability justification,” see, e.g., Quong, *The Morality of Defensive Force*, 104, n11; Strawser, “The Bounds of Defense,” 384-89; Jeff McMahan, “The Limits of Self-Defense,” in *The Ethics of Self-Defense*, ed. Christian Coons and Michael Weber (Oxford: Oxford University Press, 2016), 188; “What Rights May Be Defended by Means of War?,” 138. “Targeted Killing: Murder, Combat or Law Enforcement?,” in *Targeted Killings: Law and Morality in an Asymmetrical World*, ed. Claire Finkelstein, Jens David Ohlin, and Andrew Altman (Oxford: Oxford University Press, 2012), 198. For an argument that liability generates only a permission and not a justification, see Steinhoff, “Self Defense as Claim Right.”

²⁰ See Seth Lazar, “Necessity in Self-Defense and War,” *Philosophy & Public Affairs* 40, no. 1 (2012): 6; McMahan, *Killing in War*, 8.

more heavily than the badness of death. But it is not necessarily the case that this weight differential results from discounting the badness of death. The discounting thesis rehabilitates the objection that the liability asymmetry is doing the work in the two cases and provides a *prima facie* plausible account of the normative asymmetry. As I have already argued, however, the liability asymmetry is a red herring and the rights relationships remain symmetrical in *Ship Captain* and *Rock Rescue*. In Jason's case, as in Theresa's, one person will be killed and that one person's right will be violated or two people will be killed and their rights will not be violated.

This conclusion is at odds with the intuition—and indeed the just war tradition—as it applies to *Ship Captain*. In *Ship Captain*, Jason ought to ensure that Nicholas's right not to be killed is not violated, and instead he should impose the badness of death on two people without any concomitant rights violations. We are left with an apparent contradiction. In *Rock Rescue*, preventing badness is a decisive moral reason to act in spite of the wrongfulness that will result. But in *Ship Captain*, avoiding wrongfulness is a decisive reason to act in spite of the badness that will result. We are in need of a philosophical principle to explain the relative weights in the two cases.

5.4. DOING AND ALLOWING

In this section, I argue that the best explanation for the asymmetry between Jason's case and Theresa's is that Jason must cause harm to achieve some good while Theresa only allows one harm to occur to prevent some other harm from occurring. Wrongfulness must weigh more heavily in the proportionality and necessity determinations if the rescuer is responsible for it than if the rescuer is not responsible for it. The distinction between doing and allowing is recognized by practitioners as well as philosophers. Philosopher and veteran of the Second World War, J. Glenn Gray, refers to the distinction in practice.

The enemy was cruel, it was clear, yet this did not trouble me as deeply as did our own cruelty. Indeed, their brutality made fighting the Germans much easier, whereas ours weakened the will and confused the intellect. Though the scales were not at all equal in this contest, I felt responsibility for ours much more than for theirs.²¹

This familiar distinction between doing and allowing not only accounts for the normative asymmetry between the two cases, but also generates implications for the ethics of killing in war.

5.4.1. *Agent-relative wrongfulness*

Across a range of cases, the moral weight of wrongful harm is more significant when the rescuer causes it than when the rescuer merely allows it. We have already seen this distinction at work in *Rock Rescue* and *Ship Captain*. But the same phenomenon obtains in cases of non-lethal harm. Consider a non-lethal, non-combat case.

Confiscated Vehicle: Theresa is a police officer. She is chasing an attacker who is about to commit a violent crime. Theresa's only means of apprehending the criminal is by confiscating one of two vehicles nearby—an action that is proportionate in the wide sense. The driver of the first vehicle is the vehicle's owner. The driver and passenger of the second vehicle have stolen it. Each of the three people is trying to get to an important appointment and will miss it without a vehicle.

The proportionality requirement is met regardless of which car Theresa confiscates. Theresa's justification for acting in *Confiscated Vehicle* turns on necessity. Surely Theresa should take the car that has recently been stolen. Or, put differently, given the choice, Theresa ought not to take the car that has not been stolen. This is because if Theresa takes the first car from its proper owner, she deprives him of the use of his car and she also infringes his right not to have his car taken. She therefore causes badness and wrongfulness. If Theresa confiscates the car from the car thieves, she deprives two people of the use of a car, but because this driver and passenger have no right to use the car in the first instance,

²¹ Gray, *The Warriors : Reflections on Men in Battle*, 6. See also Philippa Foot, "The Problem of Abortion and the Doctrine of the Double Effect," *Oxford Review*, no. 5 (1967); Thomas Nagel, "War and Massacre," *Philosophy and Public Affairs* 1, no. 2 (1972): 130.

the harm Theresa causes is not wrongful harm. In *Confiscated Vehicle*, in which Theresa is all things considered justified in causing harm, Theresa must weigh the wrongfulness of infringing one person's right more heavily than the badness of the harm she will cause for two people.

In each of the above cases, *Rock Rescue*, *Ship Captain*, and *Confiscated Vehicle*, the significance of the wrongfulness of violating a person's right depends upon whether the rescuer is causing the right violation or infringement or merely allowing it. In *Rock Rescue*, Theresa should not weigh the wrongfulness of the threat against the murder victim very heavily because she has not caused it. She should save the two rather than the one because in this case of allowing wrongful harm, the badness of death outweighs the wrongfulness of the right violation. In *Ship Captain*, Jason should kill the two rather than the one because Jason is the one causing harm. He therefore must weigh the wrongful killing of Nicholas more heavily than he would do if he were merely allowing harm. Killing non-labile Nicholas would violate both the proportionality and necessity requirements. Finally, because in *Confiscated Vehicle*, Theresa must cause harm in pursuit of the justifiable good, it would be better for her to cause a harm that does not also infringe a person's right—even if that means causing the same amount of harm to two people rather than to one. The necessity requirement demands that defenders choose the defensive option that will cause the least amount of weighted moral harm.²² Weighing harm appropriately includes weighing wrongful harms one causes more heavily than wrongful harms one does not cause. A single principle can explain the superficial discrepancies between the various cases.

The principle I propose is the principle of *Agent-Relative Wrongfulness*.

Agent-Relative Wrongfulness: While the moral weight of the badness of harm is agent-neutral, the moral weight of the wrongfulness of a right violation is agent-relative.

²² Quong, *The Morality of Defensive Force*, 127-29; Lazar, "Necessity in Self-Defense and War," 6-7.

This principle merely inverts the relationship between the badness of death and the wrongfulness of rights violations as they are described in the discounting thesis. Recall that on the discounting thesis, the moral weight of wrongful harm remains the same while the moral weight of the badness of death is discounted in liability cases. According to the principle of *Agent-Relative Wrongfulness*, the moral weight of the badness of death remains constant while the moral weight of the wrongfulness of the right violation changes depending on whether the rescuer is causing or merely allowing the harm.

To apply the *Agent-Relative Wrongfulness* principle to the combat case, we must take into account the fact that the just combatant is not merely allowing but causing harm. Jason should kill the combatants and spare the non-combatants in *Ship Captain*, not because the badness of death is discounted in Ursula's and Umberto's case, but because he must weigh the wrongfulness of right violations more heavily when he is the one causing them. The objective badness of Ursula's death and Umberto's only appears discounted because the moral weight of the badness is compared against the agent-relative significance of the wrongfulness, which is weightier for the agent in doing cases than in allowing cases. Far from discounting the objective badness of death, Jason justifiably kills Ursula and Umberto in spite of the fact that the objective badness of death maintains its full weight. This is, on my view, a better explanation for the deontic phenomenon in Jason's case. He ought to kill the two liable parties rather than the one non-labile party. This is not because the badness of death is discounted, but instead because as the one causing harm, right violations take on even greater moral weight.

5.4.2. *The badness of death in liability cases*

Not only does the badness of death obtain in liability cases, but it can even be decisive to permissibility. Consider *Ship Crew*.

Ship Crew: This time Ursula is the sole unjust attacker and she threatens 100 innocent victims. Jason's only means of killing Ursula is by blowing up the ship—which will kill Ursula but will also kill the ship's 10 non-labile crewmembers. But Jason can instead defeat the threat by blowing up the dock. This will kill 10 non-labile dockworkers and will leave the ship adrift for the duration of the conflict leaving Ursula unscathed but unable to cause unjust harm in the future.

In *Ship Crew*, Jason can defeat the unjust threat to 100 by killing Ursula and also killing 10 innocent people as a side effect, or by blowing up the dock and killing a different 10 people as a side effect, but leaving Ursula alive. On most conceptions of lesser-evil justifications, Jason is justified in killing 10 non-labile people to save 100. So either course of action satisfies the proportionality requirement. What matters for Jason's choice in *Ship Crew*, therefore, is not proportionality, but necessity. Jason must choose the defensive harm that imposes the least morally weighted harm. My own intuition, and I expect it to be the common one, is that despite the fact that Ursula has met the agential requirements for liability, it is all things considered better for 10 people to be killed than for 11 people to be killed. This is so even if one of those eleven is liable to be killed.²³ The discounting thesis can generate the same conclusions in *Ship Crew*. If the badness of Ursula's death is discounted to some degree, but not completely vitiated, then killing the eleven would still be morally worse than killing ten non-labile people. My account is advantageous in that it does not demand an accounting of just how much the badness of death is discounted in liability cases.

Someone who holds that necessity is internal to liability will not find any cases in which the badness of death amounts to a decisive reason not to kill someone who is liable to be killed. This is because, on an internalist account of necessity, an attacker is liable to some harm only if that harm is the least harmful means of defeating the threat. If I attack you with lethal harm and you can defeat the threat either by killing me or by stomping on my foot, the necessity requirement permits you to stomp on my foot but not to kill me. An

²³ Those with strong retributivist intuitions might think that it is all things considered better to kill the eleven than the ten. But even on this view, the justification for killing Ursula is not grounded in her liability to defensive harm but in retribution—a discussion that falls outside the scope of this thesis.

internalist with respect to necessity also concludes that I am liable only to having my foot stomped on, and I am not liable to be killed. The internalist, therefore, will never find a case in which the attacker is liable to be killed and yet ought not to be killed on the grounds that the moral badness of death outweighs the moral reasons to kill her. On an internalist account, if the badness of death outweighs the reasons to kill her, then she was never liable to be killed in the first instance.

I am an externalist with respect to necessity. Imagine a case in which Agatha threatens unjustly to kill Violet. Theresa is armed only with a shotgun and can sneak up on Agatha and kill her to defend Violet. Meanwhile, Theodore is armed with a slingshot. He can sneak up on Agatha and shoot her with his slingshot, momentarily disorienting her, leaving time for Violet to escape. Suppose, though, that Theresa and Theodore are unaware of each other. The internalist must insist that Agatha is liable to be shot with the slingshot but not liable to be shot with the shotgun. This is because the slingshot is the least harmful means of defeating the threat, and if necessity is internal to liability, Agatha is liable only to the least amount of morally weighted harm necessary to defeat the threat. I find this claim implausible. For, if Agatha is not liable to be shot with the shotgun, then Theresa lacks a fact-relative justification. Indeed, Theresa's defensive action is impermissible in the fact-relative sense. Perhaps the most difficult implication to accept is that if Theresa shoots and kills Agatha, she has violated Agatha's right not to be killed even though her action would not have amounted to a violation of right had Theodore not been there. It is not plausible, at least not to me, that Agatha has a right not to be killed even though Theresa is using the least amount of harm available to her and is justified in believing that it is the least amount of harm available to anyone else. While I do not expect this argument to persuade those of an internalist bent, it informs what follows. For, if one adopts an account of necessity that is external to liability, then one can find cases in which the moral badness of death outweighs

moral reasons to kill.

In the US's 1991 war with Iraq, coalition war planners conducted a strike against fielded Iraqi military forces with more than 90,000 tons of munitions. But before the attack, helicopters with loudspeakers announced in Arabic that the enemy soldiers could save their lives by abandoning their vehicles. The day prior to the strike, coalition aircraft dropped millions of leaflets warning enemy soldiers of the ensuing attacks. Here, coalition aircraft crews provided the enemy soldiers with every opportunity to avoid dying in the subsequent attack. US forces devised a way to achieve mission objectives while at the same time sparing as many enemy soldiers as possible—even while those enemy soldiers were liable to be killed.²⁴

Assume for argument that the coalition conducted a just war against Iraqi aggression. If so, coalition forces have a liability-based justification for killing Iraqi soldiers. In spite of the Iraqi soldiers' liability to be killed, the coalition forces had a strong moral reason—the objective badness of death—not to kill them. As an externalist about necessity, on my view, the objective badness of harm is the reason the necessity requirement obtains in liability cases. Despite the Iraqi soldiers' liability to be killed, the objective badness of death gave coalition forces a decisive moral reason to kill as few of them as possible.

5.5. MORAL INJURY

Understanding that the badness of death is morally significant even when someone is liable to be killed helps to inform recent work in moral psychology. Some might object that, at the very least, there is no imperative to appeal to findings in moral psychology to help us to understand moral philosophy. Perhaps the one has little to do with the other. A stronger objection might be that it is not merely unnecessary to use each discipline to understand the

²⁴ John Mueller, "The Perfect Enemy: Assessing the Gulf War," *Security Studies* 5, no. 1 (1995): 92-93.

other better, but that doing so might confuse the relevant issues.

There are good reasons to reject these concerns and in fact to pursue a dialogue between moral psychology and moral philosophy. Moral psychology and moral philosophy both purport to tell us something about the relationship between human persons and morality. If there is an apparent contradiction between them, we should at least attempt to reconcile it. Otherwise, we have to admit either that moral philosophy or that moral psychology is (or both are) incapable of telling us about the relationship between actual human persons and actual morality. If so, academic questions in the literal sense are also academic in the pejorative sense. In any event, killing seems to be the kind of activity that is significant both to moral philosophy and to moral psychology and that should be motivation enough to determine whether there is some intersection between what the two fields have to say about killing.

5.5.1. Moral philosophy and moral psychology

I have argued in sections 5.3. and 5.4. above that even when a combatant has a liability-based justification for killing, the objective badness of death obtains as a moral cost. Where there is a moral cost there might also be a psychological cost. Recent work in moral psychology suggests that this is often the case. Military veterans can bear a psychological burden for justifiably killing enemy combatants who are liable to be killed that is similar to the psychological burden veterans can bear for unjustified killing. The most apt point of contact between the ethics of war and combat psychology is the still nascent but rapidly developing field of moral injury.²⁵

²⁵ The term, “moral injury,” has been around for decades. Jonathan Shay coined it in *Achilles in Vietnam*, first published in 1994. In that work, however, Shay seemed to include moral injury under the broader umbrella of post-traumatic stress. Moral injury has developed into its own field of study only in the last ten or fifteen years as psychologists have worked closely with veterans especially of the 21st century wars in Iraq and Afghanistan. See Shay, *Achilles in Vietnam*, 20, 26.

Combatants can experience moral injury if they witness or participate in actions that “transgress deeply held beliefs that undergird a service member’s humanity.” In light of this definition, one might expect moral injury to arise only when the combatant witnesses or participates in a moral failure. Though counterintuitive, a number of recent studies have shown that combatants can experience moral injury even when the acts they commit are morally justified and do not wrong anyone. In other words, even killing liable unjust combatants can amount to an act that “transgresses deeply held beliefs that undergird a service member’s humanity.”²⁶

5.5.2. *Three cases*

Consider three hypothetical cases. In *Case 1*, a soldier fighting for a just cause witnesses an atrocity in which one of her fellow soldiers murders a noncombatant. In *Case 2*, a pilot fighting for a just cause drops ordnance on a large formation of enemy combatants. Though she did her best to mitigate the damage to the civilian building in the vicinity, and though she intended to harm only the combatants and did not intend to harm noncombatants, the bomb caused damage to a civilian structure and killed a noncombatant inside. In *Case 3*, a soldier fighting a just war is engaged in a firefight with an opposing soldier fighting an unjust war. The just combatant kills the unjust combatant, bringing no harm to noncombatants.

In *Case 1*, just war theorists agree that the action the soldier witnesses is impermissible. We might expect the soldier in *Case 1* to be at a relatively high risk of moral injury because she witnessed an action that challenges a widely shared basic sense of

²⁶ For the definition of “moral injury” I use here, see Shira Maguen and Brett T. Litz, “Moral Injury in Veterans of War,” *PTSD Research Quarterly* 23, no. 1 (2012): 1. For examples of studies in which veterans suffer moral injury for committing morally justified actions, see Shira Maguen et al., “The Impact of Reported Direct and Indirect Killing on Mental Health Symptoms in Iraq War Veterans,” *Journal of Traumatic Stress* 23, no. 1 (2010): 86-90; Shira Maguen et al., “The Impact of Killing in War on Mental Health Symptoms and Related Functioning,” *ibid.* 22, no. 5 (2009): 435-43; Kent David Drescher et al., “An Exploration of the Viability and Usefulness of the Construct of Moral Injury in War Veterans,” *Traumatology* 17, no. 1 (2011): 8-9.

humanity. The psychology literature confirms the intuition, at least for some participants. In Sheila Frankfurt's study, for some respondents, witnessing or failing to prevent a massacre of civilians was an act that transgressed adopted boundaries of behavior—it was a “transgressive act.”²⁷

The pilot in *Case 2* has a lesser-evil justification for killing the non-labile noncombatant. She not only harms him, but she also wrongs him. She is justified because the good she achieves far exceeds the wrongfulness of the right infringement and the badness of death she causes. We might expect that the pilot in *Case 2* is also at risk of moral injury. Though her action was permissible, she nevertheless killed someone who was not liable to be killed. This, too, is supported by the psychology literature. In the same study, for some, “injuring [or] killing noncombatants [or] women and children” was identified as a transgressive act.²⁸

What of the soldier in *Case 3*? The unjust combatant is liable to be killed. On most just war accounts, it is not merely the case that the soldier has behaved permissibly, but unlike in lesser evil justification cases, he has not wronged anyone. Common approaches to liability-based justifications are unable to account for any moral tension for the just combatant. The surprising psychology finding, though, is that such a combatant can suffer moral injury for committing the justified act of killing someone who is liable to be killed. Of those who experienced a transgressive act in the Frankfurt study, 22% did so when “killing an enemy combatant.”²⁹ The psychological response in cases such as these persists in spite of liability and is independent of moral failure.

This empirical fact about moral injury raises a theoretical question. Why should someone experience moral injury if she has not seen or done anything morally wrong? The

²⁷ Sheila Frankfurt, “An Empirical Investigation of Moral Injury in Combat Veterans” (Dissertation, University of Minnesota, 2015), iii, 21-23.

²⁸ Ibid., 21-23.

²⁹ Ibid.

objective badness of death helps to answer this question. The objective moral badness of death is always a strong moral reason not to kill even though that reason can be outweighed by other, stronger reasons. When a defender justifiably kills an attacker who is liable to be killed, his is a liability-based justification. But even when the objective badness of death is outweighed, it is not vitiated. There is wide agreement on the moral cost that remains when harm is caused with a lesser-evil justification. I have argued here that there is also a moral cost that must be borne even when the defender has a liability-based justification for killing. It should therefore come as no surprise that the moral burden just combatants bear for killing those who are liable to be killed can translate into a psychological burden in the form of moral injury.

5.6. CONCLUSION

I have argued that the objective moral badness of death obtains even in cases in which the person killed is liable to be killed. It is not the case that the objective badness of death is discounted in proportionality calculations, but rather, that the agent-relative significance of violating someone's right not to be killed is greater when agents cause harm. The end result is a tension in any justified act of killing—even those that rely upon liability. Justified killing in war, therefore, is all things considered justified but is partially constituted by an act that there is a strong moral reason not to commit. This fact helps to explain the moral costs of war. There is no such thing as a morally “clean kill.” There is a significant moral cost to every death in war, even the justified killing of liable unjust combatants. At the same time, the objective moral badness of death, when combined with an externalist account of necessity, can account for real world cases in which just combatants spare unjust combatants who are nevertheless liable to be killed.

This view has an important practical upshot. The theoretical philosophical tension

helps to explain the practical psychological tension. When the discussion of ethics in war is constrained only to liability, it is difficult to explain the moral injury combatants can suffer when they have neither committed nor witnessed moral failures. On the view presented here, however, the just combatant is all things considered permitted to kill the unjust combatant. But beneath the all-things-considered permissibility, the moral badness of death obtains as a strong moral reason not to kill. On this view, it is no surprise that those who justifiably kill in war can experience moral injury as a result.

6. Conclusion

In the preceding papers I have argued for new ways of accounting for some of war's moral costs. First, I argued in favor of a reductivist-individualist approach to just war theory and against an exceptionalist-collectivist one. Then in the three subsequent papers, I argued that even the extant reductivist views fail adequately to account for the moral costs of war. Though the conclusions in those three papers amount only to slight variations on the available accounts, they are important in so far as accounting for the moral costs of war is central to just war theory. "War, in a good cause," J. S. Mill wrote of the US Civil War, "is not the greatest evil which a nation can suffer. War is an ugly thing, but not the ugliest of things."¹ The tradeoff Mill proposes is a kind of cornerstone of just war thought. War is morally costly, and yet it is sometimes morally justified. But it is justified only if, among other things, the moral benefits sufficiently outweigh the moral costs. By focusing on liability to the exclusion of other morally relevant elements, contemporary just war theory might inadvertently fail to recognize fully, in Mill's words, the ugliness of war.

Incorporating liability into just war thinking is essential and points us to the moral costs of war that are grounded in violations and infringements of rights—the deaths of innocent noncombatants, the displacement of refugees, and the killing of combatants who serve a just cause. But as war veterans have recounted time and time again, the moral costs of war are far broader than this. For instance, J. Glenn Gray remembers a time that he came upon a hastily built American cemetery during the Second World War.

One hundred and ninety Americans and a few dozen Germans were interred there in plain temporary graves. ... Officers and privates lay side by side, distinctions of rank

¹ John Stuart Mill, "The Contest in America," *Fraser's magazine for town and country*, 1830-1869 65, no. 386 (1862): 268.

being abolished here. ... Somehow I had never believed in the reality of war's destructiveness until then.²

On an exceptionalist view, soldiers on both sides were liable to be killed. On a reductivist view, the German soldiers interred there had been liable to be killed. But Glenn's appreciation for war's "destructiveness"—which is surely partially constitutive of war's moral cost—does not seem to depend upon deontic relationships. In this cemetery, the dissolution both of rank and of citizenship as means of separating persons points to the shared humanity of the deceased and thereby to moral costs of war that are independent of liability.

Having fought a war many believe to be objectively unjust, Vietnam veteran Karl Marlantes describes the moral cost of war differently.

I have grown to understand that in the cases where I killed to help or save my fellow Marines I don't feel guilty. I feel sad. The warrior of the future will simply have to take on this pain and perhaps realize before doing the killing that it will be a cost worth paying. Look at depictions of Abraham Lincoln's face at the end of his presidency and you'll get some idea of what I mean. I don't think he felt guilty about fighting to save the Union or end slavery. He mourned the dreadful cost.³

That Gray and Marlantes fought a just war and an unjust war, respectively, is noteworthy. Both seem to count the moral costs of war independently of that distinction. Marlantes carries sadness, but not guilt, for those he killed. Gray sees war's destructiveness in the lives that it took on both sides. Every military operation, every airstrike, every lethal round an infantry soldier puts downrange, comes at a moral cost. This constitutive element of war's moral costs can easily be forgotten if we focus exclusively, or even principally, on liability.

The first paper, "Just War Traditions and Revisions," is relevant to this theme of liability and moral costs because I interpret the reductivist position—even as it stands, without amendment—to provide a better account of the moral costs of war than the exceptionalist view. While the available reductivist accounts give too much weight to liability,

² Gray, *The Warriors : Reflections on Men in Battle*, 97.

³ Karl Marlantes, *What It Is Like to Go to War* (London: Corvus, 2011), 57.

exceptionalist accounts do not give it enough. Walzer's view, for instance, that one becomes morally liable to be killed merely by becoming a combatant at war, fails adequately to incorporate the relationship between one's own actions and one's liability to harm. My defense of the reductivist approach in "Just War Traditions and Revisions" is therefore relevant to the question of how we ought to account for the moral costs of war.

Though I hold that the reductivist approach to just war theory provides a better account of the moral costs of war, it can be strengthened in a few places; the third, fourth, and fifth papers are attempts at strengthening it. One way that the moral costs of war are often underestimated in reductivist just war theory is in counting all combatants on the unjust side as liable to be killed. As I argued in "Duty Killing and A New Moral Equality of Combatants," however, some unjust combatants retain their right not to be killed. In cases in which a combatant is epistemically justified in believing she acts on a duty of other-defense, she remains immune to defensive harm. It seems apparent to me that many combatants will believe that they fight in defense of others. Whether this belief is epistemically justified is less clear and, of course, depends on the evidence available to each combatant in each case. McMahan identifies a number of potential reasons for a combatant's epistemic limitations that might amount to excusing conditions. These excuses on McMahan's view, though, do not bear on liability. In light of my arguments in the "Duty Killing" paper, however, the causes of epistemic limitation to which McMahan points make it more plausible that unjust combatants can be epistemically justified in believing their war is just. Because these epistemically limited unjust combatants remain immune to defensive harm, their deaths are of equal moral significance to those of non-liable noncombatants. These justified rights infringements are a hitherto unaccounted for moral cost of war.

The fourth paper, "Continuing Threats in War" examines a different kind of moral cost. By continually violating victims' rights to political autonomy, the unjust side does more

than merely threaten the lives of some of its members. If the unjust side threatens to violate these otherwise lesser interests for a prolonged period of time—as is often the case in war—then the moral cost imposed upon the victim state is higher than it might first appear.

This argument has at least one important implication for 21st century warfare. When non-state terror organizations declare and engage in war against states, as al Qaeda did against the US leading up to and on 9/11, for instance, they impose imminent threats of harm as well as non-imminent threats of harm. But in the absence of an invasion, they do not impose the same kind of continuing threat to political autonomy or personal freedom that a state does when it invades another state. If the justification for killing the sleeping soldier in war is wholly or partially grounded in the continuing threat he poses, then this whole or partial justification is absent in the case of a terrorist group that is outside the borders of one's political community. Wars against nonstate terror groups that threaten citizens' lives without threatening political autonomy are, therefore, more difficult to justify than wars against invading armies.

The fifth paper, "Reasons Not to Kill in War," is perhaps the most directly relevant to the question of how we might better account for the moral costs of war. The responsibility account of liability—especially with the modification that I offer in the "Duty Killing" paper—generates a just distribution of goods and harms in cases in which wrongful harms eventuate from foreseeably risk-imposing activity. But this account, though it justly distributes wrongful harm, does so without accounting for the objective moral badness of the liable attacker's death. On the account I presented in "Reasons Not To Kill in War," the moral cost of killing a person does partially depend on whether that person is liable to be killed. If he retains his right not to be killed, then his death is both morally bad in an objective sense as well as unjust in a deontic sense. And when the person killed is liable to be killed, his death is not unjust. But if we focus only on liability, we risk losing sight of the objective

moral badness of the liable attacker's death. As I argued in "Reasons Not To Kill in War," it is a mistake to conceive of the badness of death as discounted in liability cases. Instead, it appears discounted only because the defender must weigh the wrongful harm he causes heavily both in the proportionality and necessity calculi. Though there might be a *prima facie* case for including only wrongful harm in the moral cost of war, I think this would be a mistake. Just as the moral cost of war includes the justified infringement of rights, it must include the deaths of liable combatants who are justly killed.

A final distinction between moral cost and moral tragedy is worth mentioning in closing. I have been careful throughout to reserve the use of the term "moral tragedy" for the kind of wrongful harm discussed in the "Duty Killing" paper. In cases in which an unjust combatant is epistemically justified in believing that she fights in defense of others, she remains immune to defensive harm. And yet, just combatants might still have a fact-relative justification for killing her as a lesser evil. That is, in pursuing the just war's ends, the just combatant is justified in causing wrongful harm—in infringing this unjust combatant's right not to be killed—in the same way that a just combatant can be all-things-considered justified in wrongfully killing bystanders as a side effect. In the case of an epistemically limited unjust combatant, this is a morally tragic state of affairs. Because the reductivist-individualist position crucially relies upon liability as a means of justly distributing goods and harms, it is susceptible to a phenomenon in which goods and harms are not distributed—indeed cannot be distributed—justly. In cases in which a combatant is epistemically justified in believing he fights for a just cause, he remains immune to harm. And yet, because the moral costs of losing the just war are so high, the combatant on the just side is morally obligated in the fact-relative sense to kill him. This is not a moral cost of the same kind as the objective badness of death that I developed in "Reasons Not to Kill in War." Nor is it like the moral cost of justified infringements of bystanders' rights not to be killed. Even in cases of justified

collateral harm, the distribution of goods and harms is as good as it can be all things considered. Cases like those in “Duty Killing” are morally tragic in that the distribution of wrongful harm is not a just distribution in the fact-relative sense. Reasonable people might disagree as to the evidentiary standard a combatant must meet to be justified in believing he fights a just war. My own intuition, though, is that moral tragedies of this kind obtain in the real world. Herein lies one of the moral tragedies of war.

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