Moral Reasoning and Action in War

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Abstract

The moral reasons we have to kill some people and not others in service to morally important outcomes – like winning a just war – are the central concern of this thesis. The three papers that comprise this thesis argue that reductive moral reasons – reasons derived from the ethics of individual self and other defense – apply in war and should figure in the individual and joint deliberation of soldiers when they decide whom they ought morally to kill.

The focus on reductive moral reasons also aims to explain and defend "revisionist" just war theory and the philosophical methodology underpinning it known as "reductivism." The explanations and defense respond to some familiar criticisms of revisionist just war theory. Each paper also defends a central idea of revisionist just war theory and reductive individualism. That is, that the morally best option in collectivized war is the morally best option in other contexts: distribution of unavoidable harms to those who bear the most responsibility for the circumstances in which those harms arise.

The first paper defends revisionist just war theory and reductive individualism from the charge that it discounts the collective and political nature of war. First, it argues that any appeal to collective action tacitly appeals to individual morality in order to square with our intuitions about intentional defensive killing. Second, it argues that moral reasons derived from political self-determination either do not matter in war, or will not matter enough to override those reasons we can derive from the distribution of unavoidable harms to those who bear the most responsibility for the circumstances in which those harms arise.

The second paper defends the relevance of revisionist just war theory to the way soldiers and armies fight. The paper does this by demonstrating that reductive individualism is the best way to account for the fact that soldiers kill in war to communicate reasons for action to their enemies.

The final paper defends the relevance of revisionist just war theory to moral deliberation under the conditions of uncertainty. The paper develops an expanded understanding of the necessity constraint and adapts the comparative dimension of liability to a decision theoretic approach to acting under the conditions of uncertainty.

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Table of Contents

Introduction

I spent the summer and fall of 2005 in Iraq fighting the 1920s Revolutionary Brigade. The fight in western Baghdad involved many of the elements that make morally justified fighting in war very difficult. The Brigade was a nationalist movement that had risen to *de facto* political power in the area and its members had a mix of political, criminal, and military aims. Moreover, the moral justification of the United States' presence in Iraq was becoming increasingly doubtful. Nonetheless, in western Baghdad, there still seemed to be a difference that mattered between the 1920s Revolutionary Brigade and the Iraqi government I was fighting to support. In the course of that fight, which was tragic and often to no justifiable end, I could not escape a central difficulty: those persons most responsible for the unjust state of affairs in western Baghdad – on all sides – were not bearing the costs of that conflict. I also felt sure that those involved in the decisions that killed some people and not others could do a better job of ensuring those responsible bore the costs. I have spent a great deal of time since then reflecting on this and other experiences of combat and considering what lessons they might hold for the ethics of killing in war.

An important lesson is that in war, soldiers go to great lengths to kill some people and not others in pursuit of their aims. In short, soldiers often take themselves to be fighting according to reasons. Often, there are moral reasons intentionally to kill some people and not others in war. Those moral reasons to kill some people and not others in service to morally important outcomes – like

winning a just war – are the central concern of this thesis. The three papers that comprise this thesis argue that reductive moral reasons – reasons derived from the ethics of individual self and other defense – apply in war and should figure in the individual and joint deliberation of soldiers when they decide whom they ought morally to kill.

The thesis aims to explain and defend a position in the ethics of killing in war known as "revisionist" just war theory and the philosophical methodology that underpins that position known as "reductivism." The explanations and defense I offer are not general. Rather, I respond to some familiar criticisms of revisionist just war theory: First, the suggestion that revisionists miss an important feature in the moral reality of war because the reduction of war to the individual morality of self and other defense discounts the collective nature of war. Second, the suggestion that revisionists fail to connect meaningfully with the way armies fight. Finally, the suggestion that revisionist just war theory does not address the moral implications of decision making under conditions of uncertainty that are endemic to warfare. Each paper takes these criticisms in turn and defends a central idea of revisionist just war theory and reductive individualism. That is, that the morally best option in collectivized war is the morally best option in other contexts: distribution of unavoidable harms to those who bear the most responsibility for the circumstances in which those harms arise.

Revisionist just war theory is a big tent, and even among those philosophers that are revisionist and reductivist there are important differences. All that said, there is broad agreement on three points that I take to be largely

correct.[1] First, it is permissible to intentionally kill people in war only if they are liable to be killed or if the intentional killing is a substantially lesser evil in the circumstances. War involves what governments often euphemistically call "collateral damage:" the unintended but foreseeable side-effect killing of persons that is only permissible if it is the lesser evil. But side-effect killing in particular, and lesser evil justifications more generally, are not a focus of these papers. In all three papers, the context is the moral reasons one can derive from a liability justification and the focus is on how those reasons should figure in the balance of moral reasons to kill some people and not others. Second, as in self- and other-defense, liability to defensive killing in war involves forfeiting one's right not to be killed in the circumstances by virtue of one's being morally responsible for a threat of unjust harm. Finally, reductivists deny that morality in war is *sui generis*. War involves collective actions that usually have a political character. But this does not create a "special moral sphere with special moral rules" that affect how one might be liable to defensive killing.[2]

Beyond the shared aim of defending revisionist just war theory and shared commitments of reductivism, the papers make use of three sources of argument. The first is related to the idea that the moral reality of war is *sui generis*. I do try and keep the reality of fighting in war close at hand because the defense I am after is largely about demonstrating that reductive individualism is apt to the questions

[1] The primary examples of this approach are Jeff McMahan, Cécile Fabre and Helen Frowe. Cf. Jeff McMahan, *Killing in War* (Oxford: Clarendon Press, 2009); Cécile Fabre, *Cosmopolitan War* (Oxford: Oxford University Press, 2012); Helen Frowe, *Defensive Killing* (Oxford: Oxford University Press, 2014).
[2] Frowe, *Defensive Killing*, 123.

of killing in war. Moreover, my reflections and thinking on war are often first personal. But my arguments do not appeal to any special feature of the reality of combat or my experience therein. I remain convinced now, as I was in 2005, that there is nothing special or different in the moral reality of war. It is always brutal, and more often than not evil, but the unjust harms and grave wrongs that people suffer in war are analyzable in everyday moral terms.

The second common idea and source of argument is the context of a liability justification to inflict lethal defensive harm. I am interested in the balance of moral reasons that ground permissible killing in war based on liability and two features of that justification are prominent in these papers. The first is the instrumental nature of that justification. This requires, I think, a broad view of what facts can produce moral reasons. While the arguments are generally nonconsequentialist, I do try and make room for the moral value of outcomes, and the implications these justifications have for the character of those persons who fight in war. The arguments attempt to respect the right, sympathize with the good, and tell the truth about what it means to be the kind of person who justifiably kills some people and not others in war. In every paper, I assume the right, the good, and the character of persons to deliver moral reasons that figure in the reasons soldiers have intentionally to kill. These moral reasons influence our first order moral judgment of permissibility in the following way: an action φ is morally permissible if there is no moral reason, all things considered, not to φ. An action φ is morally justifiable if there is no moral reason, all things considered, against φ and a positive moral reason to φ. Finally, an action φ is morally

required if φ is justifiable, and there is a decisive moral reason to φ. I do not defend this account of moral reasons or this account of permissibility but assume both throughout.[3] The second feature of a liability justification that I appeal to in all three papers is a distinction, following Seth Lazar, that we can make between the grounds of those justifications, and the elements of the justification, like proportionality and necessity. I do not offer any new element of liability justifications, but all three papers explore and expand the grounds of those justifications.

The final common idea that runs throughout the papers is an emphasis on what Jeff McMahan has called the "comparative dimension" of liability.[4] Liability is instrumental in nature, and so, unlike desert, how much harm a person can be liable to in war is not only a matter of that person's moral responsibility but is also a matter of the comparative responsibilities of all those who might be victims of the unjust harms and grave wrongs when some harm or wrong is unavoidable. The comparative dimension of liability makes persons liable to the infliction of harms and wrongs that are altogether disproportionate to what those persons may, in fact, deserve. I acknowledge here that an implication of this view is that a small degree of responsibility can be the basis of a liability to a massive and concentrated harm if the only other possible distributions are morally worse. All

[3] This understanding of permissibility is common and follows, among others, Derek Parfit and Jeff McMahan. Cf. Derek Parfit, *On What Matters*, vol. I (Oxford: Oxford University Press, 2011); McMahan, *Killing in War*. Also, I acknowledge from the outset that liability does not, in every case, amount to a positive moral reason to kill in war. Therefore, when I use the phrase "liability justification" I mean the grounds relevant to establishing a person's liability to defensive harm in a given set of circumstances.

[4] Cf. Jeff McMahan, "Individual Liability in War: A Response to Fabre, Leveringhaus and Tadros," *Utilitas* 24, no. 2 (2012); Jeff McMahan, "The Limits of Self-Defense," in *The Ethics of Self-Defense*, ed. Christian Coons and Michael Weber (New York, NY: Oxford University Press, 2016).

three papers suggest that this comparative dimension, which is readily available in the ethics of killing in self and other defense, is apt for explaining how warfare can remain justified and still strike us as brutally bad, and wickedly evil.

In what follows, I will use the terms of art familiar to just war theory: Combatants are those who directly participate in hostilities. Noncombatants are those who do not directly participate. Wars require belligerent sides, and I will use "just" and "unjust" to distinguish between these. A just combatant, therefore, is a combatant who fights with a just cause and not for unjust aims. An unjust combatant is one who fights for unjust aims. Just and unjust noncombatants are simply noncombatants on the just and unjust sides, respectively. Moreover, bystander noncombatants are those persons who are potential victims of a war or defensive action but who are not members of a group represented by the soldiers on either belligerent side. The context of my argument is the paradigm case of collectivized war: defense of one modern state against the unjust aggression of another state. While it is controversial that such aggression is always a just cause for war, I do not engage in that debate here and assume that defense against unjust aggression can serve as a just cause for war. In what remains of my introduction I briefly summarize each of the three papers.

Paper 1: Moral Reasons that Protect Civilians in War

This paper defends revisionist just war theory and reductive individualism from the charge that it discounts the collective and political nature of war. It is a truism that when soldiers fight, they fight collectively for political goals. Some moral philosophers, collectivists such as Seth Lazar, argue these collective actions

and their political character are central to understanding what morality requires of those who fight in war. The upshot, they argue, is that the moral features of collective action and political self-determination are an important part of explaining and defending the common intuition that civilians are morally immune from intentional killing in war. Some moral philosophers, reductivists such as Cécile Fabre, Helen Frowe, and Jeff McMahan, doubt that collective action or political self-determination significantly affects what morality requires of those who fight in war. The justifications for killing in war are the same as those for killing in self- and other-defense or killing as a lesser evil. If the intuition that civilians are morally immune from intentional killing in war conflicts with the justifications found in individual morality, it requires revision.

In this paper, I reject Lazar's attempt to defend the prohibition of intentionally attacking civilians on the unjust side of a war through appeals to a moral feature of collective action and respect for political self-determination. First, I argue that the supposed moral feature of collective action turns out to be analyzable in terms of individual morality. To square with our intuitions about inflicting massive defensive harms, Lazar makes a tacit appeal to the comparative dimension of liability. Second, I argue that the reason outsiders have to respect a group's political self-determination either do not matter in war, or do not matter enough, and so do not override a just combatant's reason to distribute a war's unavoidable harms according to individual responsibility. The two rejections follow from claims of justice when lethal harms are unavoidable. The morally best option in collectivized war is the morally best option in other contexts: distribution

of unavoidable harms to those who bear the most responsibility for the circumstances in which those harms arise.

Paper 2: Killing to Communicate

In this paper, I defend revisionist just war theory from the charge that it does not connect meaningfully with the way soldiers and armies fight. The paper does this by demonstrating that reductive individualism can account for the mixed moral agency of those who fight in war:

Soldiers often have more than one aim when they decide intentionally to kill in war. These aims matter to the reasons that justify such killings and to how we morally judge those soldiers. The same act that kills some persons, such as those operating as a platoon of tanks, and not others, such as those operating as infantry in support of the tank platoon, might aim to eliminate the threats posed by the persons in the tank platoon. We can call this the eliminative aim of killing in war. The very same act that those soldiers use to eliminate the tank platoon may also aim to communicate reasons to the infantry supporting the platoon. Soldiers often aim to kill some persons to communicate reasons for action and thereby influence the decisions of others. We can call this the communicative aim of killing in war. The central question of the paper is this: When an act has both an eliminative aim and a communicative aim, what does that imply for the permissibility of such killings and the moral agency of those who inflict such harms?

I limit my investigation of this question to the context of liability to lethal defensive harm and two theoretical concerns a communicative aim raises within this context. The first theoretical concern involves the grounds of permissibly

killing in war because killing to communicate is harder morally to justify than killing to eliminate. This raises a concern that the reasons that justify an eliminative aim might be insufficient to justify a communicative aim. The second theoretical concern involves the moral characterization of a soldier's agency given the presence of both aims. Standardly, a soldier's aims in action reflect their intentions, and these intentions help characterize the moral quality of that soldier's agency. When the same act serves two different aims, this straightforward relationship between aims and intentions gets blurred. It is not immediately obvious how an account of liability to killing in war should handle the presence of an agency that is mixed based on the presence of a communicative aim and an eliminative one. Both theoretical concerns have implications for the rights of the persons soldiers aim intentionally to kill and the rights and duties of soldiers when they exhibit such mixed moral agency.

I will argue that soldiers that fight for just causes can answer the two theoretical concerns a communicative aim raises and justify eliminative killings that also communicate reasons for actions to their enemies. Furthermore, I will argue that the nature of this justification implies decisive moral reasons to communicate. Often, the presence of a communicative aim allows soldiers to minimize harm or causes obligations of other defense to obtain within the circumstances of killing in war. So, such killings are morally required of soldiers that fight for just aims. This amounts to what I call a principle of scrutable harm that requires these soldiers to communicate reasons to their enemy in order to minimize harm and satisfy obligations of other defense. Finally, I will draw a lesson from the theoretical

concerns surrounding communicative aim for the ethics of killing in war. The grounds that justify communicative aims are not available to those soldiers that fight in a war without just cause. Therefore, it is impermissible for these soldiers to send a message by killing some and not others. This is a new reason to revise our intuition that combatants on both sides hold equal rights to kill, the so-called doctrine of the moral equality of combatants (MEC).

Paper 3: Uncertainty and Killing in War

This paper attempts to defend revisionist just war theory from the charge that it is insensitive to the moral dimensions of making decisions under the conditions of uncertainty. The paper develops an expanded understanding of the necessity constraint and adapts the comparative dimension of liability to decision theoretic approach to acting under the conditions of uncertainty:

Soldiers face uncertain options when fighting in war. Success in warfare, moral or otherwise, reliably involves soldiers choosing among many available means to achieve their ends. Very often, soldiers and combatants are unsure about whom they ought morally to kill when considering their options. Sometimes, this uncertainty arises out of empirical uncertainty: combatants might not know how much their chances of averting unjust harms will improve by killing enemy combatants. Empirical facts matter to the permissibility of killing, and they are hard to come by in war. In a further turn of the screw, combatants also face moral uncertainty. Here, the uncertainty arises out of not knowing, for example, how to weigh a probability that a small number of individuals will suffer massive, concentrated just harms against a similar risk that a much larger number of

individuals will suffer smaller, diffused unjust harms. Moral facts like these matter to the permissibility of killing, and they are hard to come by, not just in war, but at all.

For some moral philosophers, foremost among them Seth Lazar, the massive harms soldiers must invariably inflict and the impossible complexity of the choices they make pose serious challenges to an idea that has dominated just war theory and the ethics of killing in war over the last few decades. The moral philosophers advancing the now dominant view of the just war, reductivists such as Cécile Fabre, Helen Frowe, and Jeff McMahan, have argued that the justifications for killing in war reduce to justifications for killing in self- and other-defense or killing as a lesser evil. Call this reductive individualism. The central idea of reductive individualism is that killing in war reduces to questions of individual morality. That is, that the morally best option in war is the distribution of unavoidable harms according to individual moral responsibility. In this paper, I will suggest that criticism of reductivist theories along the lines of uncertainty is misguided because the reductivist's focus on individual responsibility fairly distributes the unjust harms and wrongs that arise in the scale and uncertainty of killing in war.

Beyond resolving theoretical debates in the ethics of killing in war, the scale of harms and the uncertainty involved in warfare matter because these two conditions raise concerns about the rights of the persons soldiers kill and concerns about the moral agency of the soldiers who gamble with the lives and rights of others on such massive scales. In both forms, uncertainty raises concerns about a combatant's access to the grounds of their first order moral judgments, like

permissibility, about the ability of any normative theory of killing in war to be action-guiding, and about judgments of combatant action in war that are relevant to attributing praise, blame, and moral responsibility. It is, therefore, a matter of some importance to understand how conditions of empirical and moral uncertainty interact with the permissibility of killing in war. I will argue that reductive theories of killing in war meet the challenge posed by the scale and uncertainty of warfare because these theories can coherently account for the rights of individuals and the moral agency of combatants within such circumstances.

I plan to explore the scale and uncertainty of warfare along two tracks. The first track will be a refinement of the necessity constraint within a liability justification intentionally to kill in war. I will argue against the dominant formulation of the necessity constraint as a matter of satisfying a moral principle to minimize harm. In its place, I will offer an expanded version of Jeff McMahan's "tradeoff formulation" of the necessity constraint because this formulation accounts for the wider set of moral considerations relevant to liability justifications when we introduce the scale of warfare.[5] The second track will investigate the interaction of the tradeoff formulation of necessity with the conditions of moral and empirical uncertainty. I will argue that in these conditions, combatants should weight the utility of their options according to the grounds of a liability justification and maximize the expectation that those persons most responsible for the circumstances in which unjust harms and wrongs arise suffer those costs.

[5] McMahan, "The Limits of Self-Defense," in *The Ethics of Self-Defense*. 187. Jeff McMahan, "Proportionality and Necessity in Jus in Bello," in *The Oxford Handbook of Ethics of War*, ed. Seth Lazar and Helen Frowe (Oxford University Press, 2016), 437.

Paper 1: Moral Reasons that Protect Civilians in War

§1: Introduction

No one fights a war alone. When soldiers fight, they fight collectively for political goals. Some moral philosophers, collectivists such as Seth Lazar, argue that these collective actions and their political character are central to understanding what morality requires of those who fight in war. The upshot, they argue, is that the moral features of collective action and political self-determination are an important part of explaining and defending the common intuition that civilians are morally immune from intentional killing in war. Some moral philosophers, reductivists such as Cécile Fabre, Helen Frowe, and Jeff McMahan, doubt that collective action or political self-determination significantly affects what morality requires of those who fight in war. The justifications for killing in war are the same as those for killing in self- and other-defense or killing as a lesser evil. If the intuition that civilians are morally immune from intentional killing in war conflicts with the justifications found in individual morality, it requires revision.

In this paper, I reject Lazar's attempt to defend the prohibition of intentionally attacking civilians on the unjust side of a war through appeals to a moral feature of collective action and respect for political self-determination. First, I argue that the supposed moral feature of collective action turns out to be analyzable in terms of individual morality. Second, I argue that the reasons outsiders have to respect a group's political self-determination either do not matter in war, or do not matter enough, and so do not override a just combatant's reason to distribute a war's unavoidable harms according to individual responsibility. The two rejections follow from claims of justice when lethal harms

are unavoidable. The morally best option in collectivized war is the morally best option in other contexts: distribution of unavoidable harms to those who bear the most responsibility for the circumstances in which those harms arise.

In what follows, I will use the terms of art familiar to just war theory: Combatants are those who directly participate in hostilities. Noncombatants are those who do not directly participate. Wars require belligerent sides, and I will use "just" and "unjust" to distinguish between these. A just combatant, therefore, is a combatant who fights with a just cause and not for unjust aims. An unjust combatant is one who fights for unjust aims. Just and unjust noncombatants are simply noncombatants on the just and unjust sides, respectively. Following Lazar, I will use *the permission* to refer to the permission to inflict intentional harm on unjust combatants, and *the prohibition* to refer to the prohibition of the intentional infliction of harm on unjust noncombatants.[6] The context of my argument is the paradigm case of collectivized war: defense of one modern state against the unjust aggression of another state. While it is controversial that such aggression is always a just cause for war, I do not engage in that debate here and assume that defense against unjust aggression can serve as a just cause for war.

§2: Lazar's Argument

In this section I introduce and summarize Lazar's argument for the *permission* and the *prohibition* from collective action and political self-determination without comment. I raise detailed objections in later sections. Moral reasons that protect noncombatants in war are a central part of any

[6] Seth Lazar, "Complicity, Collectives, and Killing in War," *Law and Philosophy* 35, no. 4 (2016), 366.

acceptable ethics of killing for Lazar. This is perhaps the reason Lazar takes the project of those who, like Fabre, Frowe and McMahan, argue for reducing the justification for killing in war to the justifications for killing in other circumstances, to be misguided. While there are important differences among reductivists, these philosophers agree on three points.[7] First, it is permissible to intentionally kill people in war only if they are liable to be killed or if the intentional killing is a substantially lesser evil in the circumstances. War involves what governments often euphemistically call "collateral damage:" The unintended but foreseeable side-effect killing of persons that is permissible only if it is the lesser evil. But side-effect killing in particular, and lesser evil justifications more generally, are not my concern here, so I will leave this aside. Second, as in self- and other-defense, liability to defensive killing in war involves forfeiting one's right not to be killed in the circumstances by virtue of one's being morally responsible for a threat of unjust harm. Finally, reductivists deny that morality in war is *sui generis*. War involves collective actions that usually have a political character. But this does not create a "special moral sphere with special moral rules" that affect how one might be liable to defensive killing.[8]

Lazar is sympathetic to some implications of the reductivist approach.[9] However, he rejects point two above because most reductivist accounts of killing

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[7] The primary examples of this approach are Jeff McMahan, Cécile Fabre and Helen Frowe. Cf. Jeff McMahan, *Killing in War* (Oxford: Clarendon Press, 2009); Cécile Fabre, *Cosmopolitan War* (Oxford: Oxford University Press, 2012); Helen Frowe, *Defensive Killing* (Oxford: Oxford University Press, 2014).

[8] Helen Frowe, *Defensive Killing*, 123.

[9] Seth Lazar, "Evaluating the Revisionist Critique of Just War Theory," *Daedalus* 146, no. 1 (2017): 113-24; Seth Lazar, "Just War Theory: Revisionists Versus Traditionalists," *Annu. Rev. Polit. Sci.* 20 (2017): 37-54.

in war ground the liability of many unjust noncombatants to intentional defensive harm. This conflicts with the common intuition that noncombatants are generally immune from intentional attack.[10] So, to explain and defend a noncombatant's moral immunity to intentional defensive harm, Lazar's broader work seeks other grounds for what he calls the principle of Moral Distinction: "In war, with rare exceptions, killing enemy noncombatants is *pro tanto* more seriously fact-relative wrongful than killing enemy combatants."[11] Lazar makes the cumulative case for the Moral Distinction by appealing to reasons derived from considerations other than liability. Lazar makes the case that killing noncombatants is often "unnecessary, opportunistic, and risky" and appeals to the fact that "they are especially defenseless and vulnerable" in war.[12] These considerations, together with others, make a cumulative case for Moral Distinction. None of the considerations on their own argue decisively for Moral Distinction, but they are jointly sufficient. If the cumulative case of the Moral Distinction is sound, the *permission* and *prohibition* follow.

Collective action and political self-determination contribute to this cumulative case for Moral Distinction by adding moral reasons derived from a moral feature of collective action and the respect that outsiders owe to political self-determination. These are what Lazar calls "collectivist reasons." He argues that they support the *permission* and *prohibition*. The distinction between moral reasons derived from collective action and political self-determination, and those

[10] Seth Lazar, *Sparing Civilians* (New York: Oxford University Press, 2015), 7.
[11] Seth Lazar, "Risky Killing and the Ethics of War," *Ethics* 126, no. 1 (2015), 93.
[12] Lazar, *Sparing Civilians*, 123. The characterization of Lazar's view as cumulative is one I owe to comments and discussion with Adam Betz.

derived from individual morality is important to understand both Lazar's goal and my argument that he fails to achieve this goal. The failure, which I argue below, involves, among other things, an implicit appeal by Lazar to moral reasons derived from individual morality. Therefore, to keep the distinction in mind, I will use "individualist reason" to indicate those reasons Lazar derives from individual morality and "collectivist reason" to indicate those he derives from collective action and political self-determination.

Lazar makes four explicit claims in arguing for collectivist reasons that ground the *prohibition*:

(1) A state's unjust war, through the interactive effects of permissible actions and omissions, causes harms for which no one can be held individually responsible, but there is a collectivist reason to hold the state collectively responsible.
(2) When a state is collectively responsible for unavoidable harms, there is an individualist reason to hold its members, rather than other persons, collectively liable to bear the unavoidable harms.
(3) If a state is collectively liable to bear such harms, its citizens may decide how these costs should be distributed among them – for example, to combatants and away from noncombatants – provided the decision procedure and the resulting distribution are both reasonably just.
(4) Outsiders have a collectivist reason to respect any such distribution because it reflects an internal political decision that is reasonably just.

Claims (1)-(4) imply:

(C) Therefore, just combatants have collectivist reasons to observe the *permission* and *prohibition* when they "direct … operations"[13] that inflict intentional lethal harms.

Lazar limits the scope and application of collectivist reasons with two theoretical adjustments. He limits the scope of his four claims with what he calls the

[13] Lazar, "Complicity, Collectives, and Killing in War," 388.

> *Limiting Assumption:* both collectivist reasons apply only to "broadly representative political communities" (hereafter liberal states).[14]

He limits the application of collectivist reasons with what he calls the

> *Key Caveat:* "if the [unjust state's] decision makes it harder for the justified belligerent to win its war, then the reason to respect it is likely to be overridden."[15]

With the Limiting Assumption and Key Caveat in place, we can state Lazar's conclusion with a little more precision:

> (C*): Therefore, when resisting a liberal state's unjust war, just combatants have collectivist reasons to apply the *permission* to that state's combatants and apply the *prohibition* to that state's noncombatants, unless applying the *prohibition* to unjust noncombatants makes the just combatants' victory harder.

Each of these claims, as well as Lazar's reasoning, require some clarificatory remarks. Claim (1) applies a moral feature of collective actions - that collective actions can cause harms that exceed the individual responsibility of the agents - to an unjust war. Following Phillip Pettit and Anna Stilz, I will call this gap between the harms inflicted in an unjust war and the individual responsibility of the state's agents the "responsibility deficit" of an unjust war.[16] Claim (2) grounds the collective liability of citizens in a state prosecuting an unjust war in the comparison between the moral responsibility of these citizens and that of non-members. Lazar's Claims (1) and (2) imply that when a state's unjust war makes harms unavoidable, the citizens of that state, combatant and noncombatant alike, are liable to bear those harms. This justifies the *permission*

[14] Ibid., 378.
[15] Ibid., 388.
[16] Cf. Philip Pettit, "Responsibility Incorporated," *Ethics* 117, no. 2 (2007): 171-201; Anna Stilz, "Collective Responsibility and the State," *Journal of Political Philosophy* 19, no. 2 (2011): 190-208.

because unjust combatants are both individually liable and collectively liable to intentional defensive killing. It is worth noting that the permission granted by Claims (1) and (2) is actually more expansive than the *permission* that Lazar seeks to defend. Lazar suggests as much: "So, there are good *pro tanto* reasons imposing the costs of a state's wrongdoing on the population of that state" and these reasons alone tend to "support … the Permission" while causing "problems for the Prohibition" because these reasons imply "that it is better to harm unjust noncombatants than to let, for example, just noncombatants be harmed."[17] If Claims (1) and (2) together imply that both unjust combatants *and* unjust noncombatants are liable to attack for collectivist reasons, then Lazar's argument could seriously undermine the *prohibition* because it provides a justification for attacking unjust noncombatants. This means that Claims (1) and (2) together imply a collective liability to intentional killing in war.

Lazar addresses the implication of collective liability created by Claim (1) and (2) and supports the *prohibition* in the second half of his argument. Claim (3) applies the right of a community to distribute harms and benefits among themselves, so long as this distribution is sufficiently just, to the harms of the unjust war. Claim (4) extends the respect non-members owe a state's political self-determination to the distribution of harms within that state. Lazar's Claims (3) and (4) imply that when a political community determines that harms to its citizens should be distributed to its combatants rather than its noncombatants, its enemies should direct the infliction of lethal harm towards its combatants out

[17] Lazar, "Complicity, Collectives, and Killing in War," 384.

respect for its right of political self-determination. Therefore, when Claims (3) and (4) are in place, the intentional killing of unjust noncombatants would not be justified. This supports the *prohibition* because the unjust liberal state has determined to hold their noncombatant population collectively immune from intentional defensive harm. Lazar's argument depends on the ability of the moral reasons derived from Claim (3) and (4) to override the moral reasons derived from Claim (1) and (2) to impose the costs of a state's unjust war "on the population of that state." This, in turn, relies on the assumption that the reasons we have to respect collective self-determination can override reasons derived from individual and collective reasons to impose costs on an unjust state's population.

My subsequent argument questions this central assumption along two separate lines. The first line of critique is that notions of collective responsibility are not apt to the question of killing in war and require implicit appeals to moral reasons derived from individual morality to square with our intuitions. The idea that an unjust war has a responsibility deficit is a fiction and should be rejected. The second line of critique is that, even if notions of collective responsibility are apt to killing in war, the reasons derived from collective respect will not matter enough to support the *prohibition* in any meaningful way. Both lines of critique depend on making the assumption at the root of Lazar's argument explicit and analyzing it. I think something like Claim (5) captures the assumption. This claim follows from Lazar's stated purpose of justifying the *prohibition* and his Key

Caveat. Claim (5) is the only way to make sense of the problem the collectivist reason to respect is supposed to solve:

> (5) The collectivist reason to respect internal political decisions of citizens sometimes overrides: (a) the moral reason to distribute unavoidable harms according to individual and collective liability, and thus also overrides (b) the individualist reasons to give priority to distributing harms to the liable rather than to the non-liable and to increasing the probability of a just victory.[18]

Claim (5) is vague in more ways than one. I will later discuss the vagaries of the collectivist reason to respect political self-determination, but there is some clarification worth doing now. Without Claim (5a), Lazar's argument will not justify the *prohibition*. So, respect for political self-determination must, at least sometimes, override justifications based on the individual and collective liabilities of some citizens of the unjust state. But Lazar is unclear how far this should go and his account struggles to put an upper limit on how much harm just combatants should inflict on unjust combatants in order to avoid harming unjust noncombatants, out of respect for political self-determination. The Key Caveat is vague because it is unclear what "*harder* for the justified belligerent to win its war" might mean.[19] There are at least four ways to understand "harder" in the Key Caveat. It could mean "more costly, even trivially, to the just side" or "would diminish the probability of victory by the just state," or "substantially more costly to the just state," or, finally some combination of probability of victory and costs to the just state. So, it seems to entail something like Claim (5b): the individualist reasons to give priority to distributing harms to the liable rather

[18] Ibid.
[19] Ibid., 388. Emphasis added.

than to the non-liable and to increasing the probability of a just victory. If so, respect for political self-determination would require the just side to suffer some costs, or accept some reduction in the probability of victory, in order to avoid killing unjust noncombatants. However, Lazar is again unclear how far this requirement should go because the Key Caveat is vague.

§3: Collective Action and the *Permission*

Claims (1) and (2) imply that, assuming that the proportionality constraint is satisfied, just combatants have sufficient moral reason to impose the costs of an unjust war on most citizens of a liberal state, combatant and noncombatant alike. It is important to not allow the language of economics – such as costs, surplus, and deficits –euphemistically to obscure what is at issue. Lazar's claim is that there are moral reasons to impose costs by intentionally killing some persons to avert the infliction of unjust harms on others. This is tantamount to claiming the combatant and noncombatant citizens of an unjust state are *liable*, on the basis of their collective responsibility, to be intentionally killed to avert the harms that they or their fellow citizens will otherwise cause.

Lazar's inference from Claim (1) to Claim (2) that supposedly grounds this tacit collective liability turns on two issues. First, the argument for Claim (1) must show a liberal state's unjust war has a responsibility deficit, and that holding the state collectively responsible accounts for this deficit by giving moral reason to prefer the intentional killing of unjust citizens over allowing unjust harms to fall on the victims of the unjust war. Second, the argument for Claim (2) must suggest a way to translate a state's collective responsibility to its citizens in such a way

that contributes to a justification for inflicting intentional defensive harm. In other words, Lazar must make citizens' collective responsibility count as a reason to hold them collectively liable in virtue of their membership.

I will argue that Lazar's arguments for collectivist reasons that support the *permission* is mistaken. I press three objections against Lazar's argument for Claim (1) to suggest it fails to add anything morally important through collective action that is not already available within reductive accounts of responsibility. If the three objections hold, notions of collective responsibility are not apt to questions of killing in war. To square collective responsibility with our intuitions, we instead have to rely on implicit appeals to individual morality. This suggests we can account for the "negative surplus" harms of a liberal state's unjust war in terms of individual responsibility. The idea that there is a responsibility deficit in an unjust war is a fiction; hence we should reject Claim (1).

I press two objections against his argument for Claim (2) to explain how the alleged responsibility deficit of an unjust war can actually be accounted for in terms of the comparative moral responsibility of citizens in the unjust state. Therefore, Lazar's collective liability reduces to the "comparative dimension" of liability to defensive harming in self- or other-defense.[20] Lazar's argument gets a permission for the intentional defensive killing of unjust combatants and noncombatants, but not from a collectivist reason. The harms of an unjust war might be massive, but we don't need notions of collective responsibility to explain them.

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[20]Jeff McMahan, "Who Is Morally Liable to Be Killed in War," *Analysis* 71, no. 3 (2011): 551. Cf. McMahan, "The Limits of Self-Defense," in *The Ethics of Self-Defense*, 185-210.

3.1: Objections to the Responsibility Deficit in an Unjust War

Lazar argues there are four reasons to think a state's collective responsibility for an unjust war follows from the deficit of individual responsibility for the massive harms the war causes. First, and most simply, we can achieve more through collective action. Just as we can together do more good than we intend, we can also cause more harm than we intend. Lazar is simply recognizing that "[w]hen we act together for bad ends, we create a similar, though oppositely valenced surplus."[21] The amplifying effects of collective action are an animating reason to act collectively at all. Second, a liberal state's unjust war causes harms through the interactive effects of permissible actions and omissions. Here, Lazar is trying to explain the moral dimensions of the truism above that through coordinated actions we can cause more good together so we can also cause more harm together. A liberal state's unjust war should be a paradigm case of a collective action that results in a responsibility deficit through the ways in which the effects of many seemingly innocuous acts interact. The third fact compounds the second. We can act in ways that are individually permissible but collectively abhorrent. Lazar argues that a large number of causally trivial individual acts can lead to enormous harms. The citizens' reasonable "expectations of what others would do" exculpate them individually for "doing something together that is egregiously wrong" because these expectations and aggregated actions make any one individual's actions "causally irrelevant."[22] The causal irrelevance of each citizen's action prevents these citizens from being

[21] Lazar, "Complicity, Collectives, and Killing in War," 379.
[22] Ibid., 380.

individually liable for harms that their individual action has trivially supported. Finally, the collective actions of unjust wars require innumerable citizens to fail to act. For Lazar, the omissions of citizens within the unjust liberal state are "causally effective"[23] in the aggregate when the state fails to take political action to stop the unjust war. But the war is not attributable to individual persons who fail to act. No single person could, alone, stop a state's unjust war.

It is important to note that this claim is familiar in Lazar's wider work. Presumably Lazar is here making the case for a responsibility deficit based on the causal overdetermination of unjust wars and the causal inefficacy of the acts and omissions of citizens. But this fact is true of most citizens – combatant and noncombatant alike – individual combatants fighting in an unjust war can claim as easily as noncombatants that nothing they do or fail to do is likely to make a difference to stopping the unjust war.[24] A state is collectively responsible because the "aggregate cost" for which each citizen "is *individually* responsible falls short," through the interactive effects of permissible actions and omissions, "of the overall cost for which they are, together, *collectively* responsible."[25] The result of Claim (1) is that unjust wars cause massive harms that exceed the aggregated responsibility of individuals on the unjust side. There are, Lazar argues, harms for which no individual is responsible. This is the "responsibility deficit."

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[23] Ibid., 381.
[24] That both combatant and noncombatant share similar causal and epistemic relationships to an unjust war is fundamental to understanding much of Lazar's wider work. I owe this observation to the helpful comments of Adam Betz. Cf. Seth Lazar, "The Responsibility Dilemma for Killing in War : A Review Essay," *Philosophy & Public Affairs* 38, no. 2 (2010): 180-213; Lazar, *Sparing Civilians*.
[25] Lazar, "Complicity, Collectives, and Killing in War," 379. Emphasis in the original.

Lazar's argument applies the responsibility deficit, a concept developed by philosophers writing on collective responsibility, to ground an individual's liability to defensive harm that averts the harms of an unjust war. His view seems especially close to Anna Stilz's claim that responsibility deficits leave the moral responsibility for reparations owed for the harms of an unjust war "hanging in the air," and to Philip Pettit's claim that responsibility deficits provide a justification to force "members of the grouping as a whole" to change the "constitution under which they operate."[26] Stilz argues the responsibility deficit grounds a citizen's liability to pay compensation to the victims of the unjust war. Pettit suggests the responsibility deficit grounds a citizenry's remedial responsibility to revise their constitution, if the proper functioning of the constitution led to an unjust war. Stilz and Pettit's purposes are importantly different from Lazar's and even if there is reason to think that their arguments are cogent, there is also reason to doubt that these reasons make notions of collective responsibility apt to defensive harming. For ease of exposition, I will focus on Stilz's argument for *ex post* compensation.

Stilz gives the example of an airline accident: the November 28, 1979, Air New Zealand crash that killed 257 passengers and crew. Investigations revealed the crash resulted from the interactive effects of many employees' permissible or excused actions. Hence there simply was not enough individual responsibility to cover the many terrible harms. The harms caused by unjust wars, Stilz contends, are also like this. She therefore claims that all the individuals employed by the

[26] Cf. Stilz, "Collective Responsibility and the State," 196; Pettit, "Responsibility Incorporated," 200.

airline were collectively responsible for the crash and that "[s]queamishness about implicating individuals … seems rarefied" in the face of the "uncompensated wrongs."[27] Following Stilz, Lazar is making the case that the same is true of an unjust war.

Our intuitions about compensation in the case of an airline accident might translate to compensation in the case of an unjust war, but that is not the issue here. Lazar is arguing for a moral reason that supports a justification intentionally to kill persons to avert the harms of an unjust war. We may doubt that intuitions about compensation are mirrored by precisely parallel intuitions about intentional defensive harming. First, consider a variant of the Air New Zealand case:

> *Mountain Crash:* Airline's plane, flight Doomed, accidentally crashed into a mountain killing all 100 passengers and crew. Airline's safety policies are thorough and comply with regulations. While many Airline employees contributed to the crash, no one person or corporate division is at fault. Investigator faces the following choice: (a) let the harms lie with the families of the passengers and crew or (b) collect 1% of the annual income of Airline's 30,000 employees as compensation for the victim's families.

Most share Stilz's intuition that choosing (b) is permissible. However, the intuition here could be a response to the fact that option (b) disperses the overall harm quite widely, so that no individual suffers more than a tiny harm. If the harm is sufficiently small, and the distribution sufficiently wide, (b) could take a number of forms and get the same intuitive result. For example, Investigator could collect a one-time fee of $50 from all 500,000 persons employed in the airline

[27] Stilz, "Collective Responsibility and the State," 193-96.

industry worldwide. Intuitions about compensation for the harms of an unjust war might also be the result of our tendency to think that dispersed harms matter much less than concentrated harms. This would explain why many people accept that civilian citizens of a state that has fought an unjust war may be liable to contribute financially to reparations to the victims of the war even though these same people would vehemently reject the idea that these citizens might be liable to *attack during* the war.

Lazar's discussion concerns liability to intentional killing in war, which involves the infliction of great concentrated harms. Here is an example similar to the Air New Zealand crash and *Mountain Crash* except that it involves the possibility of defensive harming rather than enforced compensation:

> *Drone Crash:* Airline's plane, flight Doomed, is about to crash into Drone accidentally. This will kill all 100 passengers and crew. Airline's safety procedures are thorough and comply with all regulations, but could be better if Airline's revision process kept pace with changes in drone technology. In particular, with better procedures, Drone would not have slipped passed Doomed's radar while on a routine flight, as has in fact happened. Controller, using a superior ground-based radar and knowing the policies surmises the situation. Controller can save all 100 persons on board by remotely assuming control of the cockpit through a process that electrocutes 100 randomly chosen Airline employees.

It seems impermissible to electrocute the Airline employees. Indeed, even if Controller could avert the crash by killing only 90 of them, it would still seem impermissible for him to do so. The intuition that intentionally killing the 100 Airline employees is impermissible is so strong that we would need to adjust the facts of the case such that Controller is acting to achieve a lesser evil to ground the intuition that Lazar needs. But, lesser evil justifications for intentional killing are

not at issue. The concentration and degree of the possible harms in Drone Crash requires a reason to impose these costs on the Airline employees rather than on the 100 persons on board. And the employees' corporate membership cannot provide this, because it is not weighty enough to overcome the moral asymmetry between doing harm and allowing harm to occur. When we raise the stakes of the harms involved through its concentration and degree so that they are relevantly like intentional killing in war, our intuitions are different from those we have about cases like Mountain Crash. This is a reason to doubt that we can draw any conclusions about the permissibility of killing in war from our intuitions about the supposed responsibility deficit in cases such as Stilz's in which what is at issue is compensation rather than defense. Averting the unavoidable harms of an unjust war requires the infliction of massive, concentrated harms.[28]

Drone Crash suggests that mere membership in a collective that is allegedly collectively responsible for a threat is not a basis of liability to harm when that harm would be concentrated rather than dispersed. But even *Drone Crash* is not relevantly analogous to war. In *Drone Crash*, no members of the collective seem to be more responsible for the threat than any others. The following case is more closely analogous to a threat posed by unjust war.

> *Drone Crash2:* As in *Drone Crash*, except Controller knows Safety Dave, Airline's chief of drone safety, and his corporate Safety Team of 99 employees. Safety Dave and his team are competent and know this. The team acts on the reasonable belief that unless Safety Dave corrects them, they are doing their jobs. Safety Dave acts on the reasonable belief that if he has missed something, his team will catch the oversight. Controller has three options: (a) remotely assume control of

[28] I owe this point to Jeff McMahan's helpful discussion of these cases and the arguments of Pettit and Stilz.

> the cockpit through a process that electrocutes Safety Dave, Airline's chief of drone safety, and his corporate Safety Team of 99 employees; (b) remotely assume control by electrocuting 100 randomly chosen Airline employees; or, (c) do nothing and let Doomed crash.

There is reason to think that Safety Dave and his team are morally liable because of their individual responsibility for the failure to update the company's policies. If anyone's right not to be killed in these circumstances is forfeit, it's the rights of those in the corporate safety team. The judgment follows from a claim about the comparative moral responsibilities of the persons in the different groups in (a)-(c). Airline's corporate policies have caused unavoidable and indivisible harms; Safety Dave and his team are responsible for these policies and so should bear the harms as a matter of fairness.

Drone Crash2 poses at least two problems for the view that unjust wars generate responsibility deficits. First, since the comparative moral responsibility of Safety Dave and his team explains the difference in our intuitions between Drone Crash and Drone Crash2, this could generate a requirement to disaggregate the overall harms of an unjust war into smaller threats that are unavoidable and irreducible. Harming anyone in Drone Crash2 seems morally bad, so the intuitive result does not follow from any notion that Safety Dave and his team *deserve* electrocution. Since Safety Dave and crew do not deserve punishment, what supports our intuition is a comparative claim that is "essentially a matter of justice in the distribution of harm when some harm is unavoidable" and also "indivisible and irreducible."[29] The intuition in Drone Crash2 is sensitive to changes in the

[29]McMahan, "The Limits of Self-Defense," in *The Ethics of Self-Defense*, 201.

divisibility of the harm. Suppose Controller had one further option (d): remotely assume control of Doomed through a process that breaks one leg each for Safety Dave and his team and gives 100 random Airline employees a powerful, but brief shock. So, if the comparative responsibility of Safety Dave and his team explains the permissibility of (a) in Drone Crash2, part of that explanation is that the harm of 100 lives lost is irreducible.

Disaggregation is a problem for Lazar's responsibility deficit because the claim that the aggregated harms of an unjust war are indivisible and irreducible is almost certainly false. This certainty remains even when we consider only the harms of an unjust war for which allegedly no individual is responsible. For example, consider the irreducible claim in light of the often-cited changing moral character of war.[30] The moral character of a war might change because an overall just war becomes unjust as its aims change, or because some subordinate operation egregiously violates morality *in bello*. Also, the threats posed by each side might change over time, such as when an unjust aggression turns into an unjust occupation.[31] As a matter of analysis, the changing moral character of war applies as much to the unjust side as to the just. Any likely war is going to involve just and unjust harms that arise through the interactive effects of permissible actions and omissions of both sides. So, to support any comparative claim, like the one we would make in Drone Crash2, we would need to disaggregate the overall harm of

[30]This is my Clausewitzian phrasing of what others have called the "multifaceted," "heterogeneous," and "mixed" moral character of war. Cf. Saba Bazargan, "Morally Heterogeneous Wars," *Philosophia* 41, no. 4 (2013): 959-75; Cécile Fabre, "Guns, Food, and Liability to Attack in War," *Ethics* 120, no. 1 (2009): 36-63; Frowe, *Defensive Killing*; Lazar, *Sparing Civilians*.
[31] Cf. Jeff McMahan, *The Ethics of Killing : Problems at the Margins of Life* (Oxford: Oxford University Press, 2003), 399.

an unjust war to determine the parts of that harm that are unjust, irreducible, and for which no persons are individually responsible. I will show that Lazar's Claim (2) makes a comparative claim in the next section, so the problem of disaggregation applies to the responsibility deficit.

Disaggregation is also a problem for Lazar because he based his case for the responsibility deficit on the causal overdetermination/inefficacy of the acts and omissions of citizens.[32] In other work, Lazar emphasizes the similarity between combatants and noncombatants and their relationship to the harms of an unjust war. This is due to what he calls the "Overlap Hypothesis:"

> *Overlap Hypothesis:* A morally significant proportion of noncombatants are as responsible as a morally significant proportion of combatants for contributions to unjustified threats.[33]

Lazar offers a cursory empirical argument and some principled reasons to think the *Overlap Hypothesis* obtains in war. Lazar's empirical argument for this hypothesis is similar to the one he offers for the responsibility deficit – that threats of unjust harm arise from the interactive effects of innumerable acts and omissions by combatants and noncombatants alike.

Lazar bolsters his empirical argument for *Overlap Hypothesis* with four reasons that follow from analyzing some general features of war. First, it seems implausibly naïve to suppose the "chaos and carnage of war"[34] could track substantive moral principles of justice. The responsibility account seems to presuppose that it can. Second, denying the *Overlap Hypothesis*, according to Lazar,

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[32] I am thankful to Adam Betz for pressing me to make this claim here.
[33] Lazar, *Sparing Civilians*, 9.
[34] Ibid., 14.

denies the most obvious moral fact about war: it is an irreducible moral tragedy. The responsibility account again presupposes that we could fight war in a "morally pure" way that denies the *Overlap Hypothesis*. Third, the truth of the *Overlap Hypothesis* follows from the widely held intuition that most members of a political group bear a non-trivial responsibility for the wars that group might fight. To deny the *Overlap Hypothesis* is, then, to tacitly deny this kind of responsibility. Fourth, and related, embracing the previous intuition and allowing the kind of responsibility most members bear to be the basis of liability produces counter-intuitive results. For, given the *Overlap Hypothesis* and this low-threshold for responsibility, too many persons we take to be paradigmatically immune in war – like children – will meet the threshold. In these final two reasons, Lazar is rehearsing the "responsibility dilemma"[35] he thinks follows for the responsibility account given the truth of the *Overlap Hypothesis*. The conditions of modern war, then, support an empirical case to think the *Overlap Hypothesis* is true in fact. Given this fact, we have important reasons, on analysis, that the *Overlap Hypothesis* follows from any manifestation of war, in any future empirical circumstances of this or that war. So, the responsibility account will produce a morally significant overlap between combatant and noncombatant populations.[36] The *Overlap Hypothesis* seems to imply that as we disaggregate the harms of a morally mixed unjust war, there will be a number of persons equally responsible for those harms. In short, as we scale down to the disaggregated unjust harms, the specter of a responsibility deficit becomes increasingly unlikely. If we agree with Lazar that

[35] Cf. Lazar, "The Responsibility Dilemma for Killing in War : A Review Essay," 180-213.
[36] Lazar, *Sparing Civilians*, 16.

the *Overlap Hypothesis* is plausible, it makes the responsibility deficient less plausible.

The second problem posed by Drone Crash2 is that liberal states seem to have persons analogous to Safety Dave and the members of his team. If, as seems likely, liberal states have citizens whose personal and institutional roles require them to enact, assess and revise the policies that might avert the harms of an unjust war, there is reason to doubt that any unjust wars liberal states fight have a responsibility deficit. We can deepen this second problem with intuitions about the liability of culpable persons.

> *Drone Crash3:* As in *Drone Crash2*, except Controller knows Safety Bob, Airline's chief of drone safety, and his corporate Safety Team of 99 employees. Safety Bob's team is competent and he knows this. Safety Bob bragged to Controller about how his team's performance allows him extended golf outings because he reasonably believes that if he has missed something, his team will catch the oversight eventually. Controller has three options: (a) remotely assume control of the cockpit through a process that electrocutes Safety Bob, Airline's chief of drone safety, and his corporate Safety Team of 99 employees; (b) remotely assume control by electrocuting 100 randomly chosen Airline employees; or, (c) do nothing and let Doomed crash.

Intuitions about liability in Drone Crash3 support (a) more forcefully than in Drone Crash2, and Safety Bob's culpable negligence explains this. According the argument for Claim (1), the anticipated interactive effects caused by the actions of Safety Dave and his team creates a responsibility deficit. But this obviously conflicts with Drone Crash3. What Lazar's argument for Claim (1) disregards is the impact of the culpable liability of persons who act like Safety Bob on the responsibility deficit of an unjust war. It is certain that the aggregate trivial actions

and omissions of a liberal state's citizenry contribute to an unjust war; but, we need to account for this fact without treating an unjust war like an outbreak of bad weather. It is just as certain that among those citizens are many who are somewhat, and even highly, culpable for consciously manipulating the interactive effects of permissible actions and omissions to promote unjust ends. For example, in the outbreak of World War I, there were numerous government officials on all sides that, either through acts of commission or failures of omission, did not stop the European slide into war. Lazar's argument ignores the ability of the comparative moral responsibility of culpable agents to fill the supposed responsibility deficit.

One might reasonably object that a responsibility deficit might still exist alongside the moral responsibility of culpable agents.[37] In short, even after we account for the culpability involved, there may still be a moral remainder sufficient to motivate concerns for a responsibility deficit. I think this objection fails to take account of what David Rodin has called the "plastic" nature of moral responsibility in the context of defensive harm.[38] In fact, to suppose that culpable moral responsibility cannot account for the massive harms associated with an unjust war may require a serious revision to the relationship between moral responsibility and notions like proportionality. For there to be a deficit at all requires at least one fully culpable person that is not fully liable to harms that avert the unjust harms that are now manifest. It is hard to find an example of this. Safety Bob's culpable negligence is sufficient to make him liable, on his own, to intentional killing that averts Doomed's crash. At the very least, the presence of enough culpable persons

[37] I am thankful to Janina Dill for pressing this objection.
[38] David Rodin, *War and Self-Defense* (Oxford: Clarendon Press, 2002), 63.

to account for a responsibility deficit within any given unjust war is sufficiently plausible to doubt collective responsibility is apt to killing in war. I think the stronger claim is also plausible: I do not think, short of a significant revision of the relationship between moral responsibility and liability, that it possible for both claims to be true. A responsibility deficit cannot exist alongside culpability.

Concentrated *ex ante* harms, disaggregation, and culpable liability cast doubt on Lazar's recourse to notions of collective responsibility to account for the massive harms caused by an unjust war. In an unjust war, there might be a responsibility deficit *ex post* that leaves questions of compensation unresolved. However, because of the difference between justifying the infliction of massive, concentrated harms and the infliction of relatively minor, diffused harms, notions of collective responsibility that appear apt to *ex post* compensation are not apt to killing in war. This gives us a reason to think this kind of shortfall is not relevant *ex ante* because defensive harming concentrates massive harms. If Lazar's argument for the *prohibition* rests on a claim about the comparative responsibility of the unjust state's citizens, it also implausibly assumes that the harms that create the responsibility deficit are irreducible. Finally, it fails to account for the likely fact that liberal states have persons, like Safety Dave and his team, with individual responsibility to prevent the harms of an unjust war, or persons, like Safety Bob, who culpably promote an organizational culture that allows the harms of an unjust war. An unjust war often causes harm through the aggregate effects of individually trivial actions. However, there are usually many persons who have either the institutional obligation to stop unjust wars, or leverage the trivial actions of others

in culpable ways. The harms of an unjust war might be massive, but we don't need notions of collective responsibility to explain them. Culpability and comparative responsibility seem sufficient to account for the responsibility deficit.

3.2: Objections to Collective Liability

I have shown reasons to doubt Lazar's recourse to collective responsibility to resolve the responsibility deficit of an unjust war. These reasons, however, revealed sources of liability grounded in the responsibility of some citizens of a state fighting an unjust war. This brings us to Claim (2), which must show how the collective responsibility of the unjust state distributes collective liability to its citizens in virtue of their membership. Lazar argues that compared to otherwise innocent persons, it is a matter of objective fairness that those who (a) can stop an unjust threat (b) would benefit from the threat and (c) own the means of the unjust threat should absorb any harms for which there is no individual responsibility.[39] The argument for Claim (2) gives an *individualist* reason, based on a comparative claim, to expand the basis of liability to *ex ante* defensive harms well beyond the *permission*. If (a)-(c) ground liability to lethal harms, this liability extends well beyond the unjust combatants of the liberal state. States excel at making war, but they do not do this alone and not all citizens benefit. In short, Lazar's (a)-(c) do not apply to all and only the citizens of the unjust liberal state.

To get from Claim (1) to Claim (2) and deliver a moral reason that supports the a justification for the *permission*, Lazar needs the collective responsibility of citizens to be like David Miller's "outcome responsibility," which is backward

[39] Lazar, "Complicity, Collectives, and Killing in War," 382-3.

looking and assigns liability on the basis of moral and causal responsibility for a situation.[40] Citizens of liberal states are collectively liable because they (a) can influence the state's decision-making (b) would benefit from the unjust threat and (c) own the means of the unjust threat. But there is reason to think these three criteria do not track citizenship or political membership in a state, even in those states within the scope of the limiting assumption. Consider these examples:

> *Gun-Runner:* a non-citizen arms dealer who holds lucrative contracts with State X to rent arms and ammunition to its military. State-X pays the rent to Gun-Runner by running a fiscal deficit for the next 15 years. When State X starts an unjust war, Gun-Runner triples his business and comfortably retires to a remote area.
>
> *Poor Sod:* Poor Sod is a legal immigrant in State X and a combatant. He has paid no taxes, enjoyed none of the benefits of State X's collective surplus, and did not vote in the last elections. Poor Sod fights in State X's unjust war and survives to return home. The benefits of the war were an expanded market for State X's goods, a new labor-pool for sweatshop labor, and access to new raw materials. In effect, Poor Sod fought a war to outsource any prospective job he could have had. Besides his pay and pension, Poor Sod does not benefit from the lucrative resources captured by State X's unjust war.

Gun-Runner is a beneficiary and so has some obligation to bear costs for State X's unjust war. At the very least, he should disgorge any benefit he gained that might plausibly stop the unjust war *ex ante*, or compensate victims *ex post*. (At most he is liable to be killed to prevent his contributions to the war.) Poor Sod is not a beneficiary, at least not on balance. Certainly, a liberal state's ability to wage war has benefits that accrue to its citizenry more generally. The United States Federal Emergency Management Agency (FEMA) is a good example of such benefits.

[40] David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), 84.

Nearly every citizen in the United States stands to benefit from effective and timely aid from their federal government during a natural disaster. But it still seems that Poor Sod is a victim of the unjust war in a way that public goods like FEMA do not offset (and such public goods did not, in any case, derive from the unjust war).[41] So, Lazar's limiting assumption will get the wrong result by including Poor Sod but not Gun-Runner in the distribution.

Some might object that this result – including Poor Sod and not Gun-Runner – is not particularly troubling, at least for Lazar's argument. That is, Lazar's point, and all he needs for his argument, is that using reasons derived from collective responsibility systematically select those persons for whom it is more often true that they bear comparative responsibility for the unjust war.[42] This suggestion, however, makes the scope of the comparison Lazar is using exceedingly small. The point of the argument is to offer substantive support for the *prohibition* as a response to the critique of the reductivists. For Lazar's argument to succeed, it has to offer collectivist reasons that can override the individualist reasons to hold many noncombatants, like Gun-Runner, liable to defensive harm. The result of the reductivist critique that is most intolerable to Lazar is that it includes too many noncombatants in the set of persons liable to intentional harms that avert the harms of an unjust war. Lazar may concede that individuals like Gun-Runner are indeed liable and the point will remain. We need only reframe our imagined cases so that Poor Sod remains, intuitively, less liable according to individualist reasons than

[41] Stilz might argue that State-X is failing to actually exercise Poor Sod's rights, and so he is a victim of his State's failing institutions. Stilz, "Collective Responsibility and the State," 204.
[42] I am thankful to Janina Dill for pressing this objection.

some noncombatant exemplar the collectivist reasons Lazar offers fail to include and my objection remains. Lazar's argument either includes collectivist reasons that can override individualist reasons provided by the reductivists, and so accomplishes his aim of supporting the *prohibition*; or, his argument concedes that every person form whom we have a liability justification on individualist grounds remains liable and the collectivist reasons apply to anyone not included in that set. If it is the first, Lazar's argument is theoretically successful but does not square with intuitions about Poor Sod and Gun-Runner. If it is the second, Lazar's argument misses its aim and does not buy back much theoretical space for the *prohibition* against the reductivists. This is why Lazar's argument implies something like claim 5 (a) above. The collectivist reason to respect internal political decisions of citizens must, at least sometimes override the moral reason to distribute unavoidable harms according to individual libility. Otherwise, it is not at all celar why we are here and going down this road to collectivist explainations.

All that said, those who object to my argument so far have a point worth noting. Lazar's claims focus on a comparative analysis of collectives. So, we can meet Lazar on his own ground and find problems with basing collective responsibility on (a) – (c) above. A final example shows how all three criteria – the power to act, the likelihood of benefiting, and the ownership of the means – are not coextensive with political citizenship:

> *Proxy War:* Proxy is a client state of Imperium. Imperium provides nearly all the means that Proxy uses to fight an unjust war against its neighbor. Proxy, Imperium and their citizens have the political freedom to stop the war, stand to benefit from

> the change in regional power if Proxy succeeds, and together own all the means Proxy will use.[43]

If moral responsibility for an unjust war follows Lazar's criteria for collective liability, then it seems the citizens of Proxy and Imperium are both collectively responsible for Proxy's negative surplus. Proxy War is not a question of having a responsibility shortfall. Rather, Proxy War suggests the elastic quality of moral responsibility. It seems a fact of morality that we can ascribe equal, or nearly equal, responsibility for the same wrongs to many persons who responsibly contribute to that wrong.[44] Proxy war shows the harms caused by an unjust war are as likely to have a surplus of individual responsibility as they are to have a responsibility deficit. The fact that (a)-(c) do not apply to all and only citizens of a liberal state explains this.

Lazar could respond to these cases by conceding that (a)-(c), not citizenship *per se*, are the basis of collective liability. This would mean that citizenship in a liberal state is only an approximate criterion for collective liability. It is at least practically useful. Citizenship could give an initial gloss on collective liability that just combatants could then refine by using the criteria (a)-(c) to account for a liberal state's use of international corporations, and coalition or proxy warfare to achieve it ends. This might leave Lazar's argument safe from examples like Gun Runner, Poor Sod and Proxy War so long as (a)-(c) are criteria for collective liability and not

[43] Proxy War is a stylized version of historical relationships like the one between the United States and Israel. For a good bit of Israel's modern history, a plausible doctrine of collective responsibility might imply that US citizen were as responsible as the average Israeli citizen for Israel's wars.

[44] Cf. David Rodin, "The Lesser Evil Obligation," in *The Ethics of War : Essays*, ed. Saba Bazargan and Samuel Charles Rickless (New York: Oxford University Press, 2017), 28-45.

individual liability. But Lazar's argument for Claim (2) invoke (a)-(c) as a matter of individual morality: The reason (a) matters is because it "tracks the basic principle of justice" that, when unjust harms are unavoidable, those persons who had the "opportunity to avoid" causing those harms should bear the defensive harms that avert unjust harms for "others who had no adequate opportunity to avoid it." The reason (b) matters is because those that "typically enjoy the benefits" of collective action "must also accept the costs," even if that means being harmed to avert the unjust harms inflicted by those collective actions. Finally, the reason (c) matters is because individuals have a moral obligation to prevent misuse the means of action they own, and so must "accept greater costs to forestall the misuse of your stuff than to forestall the misuse of other people's stuff things to perpetrate injustices."[45] The collective description in Lazar's argument is not giving a reason that is different from the morality of killing in self- or other-defense, it is invoking it. The reasons (a) – (c) matter, and the reasons there might be hope for Lazar's arguments to handle the problematic intuitions above, is by appeal to our intuitions about the comparative dimension of individual liability.

There is reason to doubt that Lazar's recourse to collective responsibility and the supposed responsibility deficit is apt to killing in war. This is due in the first place to the clear difference between justifying the massive, concentrated harms of intentional defensive killing and justifying the minor, diffused harms of *ex post* compensation. The appeals to collective responsibility are at home in the cases Pettit and Stilz highlight. The case is different when we move to the context of

[45] Lazar, "Complicity, Collectives, and Killing in War," 382-3.

killing in war. Our intuitions in these cases are not precisely parallel and we might wonder if the appeal to collective responsibility is apt to the moral questions Lazar is trying to explore. More seriously, I have suggested there are good reasons to doubt there is a responsibility deficit in an unjust war at all, and reason to think that Lazar's conditions (a)-(c) do not apply to all and only citizens. This shows that collectivist reasons are likely false and also unnecessary to ground the *permission*, which can be grounded in individualistic reasons derived from comparative liability in a political context.

This completes my first argument that the responsibility deficit of collective action turns out to be analyzable in terms of individual morality. Before moving to the second, we should take stock of the arguments. Even though there is reason to doubt Lazar's arguments for Claims (1) and (2) imply the *permission* for all and only citizens of the unjust state, the comparative dimension of liability (that is, that liability lies with those who are *most* responsible) does suggest that many unjust combatants and noncombatants are liable in war. The claim that (a)-(c) are bases of responsibility and liability is consistent with a reductive account of individual liability. (a)-(c) thus provide a non-collectivist basis for the *permission*. Lazar's claims about collective responsibility are unnecessary for his claim that most unjust combatants and unjust noncombatants are liable to defensive harm. As he himself has pointed out elsewhere, some reductivist views have this implication, for reasons he now implicitly embraces, having to do with *comparative* responsibility.

§4: Collective Respect and the *Prohibition*

I now turn to my second aim, which is to show that the reason outsiders have to respect a group's political self-determination (their reason of "collective respect") does not matter in war. That is, it does not override the reason to distribute a just war's unavoidable harms according to individual responsibility and liability. Claims (3) and (4) imply that the collective respect just combatants owe to a liberal state extends to the unjust citizens' decision to direct the distribution of an unjust war's costs toward combatants and away from noncombatants. Call this the *combatant distribution*. In this section, I argue first that the combatant distribution is not a result of political self-determination. Second, even if the combatant distribution were the result of political processes in the unjust state, outsiders would not be required to respect it. So, the reasons we might have to respect the political self-determination of an unjust state either do not apply to the combatant distribution or do not matter in war.

4.1 The Combatant Distribution as a Political Choice

My first objection is that Lazar's explicit assumption that "democratic states choose to lay the costs of war"[46] on unjust combatants as a result of some exercise of the citizens' political self-determination is false. It is obviously true that liberal states build and field armies with combatants. However, there are several reasons why this may be so. Compliance with the norms of international law explains a liberal state's resort to the combatant distribution; it is not the result of any authentic political deliberation about who should fight and die. In fact, a decision to contravene the combatant distribution might be better evidence of a

[46] Ibid., 385.

community's actual political will. For example, Scott Sagan and Benjamin Valentino have recently argued that *respecting* the *prohibition*, at least in its application to foreign noncombatants, does not reflect the popular will of the United States.[47] The point here is not to claim that, on the basis Sagan's and Valentino's study, the United States prefers all harms to go to noncombatants instead of combatants, their own included. Rather, it is to highlight that the actual political will of a citizenry is complex, fickle, and has little *prima facie* moral value. It is also the case that the evident political will of a group could prefer to protect its combatants at costs to their noncombatants. The persistence of popular support for a group of combatants that contravene the *prohibition* by hiding among the noncombatant population could be evidence of political self-determination. For example, a population might evidently accept without protest the choice of guerrilla fighters not to wear uniforms or carry their weapons openly.

Lazar could object here that there are also clear examples of the combatant distribution reflecting the actual political self-determination of a liberal state. We might, for example, be more confident of Lazar's assumption when we reflect on a liberal state's rapid mobilization when it is forced to fight. Such as the United States in World War II. However, this simply points to the real problem and brings us to my more substantive objections. The question of what a liberal state's actual political will is, at any given time, is a complex empirical issue. But we need not settle this issue here. I only need enough reason to think Lazar's assumption that

[47] Scott D. Sagan and Benjamin A. Valentino, "Revisiting Hiroshima in Iran: What Americans Really Think About Using Nuclear Weapons and Killing Noncombatants," *International Security* 42, no. 1 (2017): 41-79. I owe thanks to Janina Dill for pressing me to clarify this point.

the combatant distribution reflects political self-determination is tenuous, at best. Given the complex set of actions and institutions in any liberal state, it is doubtful it reflects a community's settled political self-determination. Close study of any liberal state's military shows how Lazar's claim that the fielded army represents a political choice stretches credulity. In the United States, it is hard to make this claim even of the equipment the Department of Defense put in the field.[48]

4.2 Just Distribution Among Citizens of the Unjust State

The combatant distribution of a liberal state fighting an unjust war could be morally problematic in two distinct ways. The first way concerns justice in the distribution of harm among the combatants and noncombatants of the unjust state. The second way concerns justice in the distribution of harm between the citizens of the unjust state and the victims of the unjust war. In each way, the combatant distribution could be substantively unjust because it unfairly leaves persons worse off. If these worries are serious, collectivist reasons derived from the combatant distribution do not matter in war. We can also distinguish a third concern: is the justice of the combatant distribution absolute? Collective respect would not, for example, require just combatants to kill 100,000 unjust combatants rather than killing one unjust noncombatant when all are liable to some degree and either option would be equally effective. The worry here is *how much* collectivist reasons derived from the combatant distribution matter. The question of a threshold applies to each way in which the combatant distribution could prove morally

[48] Cf. Nick Kotz, *Wild Blue Yonder: Money, Politics, and the B-1 Bomber* (New York: Pantheon Books, 1988).

problematic. In this section, I focus on the justice and threshold of the combatant distribution among the combatants and noncombatants of the unjust state.

The combatant distribution is unjust among unjust combatants and unjust noncombatants. This is because if a liberal state fighting an unjust war were to insist that its adversaries respect the combatant distinction, this would be unjust to its combatants.[49] Lazar's argument for Claim (3) breaks into two parts: First, a liberal state has a range of permissible options when deciding how the harms associated with a responsibility deficit should be distributed to their citizens. Second, the combatant distribution is within the range of alternatives that are "reasonably *substantively* just and reasonably *procedurally* just."[50] Given that the citizens have a permissible range of distributive options, and distributing the negative costs of an unjust war to combatants is within this permissible range, Claim (3) appears true. Lazar's claim that liberal states have a range of options is not without controversy, but I do not address that issue here. Claiming that the combatant distribution is within that range, however, needs an argument for why the combatant distribution of a liberal state remains substantively just even when the war is unjust. If a liberal state's combatant citizens suffer and die in an avoidable unjust war, they have a just complaint against noncombatant citizens that the state is a substantively unfair political arrangement that has left them worse off.

The point here is not the unjust institutions that Lazar avoids through the Limiting Assumption. Liberal states tend to field "armed forces either with

[49] The claim that the combatant distribution is unfair to unjust combatants is a common one made by reductivists. Cf. Victor Tadros, "Orwell's Battle with Brittain: Vicarious Liability for Unjust Aggression," *Philosophy & Public Affairs* 42, no. 1 (2014): 42-56.
[50] Lazar, "Complicity, Collectives, and Killing in War," 386.

genuine volunteers or with conscripts enlisted under a fair system."[51] This avoids obviously unfair results like enlisting an oppressed minority to fight and suffer as a means to another's benefit. There are, however, at least three facts about liberal states that suggest that the combatant distribution is unfair: noncombatants tend to have more political power than combatants, to benefit more substantially from any unjust war, and to take the misuse of the means of war, including unjust combatants themselves, less seriously. Admittedly, these circumstances of liberal states are contingently true. But these circumstances recall Lazar's criteria (a)-(c) above. Those persons that, in the circumstances in which unjust harms arise, enjoy more power to stop those harms, stand to benefit most from those harms obtaining, and own the means by which those unjust harms are posed are contingently, but nonetheless importantly, liable to defensive harms.

The question of fairness at issue here is distinct from the worry (a)-(c) posed above. It is not only that persons who satisfy (a)-(c) for an unjust war are not all and only citizens. Here, we could even suppose that the unjust combatants were the only persons satisfying (a)-(c) and the fairness complaint would still remain. We have seen, on both collectivist and reductivists grounds, that when a person satisfies (a)-(c), there are grounds for liability compared to otherwise innocent persons. But if these differences matter between the innocent and the responsible, certainly they also matter among those who are responsible. That is, even within those who bear some responsibility for unavoidable harm, those who are most responsible, as a matter of fairness, should bear the highest costs to avert the harms.

[51] Ibid., 387.

To be substantively just, then, the combatant distribution would have to distribute costs to those who are most responsible, even among people who are all responsible to some degree. This is why the typical noncombatant's political power, likely benefits, and level of ownership of the means of war matter. Noncombatants usually have greater political power because of their number and the institutionalized arrangements of power. The question of fairness remains even when we acknowledge the degree to which these arrangements of power can differ amongst states and within states across time. In some liberal states, for example Israel, combatants enjoy a relatively powerful political position. In others, like the United States, the political power of combatants has varied across time. For example, during the Vietnam War, combatants were relatively powerless and their service in that war a crime against them; while now, the professional military force of the United States enjoys a powerful political lobby. Nonetheless, suggesting these examples merely highlights the question of fairness by replying to my objection that the combatant distribution is, in fact, fair. Furthermore, liberal states still fight wars in the name of national interests that translate directly to economic benefits, but these benefits usually go disproportionately to the rich, who are noncombatants. And again, one might reasonably question the empirical claim only to highlight the more fundamental question of fairness. Pointing out the fact that some combatants somewhere share in the spoils of their war suggests again that the combatant distribution is, in fact, fair. Finally, the presence of a professionalized military in liberal states has, arguably, allowed noncombatants to take an indifferent, or even flippant, view of their collective means to make war. If

this is right, the unjust combatant is a victim of the combatant distribution. But there is a significant caveat to make here. Unjust combatants are victims only in comparison with unjust noncombatants that are, *vis a vis* (a)-(c), more responsible than the unjust combatant. A reasonably just distribution of the harms necessary to defeat an unjust war should take this difference into account. Insofar as the combatant distribution in a liberal state fighting an unjust war fails to do this, it seems to be substantively unfair to unjust combatants.[52]

One might object that the argument here rejects the substantive fairness of the combatant distribution, not only during an unjust war, but at all. Even on the just side, one might cite instances where combatants are generally less well off than noncombatants. The examples are so easy to come by that the objection looks like a general worry, not just a historical artifact of this or that war. One response to this objection is that there is at least one relative difference between the combatant distribution of a just war and that of an unjust war: the presence of a just cause. Christopher Finlay makes a similar argument when considering the combatant distribution from the perspective of the just state.[53] The just state's combatant distribution must balance the substantive demands of achieving just war aims and the protection of its citizens from the harms of war.[54] However, when liberal states lack the morally important goals of just war aims; there is no balance to strike.

Consider the complaint that an unjust noncombatant who satisfies (a)-(c)

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[52] I owe thanks to Janina Dill for pressing me on the empirical nature of my claims and how these questions suggest issues of fairness in the combatant distribution.
[53] Finlay calls the questions associated with the combatant distribution questions of "*in bello* justice." Christopher J. Finlay, "Fairness and Liability in the Just War: Combatants, Non-Combatants and Lawful Irregulars," *Political Studies* 61, no. 1 (2013): 142-60.
[54] Ibid.

might have during an unjust war.[55] If the unjust war ceased, then this unjust noncombatant might be physically better off. She might miss out on some benefits, but she would also no longer be at risk of having harms inflicted on her. Here it is also important to recall that we are considering war between two modern states. The riskless war enjoyed by the west during the current "War on Terror" seems less likely in this context. Furthermore, whatever physical cost the unjust noncombatant might bear, it is highly plausible that she would be *morally* better off. She would no longer contribute to threats of unjust harm. Therefore, since the unjust noncombatant stands to benefit from ending the unjust war, she should endorse a distribution of costs that balances the harms imposed with a timely end to their unjust war. Certainly, abandoning an unjust war will protect a great many of the unjust liberal state's citizens. Even if we follow Lazar in focusing on an unjust state that will continue the war because it either "lacks the option of halting the war," or will not "take that option up," the substantive unfairness of the combatant distribution has intuitive force.[56] Therefore, a combatant distribution that ends the unjust war at the least moral cost brackets the range of substantively just distributions on the unjust side. Both the unjust combatant and any neutral third-party observer could dismiss most complaints of unjust noncombatants because they stand to be better off, morally and physically, when their unjust war ends. In short, just combatants may have no reason to respect the combatant distribution when doing so is unfairly favorable to the unjust noncombatants and unfairly

[55] Cécile Fabre makes the following point in *Cosmopolitan War* when comparing the unjust noncombatant to the just combatant. I think it is relevant to the distribution of harms among the citizens of an unjust state as well. Cf. Fabre, *Cosmopolitan War*, 88.
[56] Lazar, "Complicity, Collectives, and Killing in War," 385.

harmful to the unjust combatants. Even if the political self-determination of a liberal state directed the distribution of harms to its combatants and away from its noncombatants, just combatants owe no respect to political self-determination that takes this form.

Suppose, however, that what I have argued so far is wrong and that the collectivist reasons derived from the combatant distribution of an unjust state does matter. Many might still be sympathetic to Lazar and think there is *some* reason of collective respect to distribute unavoidable harm to unjust combatants rather than unjust noncombatants when all are collectively liable. Even if it matters, surely the priority accorded to immunity of unjust noncombatants is not absolute. Collective respect would not, for example, require the killing of 100,000 unjust combatants rather than the killing of one unjust noncombatant when all are liable and either option would be equally effective. But Lazar's argument for Claim (3) offers no explicit discussion of how much cost unjust combatants should bear. More troubling, the theoretical mechanism that should solve this problem is also silent. If the combatant distribution falls under the scope of respect for political self-determination, then political self-determination might also determine the relative weights of harms to unjust noncombatants and equivalent harms to unjust noncombatants. The objection here is troubling because there is a radical indeterminacy. We can grant Lazar that the combatant distribution represents authentic political self-determination, and that the combatant distribution remains plausibly just in an unjust war, and still have little way to know how far this respect should go. Even if it matters, it is hard to see how much it might matter. It is

empirically false that any political community has stipulated how many of its combatant citizens should die rather than some fixed number of its noncombatants citizens. Moreover, it's theoretically unclear how an answer to this question could ever be evident in the politics of a community. It would amount to an appeal to the vagaries of war to serve as proxy for a process that is supposed to command our moral respect. At best, it is indeterminate how much weight the just combatant ought to give this reason against the moral reason to distribute unavoidable harms according to individual liability.

4.3 Just Distribution and Victims of an Unjust War

The second way the combatant distribution could be morally problematic concerns justice in the distribution of harm between the citizens of the unjust state and the victims of the unjust war. We can ask parallel questions about if and how much collective respect matters. Here, Lazar must argue that observing the combatant distribution is externally just to the victims of the unjust war. Lazar's argument for Claim (4) rests on the intuition that when a liberal state "reaches a reasonably just decision on some matter that primarily concerns the well-being of its citizens" non-members have a collectivist reason "to respect that decision."[57] However, even if we grant this claim, it is hard to see how the reason to respect such decisions applies to the insistence that just combatants distribute the costs of an unjust war to only unjust combatants. This would be tantamount to requiring the victims of an unjust war to respect a political order that poses an unjust threat and is the means by which it inflicts unjust harms. The intuition that outsiders

[57] Ibid., 388.

should respect political self-determination in some cases, like reparations for an unjust war, does not hold for the political arrangements that serve as the means of the infliction of unjust harms. The intuition fails because respecting political self-determination in the second case unfairly requires that victims morally respect the means that have left them worse off.

When employed by a liberal state waging an unjust war, the combatant distribution will often be unjust to the unjust war's external victims, particularly those who are fighting in defense against the unjust war. An unjust war threatens just combatants, just noncombatants and neutral noncombatants. A requirement to respect the combatant distribution may be unfair to any or all of these people. The unjust war forces just combatants to fight and, at the least, suffer the pains of war and the moral burdens of killing intentionally and as a side-effect. Even if just combatants take on these burdens voluntarily, this does not completely vitiate their moral claims against the unjust side. Requiring a defender to honor distributive agreements amongst perpetrators has little intuitive plausibility in other contexts.

> *Kray Twins:* Reggie and Ronnie Kray run organized crime in east London. Everyone knows both that Ronnie has the dominant role and that Reggie is just a subordinate and that they have an agreement that Ronnie will protect Reggie and bear the risks and harms that go with running the organization. Ronnie threatens to kill Victim because Reggie mistakenly thinks Victim is behind on his protection payments. Victim has two options that will save his life: (a) kill Ronnie through a fight that leaves Victim paralyzed from the waist down; or, (b) kill Reggie through a fight that leaves Victim with a broken finger.

There might be a reason for Victim to accept a higher cost to himself and kill Ronnie, though I find that doubtful. However, it seems clear that the well-known

agreement between Ronnie and Reggie is not relevant to the costs Victim should bear in his defense. Now consider a variant of Kray Twins in the context of an unjust war and with a reminder of the caveat that the comparative choice we are considering is between persons on the unjust side that satisfy the criteria (a)-(c) above.

> *One Leg or Two:* State X's unjust aggression will unavoidably cause one person to die. A just combatant, Erin, has two options that completely avert the threatened harm: (a) kill an unjust combatant, Tom, through a fight that leaves Erin paralyzed from the waist down; or, (b) kill an unjust noncombatant, Sam that leaves Erin with a broken finger.

If the comparative responsibility of Tom and Sam is comparable, the difference between option (a) and (b) is nothing more than a cost to Erin. Requiring Erin, or any just combatant, to incur further costs to respect the political self-determination of Tom and Sam is unfair.

The combatant distribution is also unfair to just noncombatants and neutral noncombatants. Just noncombatants stand to be worse off if the unjust state succeeds, or even lengthens the course of an ultimately unsuccessful unjust war. Just noncombatants do stand to benefit from a successful defensive war. This fact influences the fairness complaints we can make on their behalf.[58] But the choice is similar to that of One Leg or Two. It is between the just noncombatant and the unjust noncombatants who satisfy (a)-(c). Therefore, the fact that a just noncombatant might benefit from a just action is irrelevant to fairness demands when compared to unjust noncombatants like Sam. Finally, the combatant

[58] The beneficiary status of noncombatants affects the just distribution of harms between persons in war. Cf. Jeff McMahan, "The Just Distribution of Harm between Combatants and Noncombatants," *Philosophy & Public Affairs* 38, no. 4 (2010): 342-79. Fabre, *Cosmopolitan War*, 82-94.

distribution of a liberal state's unjust war is unfair to the neutral noncombatants who are nothing more than bystanders to the conflict between the just and unjust side. These persons stand apart from the conflict, are wholly innocent, and may be citizens of either the just state or the unjust state or of a neutral state. Fairness seems to obviously demand that any distribution of costs between persons who satisfy (a)-(c), unjust combatants and unjust noncombatants alike, not leave neutral noncombatants worse off than they otherwise could be. The fairness complaints of both just noncombatants and bystander noncombatants are clear enough when we consider Erin's choice in One Leg or Two.

It seems objectively unfair for the just combatant to incur more risk of personal harm to respect an unjust state's political right to distribute the harms inflicted by just combatants to combatants and away from noncombatants. Considering the just noncombatant and the neutral noncombatant in turn simply strengthens the objection. This shows that while we may have general obligations to respect another state's political self-determination and allow it to order its own affairs, it is at least unfair to require these victims to respect the part of that ordering that is the means by which the state imposes the unjust harms. Collective respect for the combatant distribution of an unjust state does not matter in war. If this is true, the objection is fatal to the substantive justice of the combatant distribution because of how this distributes harm between the citizens of the unjust state and the victims of the unjust war.

I have suggested the combatant distribution of an unjust state is substantively unfair to victims of an unjust war and so does not matter, but there

might be some still unconvinced. Like Lazar, they might take it as a fool's errand to try to make "[w]arfare … a mechanism" of "just distribution."[59] We might want to concede there could be cases in which the collective respect just combatants owe to the political self-determination of an unjust state might require that they distribute harms according to the combatant distribution. This could take two forms. Just combatants should probably risk stubbed toes, sprained ankles and other smaller harms when the choice is down to roughly equivalent options. Or, if the choice achieved the same goal at the same cost, it seems fair to respect some person's voluntary wish. For example, if a child is liable to be harmed but harming the parent would achieve the same end, the parent could request that he be harmed rather than his child. This seems permissible, and perhaps morality requires that others respect the parent's choice despite the child's liability.

Suppose, then, that what I have argued so far is wrong and that there remains some reason of collective respect that matters enough to require just combatants to distribute unavoidable harm to unjust combatants rather than unjust noncombatants when all are collectively liable. Again, even if this reason matters, we can still ask how much it matters? Surely the priority accorded to the immunity of unjust noncombatants is not absolute when compared to the harms imposed by an unjust war on its victims. Collective respect would not, for example, require accepting the death of 10,000 just combatants rather than the killing of one unjust noncombatant if the one unjust noncombatant is liable and either option would be

[59] Lazar, "Complicity, Collectives, and Killing in War," 379.

equally effective. Even Lazar, through the Key Caveat, agrees here the priority is not absolute.

This brings us to the vagueness of the Key Caveat and what it means for the combatant distribution to make the just victory "harder." The Key Caveat has to answer the question of how much collectivist reasons matter. There are at least three ways to interpret how the combatant distribution might make victory by the just side "harder." First, this could just mean making a just victory less likely. But for collective respect to have any weight on this interpretation, the costs imposed on the just combatant could be quite high. Any military setback or just combatant death in the pursuit of just aims may make the just victory less likely. However, surely the reason to respect the combatant distribution is meant to have a non-trivial weight. Second, the Key Caveat could mean harder in the sense of any additional costs to the just side, both in terms of probability of victory or the imposition of harms on the external victims of the unjust war. But this is just to revisit the previous worry. Surely, Lazar means something more. The *prohibition* imposes costs on those who observe it. Finally, the Key Caveat could imply a substantial threshold of costs for the just combatant to accept. It would be better to say observing collective respect makes the just combatants' victory "too hard." The problem now is that it is difficult to keep the objections to Claims (3) and (4) at bay. When we collectivize the internal and external harms to the numbers typically imposed by an unjust war, the combatant distribution is likely to meet any substantial threshold to which we might agree.

Some will argue that, on any interpretation of "harder," the threshold is prohibitively low. Again, just combatants should probably risk stubbed toes and sprained ankles, and respect political self-determination when the morally best options are a virtual tie, but not much more than this. These kinds of tie-breaking marginal costs will rarely allow the collectivist reasons to respect political self-determination to override the individualistic reasons in Claim (5a) - the reason to distribute unavoidable harms according to individual liability – or, (5b) the reasons to give priority to distributing harms to the liable rather than to the non-liable and to increasing the probability of a just victory. Rendering the Key Caveat in a sufficiently strong form argues decisively against the just combatant's reasons to respect the *prohibition* for those unjust noncombatants that had the power to stop the war, will benefit from it, and own the means by which it proceeds. Collectivizing the costs of war throws this into sharp relief. The *prohibition* does not follow from the moral features of collective action in this context. Rather, it is in deep tension with collectivizing war. The threshold to override the individualistic reasons a just combatant has to distribute unavoidable harms according to individual liability, minimize the harms imposed by the unjust war and maximize their probability of victory is too much for collective respect to bear. However much these collectivist reasons matter, they will not matter enough. This is sufficient to accomplish my second aim.

§5: Conclusion

I have argued we should reject Seth Lazar's argument for the *prohibition* for two reasons: First, the collectivist reason that supports the *permission* is not, in fact,

collectivist because the alleged responsibility deficit of an unjust war and the comparative grounds of liability he invokes can be adequately addressed in the terms of individual morality. Ultimately, Lazar gets the *permission* on reductive grounds. Second, the collectivist reason to respect the internal political self-determination of a group does not override a just combatant's moral reason to distribute the unavoidable harms according to comparative grounds of liability that in fact explain the *permission.* Collective respect for an unjust liberal state does not matter in war because it has no scope, internal or external to a liberal state, when applied to the political means of fighting an unjust war. Even if it did, the weight of collective respect is not up to the task of overriding moral reasons in the collectivized costs of war. If it does matter, it cannot matter that much. The two failures of Lazar's collectivist reasons follow from claims of justice when lethal harms are unavoidable. In this context collectivist reasons almost never tell in favor of the just combatant's morally best option. The morally best option in war is the morally best option in other contexts: distribution of unavoidable harms to those who bear responsibility for the circumstances in which they arise.

Paper 2: Killing to Communicate

§1: Introduction

Soldiers often have more than one aim when they decide intentionally to kill in war. These aims matter to the reasons that justify such killings and to how we morally judge those soldiers. The same act that kills some persons, such as those operating as a platoon of tanks, and not others, such as those operating as infantry in support of the tank platoon, might aim to eliminate the threats posed by the persons in the tank platoon. We can call this the eliminative aim of killing in war. The very same act that those soldiers use to eliminate the tank platoon may also aim to communicate reasons to the infantry supporting the platoon. Soldiers often aim to kill some persons to communicate reasons for action and thereby influence the decisions of others. We can call this the communicative aim of killing in war. The central question of the paper is this: When an act has both an eliminative aim and a communicative aim, what does that imply for the permissibility of such killings and the moral agency of those who inflict such harms?

I limit my investigation of this question to the context of liability to lethal defensive harm and two theoretical concerns a communicative aim raises within this context. Standardly, a person is liable to be killed only when the infliction of that harm is a necessary, proportionate, and effective means of averting unjust harms for which she bears sufficient moral responsibility.[60] The first theoretical concern involves the grounds of permissibly killing in war because killing to communicate is harder morally to justify than killing to eliminate. This raises a

[60] The account of liability I use through most of the paper is meant to be accommodating to most of the plausible accounts of liability to killing in war. Cf. Jeff McMahan, *Killing in War* (Oxford: Clarendon Press, 2009); Cécile Fabre, *Cosmopolitan War* (Oxford: Oxford University Press, 2012); Helen Frowe, *Defensive Killing* (Oxford: Oxford University Press, 2014).

concern that the reasons that justify an eliminative aim might be insufficient to justify a communicative aim. The second theoretical concern involves the moral characterization of a soldier's agency given the presence of both aims. Standardly, a soldier's aims in action reflect their intentions, and these intentions help characterize the moral quality of that soldier's agency. When the same act serves two different aims, this straightforward relationship between aims and intentions gets blurred. It is not immediately obvious how an account of liability to killing in war should handle the presence of an agency that is mixed based on the presence of a communicative aim and an eliminative one. Both theoretical concerns have implications for the rights of the persons soldiers aim intentionally to kill and the rights and duties of soldiers when they exhibit such mixed moral agency.

I will argue that soldiers that fight for just causes can answer the two theoretical concerns a communicative aim raises and justify eliminative killings that also communicate reasons for actions to their enemies. Furthermore, I will argue that the nature of this justification implies decisive moral reasons to communicate. Often, the presence of a communicative aim allows soldiers to minimize harm or causes obligations of other defense to obtain within the circumstances of killing in war. So, such killings are morally required of soldiers that fight for just aims. This amounts to what I call a principle of scrutable harm that requires these soldiers to communicate reasons to their enemy in order to minimize harm and satisfy obligations of other defense. Finally, I will draw a lesson from the theoretical concerns surrounding communicative aim for the ethics of killing in war. The grounds that justify communicative aims are not available to those soldiers that

fight in a war without just cause. Therefore, it is impermissible for these soldiers to send a message by killing some and not others. This is a new reason to revise our intuition that combatants on both sides hold equal rights to kill, the so-called doctrine of the moral equality of combatants (MEC).

In the course of my arguments, I will use the terms of art familiar to just war theory: Combatants are those who directly participate in hostilities. Noncombatants are those who do not directly participate. Wars require belligerent sides, and I will use "just" and "unjust" to distinguish between these. A just combatant, therefore, is a combatant who fights with a just cause and not for unjust aims. An unjust combatant is one who fights for unjust aims. Just and unjust noncombatants are simply noncombatants on the just and unjust sides, respectively. Moreover, bystander noncombatants are those persons who are potential victims of a war or defensive action but who are not members of a group represented by the soldiers on either belligerent side.

My focus on liability justifications leaves to one side other types of justifications for inflicting lethal harm that are relevant to killing in war. For example, the killing of some persons might, in the circumstances, represent a substantially lesser evil than killing others. While the communicative aim of killing may be relevant to other ways of justifying the infliction of harm, I do not consider them here. I am interested in the relevance of communication to the balance of moral reasons that ground permissible killing in war based on liability. I will understand the first order moral judgment of permissibility in the following way: an action φ is morally permissible all things considered, not to φ. An action φ is

morally justifiable if there is no moral reason, all things considered, against φ and a positive moral reason to φ. Finally, an action φ is morally required if φ is justifiable, and there is a decisive moral reason to φ. I do not defend this account of permissibility but assume it throughout.[61]

§2: Punishment and Communication

Many recognize that the infliction of punitive harm is a richly communicative act. There are lessons to draw from the communicative nature of punitive harm that may apply to killing in war. The first lesson is that punishment serves as a kind of language situated within a wider system of social meaning. So, the communicative aim of punishment gives it a diverse suite of "semiotic resources" within the punitive act.[62] Acts that inflict punitive harm have a message, an audience, and a response. The second lesson is that these semiotic resources – the message, the audience, and the response – are diverse and morally important. These resources are diverse enough to find a place in many philosophical theories of punishment. Moreover, these resources are morally important enough to provide some, or indeed for some theorists, all the moral justification required for inflicting punitive harm. Understanding how these semiotic resources feature in philosophical justifications of punishment offers a theoretical context to my subsequent discussion of the communicative aim of killing in war.

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[61] This understanding of permissibility is common and follows, among others, Derek Parfit and Jeff McMahan. Cf. Parfit, *On What Matters*; McMahan, *Killing in War*. Also, I acknowledge from the outset that while liability does amount to a positive moral reason to kill in war, these moral reasons are not in every case decisive. Therefore, when I use the phrase "liability justification" I mean the grounds relevant to establishing a person's liability to defensive harm in a given set of circumstances.

[62] My use of "semiotic resources" follows the argument presented by Brennan and Jaworski. Cf. Jason Brennan and Peter Martin Jaworski, "Markets without Symbolic Limits," *Ethics* 125, no. 4 (2015): 1053-77.

Consider three of the leading philosophical justifications for inflicting punitive harm on guilty offenders. For some theorists, the purpose of punishment requires a message, an audience, *and* a response. For example, according to both Antony Duff's communicative theory and some retributivist theories, punitive harm communicates to the offender and demands her response. As Duff states:

> … criminal punishment should be conceived of as a communicative enterprise that aims to communicate to offenders the censure they deserve for their crimes, and thus to bring them to repent their crimes, to reform themselves, and to reconcile themselves with those they have wronged.[63]

The audience of the message is the prisoner harmed by the punishment, the content of that message is condemnation and a demand for his reform, and the response is the prisoner's reform. Punishment is how we tell offenders they have done wrong, whom they have wronged, what they should do to make amends to their victims, and coercive enforcement of required action. Some retributivists claim that offenders deserve their victims' condemnation. Thus, punitive harm that causes the offender to suffer that condemnation is one way in which he receives his just deserts.[64] For these theories, the communicative aim of punishment is a central feature of the moral justification for inflicting harm. Duff, for his part, claims that communication is *the* rationale that provides full moral justification for the criminal justice system.[65]

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[63] Antony Duff, *Punishment, Communication and Community* (Oxford: Oxford University Press, 2001), 129.
[64] Michael Moore explains and defends a retributive theory of punishment along these lines. Cf. Michael S. Moore, *Placing Blame : A General Theory of the Criminal Law*, *Placing Blame : A Theory of the Criminal Law* (Oxford: Oxford University Press, 2010). Victor Tadros offers an insightful discussion and critique of retributivism. Cf. Victor Tadros, *The Ends of Harm : The Moral Foundations of Criminal Law*, *Oxford Legal Philosophy* (Oxford: Oxford University Press, 2013), Chapter 4.
[65] Cf. Duff, *Punishment, Communication and Community*.

We might doubt desert or communication alone can justify punitive harm, but still think punitive harm sends a message. Theories of punishment that focus on the restoration of victims and the reparations owed by offenders use the message as a means to rehabilitate the offender and believe that such rehabilitation can justify the infliction of punitive harm. For example, rehabilitative theories take the audience to be the offender, the message to be one of reform, and the response on the part of the offender to be some measure of reform. Similarly, expressivists claim that communicating the message of social condemnation also plays a part in justifying the infliction of punitive harm.[66] The audience for this expression could include offenders, members within a society, and outsiders. For example, by punishing an offender, the state expresses revulsion against his crimes on behalf of his victims and the wider society. However, the punishment need not invite a response. Even if a response occurred, on these theories, it would not offer any further justification for the punishment, and so is not required.[67]

Finally, theories that justify punishment in terms of general deterrence or defensive harm also claim that punitive harm communicates, and such communication plays a role in the instrumental justification of that harm. For deterrence theories, inflicting punitive harm on one offender deters other potential offenders by communicating threats of future harm against perpetrators. Deterring future unjust harms by communicating these kinds of threats justifies inflicting the

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[66] Lucia Zedner, "Reparation and Retribution: Are They Reconcilable?," *The Modern Law Review* 57, no. 2 (1994): 228-50; John Braithwaite, "Restorative Justice: Assessing Optimistic and Pessimistic Accounts," *Crime and Justice* 25 (1999): 1-127.

[67] Cf. Joel Feinberg, *Doing and Deserving : Essays in the Theory of Responsibility* (Princeton: Princeton University Press, 1974).

punitive harm.[68] Deterrence theorists hold the audience for the communicative aim of punishment to be persons other than the offender. If the response of others is wholly lacking, then the punishment would be unjust. Defense theorists, such as Daniel Farrell, follow similar lines to those of deterrence because of the instrumental justification of punitive harm as a type of defensive harm. Accordingly, the primary justification is the defensive incapacitation of the offender. However, the communicative aim of the punitive harm also provides a deterrent effect, and this effect can feature in the moral reasons that justify the infliction of punitive harm.[69] The response of others is a further good that can help to justify the defensive incapacitation of an offender. So, those who justify punishment in terms of deterrence or defense allow for the communicative aim of punishment a role in justifying punishment. Both theories also invite a response from others, but for deterrence theorists the response is required.

We need not commit to any specific theory of punishment to see the two points I am suggesting. In all these theories, punitive harm has a communicative aim with diverse semiotic resources; however, there are differences amongst these theories that imply different moral roles for these resources.[70] The central difference amongst these theories is whether the communicative aim must be

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[68] Tadros, *The Ends of Harm : The Moral Foundations of Criminal Law*.
[69] Daniel M. Farrell, "Deterrence and the Just Distribution of Harm," *Social Philosophy and Policy* 12, no. 2 (1995): 220-43; Daniel M. Farrell, "The Justification of General Deterrence," *The Philosophical Review* 94, no. 3 (1985): 367-94; Daniel M. Farrell, "Using Wrongdoers Rightly: Tadros on the Justification of General Deterrence," *Criminal Law and Philosophy* 9, no. 1 (2015/03/01 2015): 1-20.
[70] Cf. LaFollette Hugh and R. A. Duff, "Punishment," in *The Oxfrod Handbook on the Ethics of Punishment*, ed. R.A. Duff (Oxford University Press), 122-47; Tadros, *The Ends of Harm : The Moral Foundations of Criminal Law*; Duff; Antony Duff and Stuart P. Green, *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2013); Antony Duff and Zachary Hoskins, "Legal Punishment," accessed November 26, 2018, 2018; Andrew Ashworth, Lucia Zedner, and Patrick Tomlin, *Prevention and the Limits of the Criminal Law* (Oxford: Oxford University Press, 2013).

present to justify punishment. The communicative aim is either one amongst many morally important considerations, or, a necessary condition for justification. This difference determines in a large measure, the relative moral importance of the semiotic resources. For example, if the communicative aim has to be present, the intended audience differs. The lessons we can draw from punitive harm to killing in war is a general one about the infliction of harm: it is richly communicative. Inflicting harm is richly communicative for two reasons: First, the semiotic resources are diverse and fungible. Those who inflict harm can adapt the semiotic resources of that action according to the primary aim the message serves. Second, the semiotic resources can provide moral reasons that ground a moral justification of that harm. The question this raises, however, is: How does the communicative aim of killing in war affect the moral justification of that harm? Here, the analogy with punitive harm breaks down for many. As the next section will show, it is not immediately obvious that the communicative aim of defensive killing should feature in the moral justification of that harm.

§3: Defensive Harm Communicates

Could defensive harm have a similarly rich set of semiotic resources that are as morally important? In this section, I argue that defensive harm does have similar semiotic resources and consider the moral question in the next section. The message of deterrence suggests that punitive and defensive harm share a similar set of semiotic resources given an apt wider system of social meaning.

The message of deterrence, conditional threats of harm for future acts, is familiar to the context of defensive harm. Consider the following example:

> *Two Clerks:* Two clerks own a liquor store in a crime-ridden neighborhood and Clerk 1 minds the register while Clerk 2 is on his break in the back. Offender enters the store and demands money while he brandishes a pistol. Clerk 1 uses a silent alarm to notify Clerk 2 who surmises the situation through a surveillance system. Clerk 2, returning from the back, begins a live stream of the surveillance system to their popular social media feed and then pistol-whips Offender on camera. The Clerks know that they must incapacitate Offender and that the live stream will publicize their ability to handle armed robbers like Offender to the neighborhood.

In the circumstances, the defensive harm Clerk 2 inflicts on Offender is permissible defensive harm and also serves a communicative aim. The message is a conditional threat to other potential robbers. There can also be lethal defensive force that communicates a similar deterrent message. Consider:

> *Lynch Mob:* Lynch Mob, led by Offender, has captured and noosed innocent Victim. Defender happens on the scene just as Offender is about to give members of Lynch Mob an order to pull the rope tight. Defender knows depriving Lynch Mob of their leader will convince them to abandon the unjust killing of Victim. Defender draws her pistol, kills Offender, and stands between Victim and the Lynch Mob daring any to try to resume the lynching of Victim.

As in the previous case, I think that Defender acts permissibly and that, by killing Offender, Defender communicates a conditional threat of future harm to the persons in Lynch Mob. Both cases involve an audience and a message aimed at threats of future unjust harms. The moral contribution of the communicative aim in each case is far from clear because, in both cases, the defensive harm would be justified without the presence of a communicative aim. The different ways in which the communicative aim contribute to the moral justification will occupy us below. For now, it is enough to show that the presence of a communicative aim, at least intuitively, does not necessarily vitiate a liability justification for defensive harm.

In these cases, the actions of Clerk 2 and Defender make sense only if circumstances provide an apt wider system of social meaning. In *Two Clerks*, the future threats of unjust harms were of a general nature. Clerk 2 was communicating with anyone who does not yet pose a threat. In *Lynch Mob*, the future threat of unjust harm is different. The mob has already inflicted unjust harm on Victim, and until the persons in that mob leave the scene, threats of unjust harms against Victim persist. While Defender's action might have some general deterrent value, the audience of her act is the remaining members of the Lynch Mob. The message, however, is the same in each case. So long as there is an audience and a risk of future unjust harms, defensive harm communicates a deterrent threat. The defensive action in each case has an audience, a message, and an expected response. This message has semiotic resources like those of punitive harm because the presence of an audience provides an apt a wider system of social meaning.

The semiotic resources of defensive harm are as diverse and fungible as those of punitive harm because those resources can serve aims beyond averting a current unjust harm or deterring future unjust harms. For example, one could communicate an offer of reciprocal cooperation. This is easiest to suppose when the audience of such messages would be one's potential allies. Suppose, for example in *Two Clerks* above, the Clerks were not only intending to deter future offenders, but also offer another neighborhood store owner the chance to join the surveillance system. It is plausible to understand Clerk 2's action, vis a vis this store owner, as

a kind of "reciprocal altruism."[71] If the clerk's actions are costly – suppose that she knows Offender's gang might retaliate – then she is accepting some risk to her future security to the benefit of another store owner.

Those that send co-operative messages to an ally through defensive harm can send the same message to competitors. This calls to mind the so-called "tit-for-tat" strategy.[72] Game theory experiments and iterated prisoner dilemmas suggest the communicative aim of an inflicted defensive harm in one circumstance sends a message that serves a goal one can anticipate having in another. That future goal can be either improved cooperation with an ally or a stable relationship with a competitor that is sub-optimal but imposes an acceptable cost to the benefit of all parties. The communicative aims of defensive harm are as diverse and fungible as those of punitive harm.

§4: Defensive Communication Matters

Defensive harm may have diverse and fungible semiotic resources; however, it is still not clear *if* or *how much* those resources matter morally to a liability justification. The central reason to think these resources do matter follows from the instrumental nature of a liability justification. If the communicative aim of defensive harm influences the instrumental value of that harm, it seems, straightforwardly, to matter. How much the communicative aim matters depends on how the semiotic resources of the killing involve the grounds of a liability

[71] Cf. Robert M. Axelrod, *The Complexity of Cooperation: Agent-Based Models of Competition and Collaboration* (Princeton, N.J.: Princeton University Press, 1997); Robert M. Axelrod and Richard Dawkins, *The Evolution of Cooperation* (Harmondsworth: Penguin, 1990).
[72] Christopher Stephens, "Modelling Reciprocal Altruism," *The British Journal for the Philosophy of Science* 47, no. 4 (1996): 533-56; Thomas C. Schelling, *The Strategy of Conflict*, Rev. ed. (Cambridge, Mass.: Harvard University Press, 1980).

justification. That is, the degree to which the message, the audience, and the response involve the facts that constitute what Jeff McMahan has called the agential and circumstantial considerations of a liability justification.[73] So, the semiotic resources of a defensive act could involve the agency of both the defender and the person or persons on whom she inflicts defensive harm. These resources can also involve the morally important circumstances. It is also important to distinguish the moral reasons that ground a liability justification, the agential and circumstantial considerations, from the judgment that a given act is necessary, proportionate, and effective, given those moral reasons. When I claim that the communicative aim matters to a liability justification, I mean it matters to the facts that ground our judgments about necessity, proportionality, and effectiveness.

The instrumental nature of a liability justification implies at least four ways in which a communicative aim matters. Adjusting *Lynch Mob* will provide examples of each and show, in increasing importance, how much the communicative aim of defensive harm matters to the grounds of a liability justification. First, the communicative aim might offer a further good that grounds a moral reason for Defender to choose one action from amongst a set of defensive options that are already permissible. The communicative aim matters to a liability justification because it makes one defensive option in that set morally justified. For

[73] Jeff McMahan, as far as I am aware, uses the term "agential conditions" to refer only to the moral agency of a person potentially liable to defensive harm. However, I am here expanding it to include the agency of the person inflicting a defensive harm. Cf. Jeff McMahan, "Proportionality and Just Cause," *Journal of Moral Philosophy* 11, no. 4 (2014): 433. Pg.433 and Jeff McMahan, "Liability, Proportionality, and the Number of Aggressors," in *The Ethics of War : Essays*, ed. Saba Bazargan and Samuel Charles Rickless (New York: Oxford University Press, 2017), 3-27.

example, suppose that in *Lynch Mob* Defender surmises two defensive options that save Victim and ward off Lynch Mob:

> A: kill one member and break another member's leg
> B: kill Offender in order to ward off Lynch Mob.

Both A and B will save Victim and disperse the mob, but each achieves that good aim at a different moral cost in terms of the harm Defender inflicts. Therefore, as a matter of the necessity constraint on a liability justification, killing Offender (B) is morally a slightly better option. In this first role, the instrumental value of the communicative aim matters, but plays a relatively minor role in the liability justification to kill Offender. Killing Offender is instrumentally effective because the killing also wards off the Lynch Mob. This true because Defender's actions communicate to that audience. There are sufficient grounds to justify killing Offender or, for that matter, many other members of the Lynch Mob. However, when Defender considers the set of his defensive options, the communicative aim provides a reason to choose one option over the other. It only slightly tips the balance of moral reasons Defender has to kill Offender and not members of Lynch Mob by providing a positive moral reason, derived from the amount of harm required, to kill Offender.

The second way in which a communicative aim might matter is often overlooked and important. In short, the communicative aim can provide a decisive moral reason that makes a permissible defensive act morally required. The best example of this is how the communicative aim of a defensive act can provide instrumental goods that ensure, given the circumstances in which threats of unjust harm arise, important moral duties like those of other defense obtain. For example,

in the first version of *Lynch Mob*, suppose now that Defender knows Lynch Mob represents a powerful group that will do him and many others serious harm in the future and that killing even a highly culpable person like Offender will be psychologically traumatic. Defender now has grounds to think the eliminative aim of killing Offender to defend Victim is insufficient to outweigh the costs incurred to himself and others. To see the point at issue one need only recognize that while the obligation of other defense is stringent, it is not absolute. Sometimes, the costs incurred in the course of defending others vitiate the obligations one has.

Suppose further that Defender also has good reason to believe that Victim's coterie will participate in a reciprocal relationship of common defense against the incursions of Lynch Mob. Now, the opportunity to communicate with Victim and his coterie that he is willing to accept the psychological toll of intentional killing and the increased risks of harm to his future interests posed by Lynch Mob is now the circumstantial consideration that makes the psychological and security costs Defender incurs reasonable. The communicative aim is a morally relevant fact because it ensures Defender's obligations of other defense obtain. That is, while the eliminative aim of defending Victim was insufficient to offset the costs to Defender, the eliminative aim and communicative aim are jointly sufficient to ensure the obligation obtains. This provides Defender with a decisive moral reason to kill Offender. In this second role, the presence of a communicative aim matters to Defender's moral agency because omitting the act in such circumstances would be a serious moral wrong. It also matters to Defender's rights because another party

could arrive on the scene and impose costs on Defender in order to enforce the duty of other defense he now has.

The third way in which a communicative aim matters is that it could play a decisive role in who, amongst a set of potentially liable persons, forfeit their rights against lethal harm. Suppose in *Lynch Mob* that Defender has reason to believe killing Offender is the *only* way effectively to save Victim because it overawes the Lynch Mob. In this example, the communicative aim provides a decisive moral reason to kill Offender, but what is at stake in not the agency of Defender, but the rights of Offender and the Lynch Mob. This circumstantial consideration provides a decisive moral reason to kill Offender and not a member of Lynch Mob. In this example, the distinction Adil Haque makes between a person's actual rights against killing and their effective rights against killing helps make the relationship between the communicative aim and Offender's rights clear. One's actual rights are a matter of, *inter alia*, the moral status of one's actions. One's effective rights are a matter of, *inter alia*, whether one enjoys a protection of one's life despite the moral status of one's actual rights.[74] Individuals have an interest in both questions. However, the question of one's actual forfeiture of a right is morally prior to considering one's effective protection. In other words, it is more seriously wrongful to vitiate the effective protection of a person's right when they have done nothing to forfeit the actual right. It also remains a morally important question to decide who, amongst a set of persons like Offender and Lynch Mob that have forfeited actual rights,

[74] Adil Ahmad Haque, *Law and Morality at War* (Oxford: Oxford University Press, 2017), 93.

should be the one on whom Defender inflicts lethal harm and vitiates the effective protection of their interests.

The distinction between actual and effective rights suggests the moral importance of the communicative aim of defensive harm might vary given the account of liability one prefers. For externalists, like David Rodin and Helen Frowe, the communicative aim of defensive harm can be the reason some person's effective rights against killing are forfeit. Externalists hold that some or all of the circumstantial considerations of effectiveness, proportionality, and necessity operate externally to the question of liability.[75] This means that both Offender and the members of Lynch Mob may remain liable in the sense that their actions have rendered their actual rights against killing forfeit. However, in this version of *Lynch Mob*, considerations of effectiveness morally constrain Defender's options to act on a member's liability because killing Offender is the only effective option. Therefore, only Offender's rights are both actually and effectively forfeit. The members of Lynch Mob remain liable, but killing Offender is the all things considered best option available to Defender. The role of the communicative aim is more serious for those who hold an internalists conception of liability. Internalists, like McMahan, hold that the constraints of effectiveness, necessity, and proportionality are internal to a liability justification.[76] So, a person's actual rights against killing are forfeit only when their effective rights are as well. On this view, the communicative aim of Defender's options implies that Offender is liable, and the

[75] Cf. Frowe, *Defensive Killing*. Rodin, *War and Self-Defense*; Rodin, "The Lesser Evil Obligation" in *The Ethics of War: Essays*.
[76] McMahan, *Killing in War*; McMahan, "Liability, Proportionality, and the Number of Aggressors," in *The Ethics of War : Essays*.

rest of Lynch Mob are not, and the communicative aim of killing Offender is the fact that generates the decisive moral reason that this is so. On either view of liability, the semiotics of the defensive killing can feature decisively in the balance of moral reasons that ground Defender's liability justification to kill Offender and not members of the Lynch Mob.

Finally, the communicative aim could rule out moral reasons that ground an otherwise permissible defensive option. Defensive harm that communicates is essentially, or at least significantly, opportunistic and, other things being equal, opportunistic harm is harder to justify than eliminative harm. When Defender harms a person only as a means of preventing that person from inflicting unjust harms, the harm she inflicts is eliminative. In Lynch Mob, if Defender kills the member holding the rope around Victim's neck Defender kills that member eliminatively. On the other hand, when Defender kills Offender, he harms a person in a way that also uses that person as a means to avert an unjust threat from others, the harm that Defender inflicts is opportunistic. One reason opportunistic harm is harder to justify is that it involves a violation of the means principle. While Lynch Mob is a good example of the difference between eliminative and opportunistic harms, it does little to motivate any moral concern over this difference. This is primarily because Offender is intuitively liable to a significant amount of harm. It seems to make little difference how Defender inflicts harm on Offender or Lynch Mob in these circumstances.

It would be a mistake to let the culpability of Offender or the Lynch Mob obscure how the presence of a communicative aim could rule out the goods that

provide justification for a defensive killing. One reason for this mistake is a failure of moral imagination akin to one George Orwell described when differentiating between shooting a "Fascist" and "a man who is holding up his trousers."[77] Those who pose unjust harms, even highly culpable aggressors, remain persons and defensive harms inflicted upon them remain impersonally bad. Another reason we cannot let an aggressor's culpability obscure concerns about a communicative aim is that aggressors are not the only victims of such harms. Killing to communicate aims to influence the decisions of other persons. It is not clear at all that a culpable aggressor's moral responsibility is sufficient grounds to justify harmfully using those persons who are manipulated by the killing of a culpable aggressor.

The moral relationship between the semiotic resources of an opportunistic killing and the grounds that justify such killing is complex and will occupy us below. For now, I want only to note that since most accounts of liability recognize the importance of the means principle, the presence of a communicative aim matters morally to a liability justification because it could rule out moral reasons derived from the communicative aim. Victor Tadros has defended the relevance of the means principle within a liability justification and provides one reason to think the presence of a communicative aim matters morally to defensive harm. Following Tadros, Defender cannot invoke the good aim of saving the Victim because the presence of the communicative aim implies an intention harmfully to

[77] George Orwell, *George Orwell : Essays*, *Penguin Classics* (London: Penguin in association with Secker & Warburg, 2005). The failure of moral imagination is well documented in war, but one can be surprised how often the moral status of culpable aggressors gets rather short shrift in the ethics of killing in war. Cf. Jonathan Glover, *Humanity : A Moral History of the Twentieth Century*, (London: Pimlico, 2001); J. Glenn Gray, *The Warriors : Reflections on Men in Battle* (Lincoln, Neb. London: University of Nebraska Press, 1998).

use Offender. The presence of this kind of intention that violates the means principle "excludes certain considerations" that normally provide sufficient justification to inflict defensive harm.[78] The presence of a communicative aim, in a sense, morally infects an otherwise morally permissible instance of defensive harm. I will refer to this problem as the moral infectiousness of a communicative aim.

All of this suggests that the semiotic resources available to defensive harm are diverse, fungible, and morally important to grounds of a liability justification. As with punishment, there are many justifiable aims that communication through defensive harming might achieve and as many messages that we might convey in order to achieve those aims. The infliction of harm is richly communicative, and the semiotic resources of defensive harm can matter a great deal to grounds that justify inflicting that harm.

§5: Killing in War and Communication

Some might doubt that the diversity and moral importance of the communicative aim of defensive harm extends to killing in war. However, it is uncontroversial that soldiers, armies, and nations communicate with each other through both verbal and non-verbal threats of war. Most recognize the communicative aim of military demonstrations, for example, the many joint military exercises of the United States and South Korea that are meant to deter North Korea and reassure regional allies like Japan. There is also the long history of brinkmanship between competitors, for example, the increasingly common

[78] Victor Tadros, "Dimensions of Intentions: Ways of Killing in War," in *The Oxford Handbook of Ethics of War*, ed. Seth Lazar and Helen Frowe (Oxford University Press, 2016), 408-9.

interaction between the Chinese military and others in the South China Sea or Richard Nixon's nuclear "saber rattling" in an effort to influence the negotiated settlement of the war between the United States and North Vietnam. Finally, deception has a role to play in war. The allies spent enormous time and resources on Operation Bodyguard ahead of the landings in Normandy. In all these examples, the communication is both verbal and nonverbal and *the* rationale for the actions. The actions make sense only if one presumes the actions communicate. Since Clausewitz, most theorists and practitioners of war have seen the ability to persuade, to win the brutal "contest of wills," as the animating purpose of using military force in war.[79]

Influencing some with force might be common in war, but is *killing* in war part of that communication that seeks to influence? Three examples make this plausible and intensify the infectiousness of a communicative aim. First, the famed Doolittle Raid of the United States Army Air Force communicated messages of deterrent threats based on American military power. On 18 April 1942, then Lt. Col. James Doolittle led an air raid on Tokyo and the Japanese home islands. Sixteen bombers killed about twenty people and wounded a further five hundred. The raid's purpose was explicitly communicative and aimed at the threat posed to the United States by Japan in the Pacific. American planners wanted Japanese combatants and noncombatants to know that their island was vulnerable and

[79] Carl von Clausewitz, *On War* (Princeton: Princeton University Press, 1976). Two philosophers that recognize this are Seth Lazar and Cheyney Ryan. However, I think Lazar's approach in *Sparing Civilians* improperly focuses on the less problematic aspects of an important moral phenomenon because it supports his goal of vindicating noncombatant immunity and Ryan's focus is on the political authorization of war, and not killing in war. Cf. Lazar, *Sparing Civilians*. Cheyney Ryan, "The Hard Hand of War," *Law and Philosophy* 37, no. 3 (2018).

wanted to reassure their American compatriots of the American military's capability. The raid delivered both messages. The Japanese altered their military plans in the Pacific to improve the security of the home islands and conducted campaigns in China to deny further use of airfields that supported Doolittle's raid. The American public, according to historical records, took heart from the raid.[80]

The Doolittle Raid communicated a threat, but the message sent by killing in war could sometimes be one of restraint in the service of justifiable ends. Suppose, in response to the 1st SS Panzer Division's massacre of 84 American prisoners of war at Malmedy, the United States Army assembled 84 German prisoners from the Wehrmacht. In a highly ritualized and public affair, the Army placed all the prisoners in front of a firing squad, executed only one and returned the others to imprisonment. Suppose the Army did all this knowing that the reprisal will be reported to the Wehrmacht commanders. This says, among other things, "We are exercising restraint; you should as well. You're not the SS, and we are prepared to cooperate with you. If you do not, we are prepared to reciprocate."[81] The message of restraint could here serve the justifiable aim of hastening the end of the Nazi's unjust war by causing division between the Wehrmacht and the SS.

Methods that we traditionally consider terrorism might also communicate restraint and serve justifiable aims. For example, in 1996 the Provisional Irish

[80] James Scott, *Target Tokyo : Jimmy Doolittle and the Raid That Avenged Pearl Harbor* (New York: W. W. Norton & Company, 2015).
[81] I owe this example of violence that communicates something other than a deterrent threat to Jeff McMahan. On the Malmedy Massacre Cf. Hugh M. Cole, *The Ardennes : Battle of the Bulge* (Washington: Office of the Chief of Military History, Dept. of the Army, 1965).

Republican Army, frustrated with British demands that the Irish disarm before allowing Sinn Féin into the peace process, exploded two massive bombs inside the United Kingdom. Unlike earlier bombing campaigns that targeted British citizens to make them feel the pain of Northern Ireland, the IRA gave warnings to the British in order to minimize the lethal harm to people prior to the Docklands and Manchester bombings. If the Provisionals are to be believed, this measure was intended to communicate restraint and protest in the face of British recalcitrance and bad faith. The government of John Major began negotiations soon after and dropped the demands that the Irish disarm.[82]

The three examples above are enough to show that killing in war has a diverse and fungible set of semiotic resources. However, all three examples raise serious moral questions, and we might doubt that the lethal harm inflicted in each is justified at all, let alone on the grounds of a liability justification. In fact, in the examples of reprisal and terrorism the killing is wrong precisely because it communicates. The problem here is the communicative aim morally infecting the goods combatants might otherwise rightly use as the grounds of a liability justification. Moreover, we can reasonably ask whether this problem arises for acts that fall short of reprisals and terrorism. It may be the case that, if the communicative aim of a killing unjustifiably harms and uses persons, then combatants cannot use the goods obtained by that killing as facts that ground reasons in liability judgments. It may be that a killing that is justifiable based on an

[82] A. R. Oppenheimer, *IRA: The Bombs and the Bullets: A History of Deadly Ingenuity* (Dublin: Irish Academic Press, 2009); Richard Bourke, *Peace in Ireland : The War of Ideas*, 2nd ed. (London: Pimlico, 2012); Tim Pat Coogan, *The IRA*, (New York: Palgrave, 2000). Toby Harnden, *'Bandit Country': The IRA and South Armagh*, (London: Coronet, 2000).

eliminative aim is impermissible because the combatant's communicative aim infects the justification.

One reason killing in war exacerbates the infectiousness of a communicative aim is because there is a functional disconnect between the purpose of the macro-threats and micro-threats involved.[83] Macro-threats are those that, paradigmatically, one state poses to another. These threats are political acts that seek to persuade or influence groups of other persons. Macro-threats are what Cheyney Ryan has in mind when he claims war's macro purpose is a "persuasive strategy – persuasion through harming."[84] At the macro level, then, the communicative aim of killing in war is evident. Insofar as killing in war is part of the strategy that seeks to persuade one's enemy to abandon their aims, killing in war is meant to influence the decisions of other persons. Micro-threats are those that, paradigmatically, one combatant poses to another. When the aims of these two threats are only distantly related, killing in war becomes problematic because only micro-threats of unjust harms to persons create the circumstances in which one might ground a liability justification based on an eliminative aim. It is also plausible to suggest that when one combatant kills another in response to a micro-threat, he can communicate through that act as well. The act both eliminates the threatening enemy combatant and overawes his compatriots. Recall the example of the tanks and infantry above. Seth Lazar also agrees that killings that eliminate combatants as a means to influence the actions of their compatriots are

[83] This distinction is familiar in the literature. Cf. Frowe, *Defensive Killing*. Lazar, *Sparing Civilians*. Haque, *Law and Morality at War*. Ryan, "The Hard Hand of War."
[84] Ryan, 280.

commonplace in war. So much so that these examples "lay bare how counterforce attacks [eliminative killings] can be used as a means to exert political pressure" on the combatants' compatriots on the battlefield and the home front.[85] In some circumstances, then, killing in war seems seriously wrong because of its communicative aim. The Doolittle Raid, the Malmedy Reprisal, and the IRA Bombings suggest not only that killing in war communicates; but also, that when we send messages this way, we risk serious moral wrongs.

The infectiousness of communicative aims is wide, for even killing that has an immediate defensive, and therefore eliminative, purpose may also be intentionally communicative and thus opportunistic. In fact, killing in war offers a range of cases in which the same act of defensive harm has an eliminative aim and an opportunistic aim. These aims are on a spectrum where the primary functional purposes of the act can invert. I will call this the functional spectrum of killing in war. The fact that harmfully using a person as a means is harder morally to justify could amount to a powerful objection to allowing the communicative aim of killing in war a role in liability justifications. Insofar as the semiotic resources of a killing in war engage with the macro-threats of a war, combatants not only harm persons, they intentionally use the persons killed as a means to influence the decisions of others. When this aim dominates the act of killing along the functional spectrum, the communicative aim could rule out the grounds that justify that killing because these grounds are morally infected.

[85] Lazar, *Sparing Civilians*, 72.

Suppose all this is correct and that killing in war can be richly communicative; rich enough to have a diverse set of audiences, messages, and expected responses. We are now in a better position to understand the two theoretical concerns a communicative aim raises for killing in war and what alleviating these concerns requires of combatants. First, because killing to communicate is harder morally to justify than killing to eliminate, the presence of a communicative aim will have implications for the rights of those combatants kill. The examples above suggest that the reasons that justify eliminative killing at the micro-level might prove insufficient to justify killing to communicate at either the micro or macro level.[86] For example, the scores of people killed and grievously injured in the Doolittle Raid did not pose any micro-threat to the American crews. Moreover, these people were, at best, only distantly related to the macro-threat posed by Japan to the United States in 1942. Killing to communicate in this example involves reprisals and terrorism. The semiotic resources of the intentional killings that occurred in the Doolittle Raid include facts that should not influence a liability justification to kill in war. The implication is that the rights of those persons killed were not, in fact, forfeit at all.

Second, because killing to communicate requires a communicative aim, we now have concerns about the mixed intentions of combatants. As the circumstances of killing in war travel along the functional spectrum, the primary aim of a combatant's act of killing should affect our moral characterization of his [or her]

[86] In personal conversation with the author, Jeff McMahan has expressed skepticism about the coherence and moral relevance of the distinction between micro and macro-threats. There is good reason for this because once these threats are functionally aligned, one might think the distinction either disappears or is, at least, exposed as morally irrelevant.

agency. The examples of the Doolittle Raid, the Malmedy Reprisal, and the Manchester and Docklands Bombing bear this out. There are morally significant differences amongst the agency of those combatants that carried out these actions. The implication is that a combatant's moral agency could be objectionable depending on its relationship to functional spectrum of killing in war.

The relationship of a combatant's moral agency to the rights of those she intentionally kills magnifies the importance of this second concern. The objectionable agency is what constitutes a violation of the means principle and thus infects the grounds of an eliminative justification. I do not think this is widely recognized in the ethics of war. For example, Lazar recognizes the functional spectrum but misses its implications for the moral agency of those who inflict lethal defensive harm. As he states:

> True, all killing in war is also opportunistic. That is one reason why wars are so hard to justify. But still, intentionally killing civilians is more opportunistic than intentionally killing soldiers; and killing soldiers almost always involves an eliminative dimension. Each kind of killing involves mixed kinds of agency.[87]

Lazar recognizes the problem of mixed agency. But his test for the presence of an opportunistic element is counterfactual. He suggests supposing that a combatant's intended target "[v]anishes." If the combatant can no longer accomplish their intended aim, then killing their intended target "is harder to justify, because it is opportunistic."[88] The characterization of the combatant's agency imposed by the counter-factual test is, therefore, binary. So long as some eliminative aim remains,

[87] Lazar, *Sparing Civilians*, 72.
[88] Ibid., 65.

the combatant's agency will pass muster. We can, however, doubt that the mere presence of an eliminative aim is sufficient to offset the presence of an opportunistic communicative aim. Moreover, while the distinction between opportunistic and eliminative harm helps refine our concern about agency, the problem can become more serious depending on one's account of intentions.

The distinction between eliminative and opportunistic harm can obscure the scope of our concern about agency because it rests on a narrow understanding of the relevance of a person's intentions to the moral permissibility of their actions and the characterization of their moral agency. To see the scope of the functional spectrum's impact on the moral agency of combatants, we can follow McMahan and recognize that the counter-factual test for opportunism relies on excessively narrow descriptions of the agent's intention. For McMahan, such tests leave out morally relevant dimensions of treating another person as an "intentional object"[89] of the agent's action. In short, there are ways harmfully to use a person as a means that extend beyond those cases captured by a counter-factual test of opportunism. Killing to communicate can involve manipulative elements that are also morally salient. Tadros has argued that we should also recognize "manipulative harm" as a morally salient fact of some cases of intentional harm.[90] The opportunism stems from the fact that a combatant profits from the presence of the persons they kill to communicate. The manipulation stems from the fact that a combatant also

[89] McMahan, *The Ethics of Killing : Problems at the Margins of Life*. Pg. 410-1.
[90] Victor Tadros makes the distinction between manipulative and opportunistic harm clear. Cf. Victor Tadros, "Wrongful Intentions without Closeness," *Philosophy & Public Affairs* 43, no. 1 (2015): 52-74; Tadros, "Dimensions of Intentions: Ways of Killing in War," in *The Oxford Handbook of Ethics of War*, 401-15; Tadros, *The Ends of Harm : The Moral Foundations of Criminal Law*.

forcefully co-opt the agency of those they kill *and* their compatriots into the combatant's plans and goals. The violation of the means principle that results from the presence of a communicative aim includes not only the persons killed, but those persons manipulated by the killing.

Both theoretical concerns raise implications for the rights of the persons combatants kill to communicate, and the rights and duties of the combatants who kill to communicate. Any account of liability that we seek to apply to killing in war should address these concerns. Addressing the first concern amounts to a person's liability to harm that necessarily harms and uses the person killed as a means to communicate with others. If there are not sufficient grounds to harm and use that person, it may infect the eliminative justification as well. The person would not, then, be liable to harm at all. Addressing the second concern amounts to having adequate theoretical means to characterize combatant's mixed moral agency along the functional spectrum of killing in war.

§6: Justifying Communication

The question of a person's rights against being harmed and used as a means is morally prior to the question of mixed agency. This is because if a person's actual rights against such acts are forfeit, the effective vitiation of that right is generally permissible. Theoretically justifying the communicative aim of killing a person is a matter of that person's liability to being harmed as a means to avert unjust harms and used as a means to avert unjust harms. So, this sets the course of the argument in this section. I will consider possible justifications for an unjust combatant's liability to killing with a communicative aim and then consider how these

justifications account for the mixed moral agency of the just combatants that intentionally kill to communicate.

There are four possible justifications based on the liability of unjust combatants available to just combatants. However, only one will prove an adequate theoretical reply to our concerns about the rights of unjust combatants and the mixed agency of just combatants. I will explore the four justifications within a familiar scenario: a version of the Tactical Bomber and Terror Bomber cases. I have adjusted these cases to focus on intentional killing within a liability justification. The Tank Crew in these cases are, in short, an ideal set of decision-makers that have good command of the morally relevant facts and act for those reasons.[91] Consider first a baseline set of cases:

> *Terror Tank*: A Tank Crew of 4 just combatants, fighting in a justified war necessary to stop an ongoing genocide of Victims, is on a mission to protect a local village. Cresting the ridge, Tank Crew surmises that a platoon of 30 Enemy Soldiers is in the village and threatens to kill 5 Victims unjustly. Tank Crew knows that demonstrating the awesome power of their tank cannon will cause the Enemy to panic and retreat, and this is the only means of saving the 5. Tank crew kills a Bystander, on the road to the village, because this provides the only opportunity to demonstrate the awesome power of their tank, saving the 5 Victims.
>
> *Tactical Tank 1:* As in *Terror Tank* but Tank Crew kills 1 Soldier, patrolling for other victims, because this provides the only opportunity to demonstrate the awesome power of their tank, saving the 5 Victims.

The Tank Crew in *Terror Tank* are seizing an opportunity present in the circumstances. However, the killing in *Terror Tank* is intuitively impermissible, and

[91] I intend the Tank Crew to be in the same epistemic and intentional status as Jeff McMahan's Bomber Crew. Cf. Jeff McMahan, "Self-Defense against Justified Threateners," in *How We Fight : Ethics in War*, ed. Helen Frowe and Gerald R. Lang (Oxford: Oxford University Press, 2014), 104-37.

the fact that Tank Crew both lethally harms and uses Bystander as a means explains this intuition. Clearly enough, Tank Crew do not have adequate grounds for a liability justification to kill Bystander. If the action is unjustified, then the moral agency of Tank Crew is also objectionable. *Terror Tank* also reinforces the infectiousness of communicative aims. One reason Tank Crew cannot invoke the good aim of saving the Victims is that their intention harmfully to use Bystander morally excludes goods that would otherwise justify the action. Tank Crew's opportunistic and manipulative killing of Bystander morally infects the good results that come by way of killing Bystander.

The killing in *Tactical Tank 1*, on the other hand, remains intuitively permissible. Most would agree that the best explanation of the intuition in this case is that Solider is liable to eliminative killing. But, the reason Tank Crew killed the Soldier was the communicative aim of killing him, and this implies Tank Crew also intend to harm and use Soldier as a means. We need to explain the difference between the cases so that we can justify Tank Crew's actions and correctly characterize their moral agency. This case also serves as an example of the functional spectrum. *Tank1* is a case in which the communicative aim of the inflicted harm is primarily opportunistic because the semiotic resources of the act draw on facts that extend beyond the eliminative aim that ground a liability justification to kill Soldier.

Tactical Tank1 is an example of a response to our concerns that reduces an unjust combatant's liability to communicative killing to his liability to eliminative killing. Namely, Tank Crew in *Tactical Tank1*, and just combatants in general,

usually have a justification for killing unjust combatants eliminatively. This first response reduces concerns about permissibility and moral agency to matters of the eliminative harm inflicted by the just combatants. Most philosophers that write on the ethics of killing in war would hold that Tank Crew has a liability justification for killing Soldier in order to eliminate his potential contribution to the threat of unjust harm. In this case, we have a plausible response to the first theoretical concern. Soldier is liable to eliminative harm. Thus, the grounds of that liability justification are also sufficient to justify any opportunistic or manipulative harms the just combatants inflict.

The reductive solution, however, simply obscures our concerns about the moral agency of the Tank Crew. The reason the just combatants' defensive harm succeeded, and therefore, the reason they intended to kill Soldier was the fact that killing Soldier produced the communicative effect of the tank's awesome power on his compatriots. In both *Terror Tank* and *Tactical Tank1*, Tank Crew's agency involved opportunism and manipulation. Both killings by the tank crews are communicative in that they are intending to demonstrate the power of their weapon, thereby deterring the soldiers from staying to kill the villagers. Both killings would be partially opportunistic, in that each would use the killing of one person as a means of influencing others. I am not sure that characterizing Tank Crew's moral agency in this case simply reduces to the eliminative justification to kill Soldier because of the relationship between intentions and permissibility.

Obscuring concerns about agency and intentions also obscure doubts we might raise along the lines of our first concern above. We might doubt that a

person's liability to eliminative harm is always sufficient to justify all the opportunistic or manipulative harm just combatants inflict on him. First, in the circumstances of *Tactical Tank1,* there is an obvious connection between the eliminative aim of killing Soldier and the opportunity presented by the semiotic resources of killing Solider. It might be that an unjust combatant's liability to eliminative harm also makes her liable to a fair amount of opportunistic and manipulative harm that serves the same aim. When the opportunistic harm serves the *very* same aim as the eliminative harm, it seems the liability to eliminative harm entails liability to such functionally aligned opportunistic harms.[92] But, this functional alignment between the intended eliminative harm and opportunistic harm intended will often not be so clear. This is a consequence of the functional spectrum of killing in war. It is reasonable to suppose that a significant number of cases will involve the kind of disconnect between these purposes that existed in the Doolittle Raid. The threat just combatants eliminate might bear only a vague relationship to the opportunity they intend to seize or the persons they intend to manipulate through killing some to communicate with others.

Turning to the moral agency of Tank Crew and just combatants more generally, reducing this concern to a matter of the unjust combatant's liability to eliminative harm is problematic because the reason just combatants act is related to the opportunistic and manipulative purpose of the communicative aim and not the eliminative purpose. For example, in *Tactical Tank1*, the Tank Crew acts for the

[92] McMahan holds this view. Cf. McMahan, *Killing in War*; McMahan, "Who Is Morally Liable to Be Killed in War."; McMahan, "Liability, Proportionality, and the Number of Aggressors," in *The Ethics of War : Essays*.

reasons derived from the communicative aim of the harm and not the eliminative aim. If Tank Crew intends that opportunistic effect as a means, the grounds that justify killing Soldier in this way should speak to this. It is also the case that if the Tank Crew's intentions matter to permissibility, there will be some good aims that they cannot hold as morally relevant to their liability justifications because of the opportunism and manipulation that attend those intentional acts. The first response to the theoretical problem fails to give an adequate account of the just combatants' moral agency because it leaves us wanting a moral reason that both grounds the liability of Soldier and aligns to the moral agency of Tank Crew. In cases where the communicative aim of a killing plays a relatively minor role in the balance of reasons a just combatant has to kill some and not others, the reductive strategy seems sufficient. But, as the importance of the communicative aim increases to a just combatant's balance of reasons, the reductive strategy appears to falter.

The second response to the theoretical problem is to maximize the liability of unjust combatants. Soldier is, according to such a view, liable to be opportunistically and manipulatively harmed in just this way. Since he is an unjust combatant supporting an unjust war, he seems liable to a wide range of actions that both harm and use him because neither the harming nor the using wrong him. Soldier's liability, on these grounds, could follow from his comparative responsibility for the micro *and* macro-threats of the unjust war. That is, Soldier is more responsible for the ongoing genocide, at least when compared to the Victims in the village. This responsibility, however slight, is enough to ground Tank Crew's

harming and using Soldier as a means to avert unjust harms. This response, following McMahan, emphasizes Soldier's liability as a "matter of justice in *ex ante* distribution"[93] of unavoidable unjust harms. Thus, it endorses a comparative basis of liability to killing in war. But this comparative dimension of liability is controversial in the context of lethal defensive harm. Some, like Lazar, reject it outright.[94] Others raise concerns when the question is one of justifying defensive harm that is opportunistic. We might agree with Haque that "*differences* in *comparative* moral responsibility cannot explain moral liability to defensive killing."[95] This is because our rights against lethal harm are matters of our "non-comparative properties" as human beings. Soldier's right against being lethally harmed and used as a means should be forfeit only if and because his actions make them forfeit.[96]

Even if we agree with McMahan and hold that liability is essentially comparative, we might still have concerns about both the Soldier's liability and the moral agency of the just combatants. The comparative grounds of liability are still subject to the constraints of necessity, proportionality, and effectiveness. While it does not seem to be the case that the Tank Crew violates any of these constraints in *Tank1*, we can imagine cases in which an unjust combatant's comparative moral

[93] McMahan, "Individual Liability in War: A Response to Fabre, Leveringhaus and Tadros." Pg. 299. Cf. McMahan, "Who Is Morally Liable to Be Killed in War."; McMahan, "The Limits of Self-Defense," in *The Ethics of Self-Defense*.
[94] Lazar rejects a comparative basis of liability in *Sparing Civilians*. Cf. Lazar, *Sparing Civilians*. Haque raises concerns that comparative liability implies a person could forfeit their right to life for a relatively minor degree of wrong doing. Cf. Haque, *Law and Morality at War*.
[95] Haque, 262.
[96] Ibid.

responsibility is so slight that killing her to communicate with others could violate one of these constraints on liability. Consider:

> *Tactical Tank2:* As in *Tactical Tank1* but Tank Crew knows that a feature of the unjust government's genocide is that it uses advanced technology to manipulate Soldier's experience so that he reasonably believes Victims are little more than diseased humans that regrettably must be eliminated. Tank Crew kills Soldier, patrolling for other victims, because this provides the only opportunity to demonstrate the awesome power of their tank, saving the 5 Victims. [97]

Killing Soldier in these circumstances remains intuitively permissible. But only just because of Soldier's minimal responsibility. The case can suggest concerns that, as the number of minimally responsible unjust combatants increases in any given circumstance, we will also approach the limits of their liability to opportunistic and manipulative harm. It seems plausible that there is a limit to Soldier's liability to opportunistic and manipulative harm that is consistent with, inter alia, the excuses one might cite in his defense and the number of unjust combatants killed in any given circumstance. This could mean that comparative moral responsibility will not, in all cases, be enough to justify killing an unjust combatant in order to communicate with others. To retain a liability justification to kill unjust combatants along the functional spectrum of killing in war, we need a reason that Soldier's moral responsibility might not always provide because his responsibility is so slight it cannot justify the opportunism and manipulation present in the communicative aim.

[97] The episode "Men Against Fire" of the television series *Black Mirror* gives a particularly vivid portrayal of this kind of case. J. Glenn Gray and Jonathan Glover both offer accounts that explain the psychological power of a combatant's "image of the enemy" and its role in enabling killing in war. Cf. Gray; Glover.

Suppose then, for the sake of argument, Soldier is not liable to be killed opportunistically or manipulatively. It might still be permissible to kill him because of his liability to eliminative killing. But we must explain this solution in a way that accounts for the moral agency of Tank Crew and just combatants along the functional spectrum. The third response accounts for the communicative aim of killing Soldier as a side effect. The side effect communicative aim is one the Tank Crew likely foresaw and hoped would come about but did not intend. *Tactical Tank1* and *Tactical Tank2* could thus be examples of Frances Kamm's doctrine of triple effect. The Tank Crew could be "acting 'because of'" the opportunistic effect of demonstrating the Tank's awesome power and this is "different from acting 'in order to' " bring that awesome power about.[98] This is a controversial distinction because we would have to believe that Tank Crew intended the good effect, saving the five Victims, without intending the means to that effect, killing the Soldier. But this is also a plausible explanation of the difference in these cases. Unlike *Terror Tank*, it seems possible for the Tank Crew to kill the one soldier eliminatively, but only *because of* the opportunistic effect the killing will also have. In short, the opportunistic effect in *Tactical Tank1* and *Tactical Tank2* need not be intended, even though the Tank Crew acted because of this effect. This is not true in *Terror Tank* because the Tank Crew had no eliminative purpose for killing Bystander and so could only intend the communicative aim.

[98] I am indebted to Jeff McMahan for the suggestion that the case is an example of Kamm's principle. Cf. Frances Kamm, "The Doctrine of Triple Effect," *Proceedings of the Aristotelian Society* 74 (2000): 21-39; Frances Kamm, *Intricate Ethics : Rights, Responsibilities, and Permissible Harm* (Oxford: Oxford University Press, 2007).

So, we can justify Tank Crew's actions in Tank1 and Tank2, but we are left with only the contentious distinction between "because of" and "in order to." Suppose this is right and Kamm's principle justifies Tank Crew in Tank1 and Tank2. This is a possible account of Tank Crew's intentions, but not a very likely one. Consider another example:

> *Tactical Tank3:* As in *Tactical Tank1* but Tank Crew first judges that Soldier, who is transporting supplies between bases, is not worth incurring the risk of expending their last cannon round just to eliminate his possible contribution to a threat they might later face. Then, Tank Crew surmises that saving the 5 is well worth the risk of expending the round and kills Soldier, transporting supplies between bases on the road, because this provides the best demonstration of the awesome power of their tank, saving the 5 Victims.

In Tank3 the communicative aim of Tank Crew killing Soldier is opportunistic. However, it is also no longer plausible to suppose Tank Crew's intentions are such that their action can meet Kamm's doctrine of triple effect. So, the third response based on triple effect is implausible in many cases. But the problem is more serious than this because eliminative harm that has a communicative aim occurs in circumstances where the doctrine of triple effect cannot apply, even if justified and plausible. I think the cases are rare where just combatants might be able to invoke Kamm's doctrine of triple effect; therefore, just combatants must often find a way to justify an intended opportunistic harm on the grounds provided by the communicative aim.

We can see this by taking one step closer to the circumstances just combatants often face in war by presenting *Tactical Tank* as a choice among defensive options. Consider:

> *Tactical Options:* A Tank Crew of 4 just combatants, fighting in a justified war necessary to stop an ongoing genocide of Victims, is on a mission to protect a local village. Cresting the ridge, Tank Crew surmises that a platoon of 30 Enemy Soldiers is in the village and threatens to kill 5 Victims unjustly. Tank Crew knows that demonstrating the awesome power of their tank cannon will cause the Enemy to panic and retreat, and this is the only means of saving the 5. Tank Crew sees two Soldiers, Bob and Joe, patrolling opposite ends of the village looking for other Victims. Tank Crew kills Bob because he is closer to the platoon and thus provides the only opportunity to demonstrate the awesome power of their tank, saving the 5 Victims.

Tank Crew's action in *Tactical Options* still seems intuitively permissible. But this cannot be for the same reasons that *Tactical Tank1, Tactical Tank2,* or *Tactical Tank3* were permissible. Once there are two options, killing Bob and killing Joe, we change the relationship between Tank Crew and their intended actions. *Tactical Options* is relevantly similar to Kamm's *Double Track* trolley case:

> Trolley is threatening to kill five Victims. Operator can switch Trolley onto either Loop A or Loop B. Loop A is unoccupied, so the Trolley will still kill the five. Loop B is occupied by one Worker. Hitting Worker will stop the Trolley and save the five Victims.[99]

Kamm claims that this case shows that when we choose options that involve effects that other options do not have; we exhaust the appeal to the doctrine of triple effect. The just combatants' "because of" the communicative aim has now become an "in order to" send the message when they chose that option over others. This is one way in which the presence of options affects the permissibility of our actions. If I choose an option that has an effect, over other options that lack that effect, and all else is equal, I intend that effect.[100]

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[99] Adapted from Kamm's case. Cf. Kamm, "The Doctrine of Triple Effect," 36; Kamm, *Intricate Ethics : Rights, Responsibilities, and Permissible Harm*.
[100] Kamm, "The Doctrine of Triple Effect."

The circumstances of *Tactical Options* are a common moral phenomenon in war. Eliminative harm that also involves opportunism and manipulation via the message it sends is a durable feature of war that is morally salient. *Tactical Options*, *Tactical Tank1, 2, 3* and *Terror Tank* reinforce the truth of the functional spectrum of killing in war. The intended purposes might invert depending on which aim best explains the intention of the just combatants that are inflicting the harm. On one end will be acts that are primarily opportunistic or manipulative and taken for those reasons – such as *Tactical Options* and *Tactical Tank2* and *Terror Tank.* On the other end will be acts that are primarily eliminative and taken for that reason, but still, have some opportunistic effect that features in the justification of inflicting the lethal harm. Along the spectrum, we can anticipate the communicative aim mattering in the three positive ways or infecting the just combatants' liability justification as suggested above. In a wide range of these cases, the theoretical concerns raised by communication stand in need of a response. We need some plausible way to accommodate the communicative aim of a killing within a liability justification while accounting for this aim's relationship to the just combatant's moral agency.

A more promising response to this spectrum of cases is to justify the communicative aim of killing in war by claiming Tank Crew extended the permissibility of eliminative harm to the communicative harm they inflicted. This amounts to a somewhat novel application of Kamm's "Principle of Secondary Permissibility (PSP)." She states:

> It (PSP) sometimes allows as an alternative an act that would not have been permitted if it were the only act one could perform, when this

> alternative act is the one, of all those that could reasonably be done, that minimizes the harm that would permissibly have been done to the same person.[101]

As stated, the PSP is not an exact fit for these cases. Tank Crew, in these cases, is not minimizing the harm inflicted on the soldiers they kill. But there are other applications Kamm makes of the PSP in which one permissibly minimizes the overall harm through means that are no worse for the persons that are harmed.[102] So when just combatants can rely on an unjust combatant's liability to eliminative killing, then they can extend this permissibility to the communicative aim.

The appeal to Kamm's PSP alleviates our concerns about the grounds of Soldier's liability to such harms. Since it would be permissible to kill these unjust combatants eliminatively and killing them opportunistically or manipulatively is at least no worse for them in terms of the harm inflicted, then the just combatants can justify any additional wrongs inflicted on the unjust combatant by using them as a means through the minimization of the overall unjust harm inflicted by saving the 5 innocent Villagers in *Tactical Tank1*, *Tactical Tank2,* and *Tactical Option*s. The appeal to PSP also seems plausible in many of these cases along the spectrum. It meets the first theoretical concern because the unjust combatant's effective rights against killing in these cases yield to the moral reasons that made their actual rights potentially forfeit – namely the minimization of unjust harms for which they bear moral responsibility.

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[101] Kamm, *Intricate Ethics : Rights, Responsibilities, and Permissible Harm*, 171.
[102] Frances Kamm, "The Trolley Problem and Aggression," *Social Philosophy and Policy* 32, no. 2 (2016): 1-17; Kamm, *Intricate Ethics : Rights, Responsibilities, and Permissible Harm*; Frances Kamm, *The Moral Target : Aiming at Right Conduct in War and Other Conflicts* (Oxford: Oxford University Press, 2016).

Kamm's PSP can also adequately characterize the mixed agency of Tank Crew when they intentionally use the killing of one unjust combatant to communicate to others. In the circumstances where just combatants have options, there is an important connection between the Tank Crew's intentional choice of one option over another and the overall justification of the act. Here we might consider the *Tactical Options* cases as examples of another lesson Kamm's doctrine of triple effect offers. Namely, our intentions are an important feature of any case in which a greater good justifies an act that is *pro tanto* wrong. For Kamm, the doctrine of triple effect "implies that the greater good, which justifies the bad side effect, need not be intended for the act to be permissible."[103] Kamm suggests this gives us reason to think that intention is not importantly related to permissibility. But this is contentious. If we agree that the just combatants' intentions and motivations in action do affect the permissibility of those actions, then choosing an option in order to produce some good effect not only involves intending that effect but seeks to justify that act in terms of its good effects.[104] If this is so, an appeal to the PSP implies and requires Tank Crew actually to intend the good. That is, Tank Crew can only invoke the semiotic resources of a killing act as facts that ground their justification to so act if they see their actions and choices as leading to the good effect and not merely bringing it about as an unintended, merely foreseen good side-effect.

[103] Kamm, *Intricate Ethics : Rights, Responsibilities, and Permissible Harm*.
[104] Tadros, *The Ends of Harm : The Moral Foundations of Criminal Law*; Tadros, "Wrongful Intentions without Closeness."

The requirement to intend the good effect connects a just combatant's intentions to the reasons that ground their actions and accounts for mixed agency. When a just combatant's actions involve mixed agency, the PSP requires that the reason for which they act is also the reason that does the most justificatory work. Because the communicative aim both lethally harms and uses an unjust combatant as a means to a greater good, then just combatants had better intend a good effect that bears the proper relationship to the unjust combatant. At the very least, as Kamm points out, it could be a defect of practical reason for the Tank Crew to not intend the good.[105] It is plausible to think that just combatant's bear a stringent duty to employ effective practical reason in the pursuit of just aims. More strongly, I think there are grounds to claim that the functional spectrum of killing in war will often require just combatants intend the good aim required for permissible use of eliminative harms that have communicative aims. Just combatants can meet the theoretical concerns raised by the communicative aim of killing in war. When a just combatant extends the permissibility of an eliminative killing and intends the good effect that communication serves, they make the fact that killing some will reduce overall unjust harms to others available to the balance of moral reasons that ground their actions. This makes my first claim that just combatants may permissibly kill to communicate sufficiently plausible.

§7: The Principle of Scrutable Harm

There is a plausible objection to my conclusions so far. The communicative aims of harmful acts require a wider system of social meaning, and there are two

[105] Kamm, *Intricate Ethics : Rights, Responsibilities, and Permissible Harm*.

reasons to doubt such contexts exist in war. Killing in war, in short, does not communicate. First, the instrumental role attributed to the communicative aim implies a state of discourse that is sensible and predictable to all the belligerent parties. This could tacitly commit us to a fundamentally rational explanation of war, or those persons fighting in war. These are two things that are, often enough, manifestly irrational. Second, and more troubling, even if we can meet the first doubt in principle, combatants may be invoking an instrumental rationale for killing that we have strong reason to doubt. For, the instrumental value of the communicative aim of killing in war is not only a matter of the intended message. It is, perhaps centrally, also a matter of the audiences' interpretation. This means that unlike the eliminative aim of killing, the instrumental value of the communicative aim is subject to the actions and agency of the audience. There are good reasons to doubt, in general, that combatants enjoy any meaningful control over the audience of the messages they send no matter their intentions.[106]

My response to this objection is to grant its force but take it to imply a normative guide for just combatants that kill with communicative aims. Rather than debunking the argument so far, I think the objection implies a principle of scrutable harm:

> *Scrutable Harm*: just combatants are morally required intentionally to kill in a way that communicates reasons to their enemies to act in a way that minimizes unjust harms.

[106] I owe thanks to Cheyney Ryan, Michael Robillard, and Janina Dill for pressing these points.

This principle accounts for the moral relevance of just combatants' intentions to permissibility given the functional spectrum of killing in war and the doubts we have about the instrumental value of communicative aims.

Three further considerations brought up by the semiotic resources of killing in war suggest scrutable harm is morally required of just combatants. First, is the prospect of a *modus vivendi*. Recall that what we communicate is not simply a matter of what we intend, but also a matter of how it is interpreted. The semiotic context of killing in war created by the audience, the message, and the expected response, increases the moral value of a just combatant's instrumental rationality. One thrust of my argument so far is that we can plausibly view exchanges of military force as a kind of language situated within a wider system of social meaning. That social context includes the enemy. In short, insofar as the message sent by killing some and not others make a *modus vivendi* with the enemy more likely, sending that message seems morally required. The message that moves these exchanges from military force to armistice and, hopefully, a resumption of diplomacy, or makes these more likely, is an option just combatants should not forego. Second, just combatants may have a moral requirement to communicate a punitive message as well. If states and civil society owe their members clear punitive messages – like the ones an effective criminal justice system sends to the victims of crimes – this requirement might carry to the context of resisting unjust aggression.

Finally, the principle of scrutable harm requires just combatants to address their enemy in a morally important way. When just combatants have a choice

between addressing their enemies as obstacles to be eliminated, or as individuals with normative control of their choices and aims, it is plausible to require them to choose the latter. This would mean killing that communicates would satisfy a criterion that Thomas Nagel claims is central to justifying killing in war:

> Hostile treatment, unlike surgery, is already addressed to a person, and does not take its interpersonal meaning from a wider context. But hostile acts can serve as the expression or implementation of only a limited range of attitudes to the person who is attacked. Those attitudes, in turn, have as objects certain real or presumed characteristics or activities of the person which are thought to justify them. When this background is absent, hostile or aggressive behavior can no longer be intended for the reception of the victim as a subject. Instead, it takes on the character of a purely bureaucratic operation.[107]

Killing to communicate forces just combatants to address enemy combatants in at least two morally important ways. Communication addresses "real or presumed characteristics" of the combatant's intentions and actions. One must presume the combatant has compatriots and is part of a larger plan, in order to kill that combatant in a way that communicates to those compatriots and influence their larger plan. Communication also addresses the enemy combatants as a group of persons with authority over their own ends. To communicate reasons for action, one must not only presume, but attend to, the enemy combatants' rationality in terms of ends that matter to them in order to understand how they will interpret the message. If killing in war is to avoid the "character of a purely bureaucratic operation" in which one side more efficiently eliminates the other, then just combatants should see beyond elimination and kill to communicate when the circumstances arise. There is, of course, more to say about a principle of scrutable

[107] Thomas Nagel, "War and Massacre," *Philosophy & Public Affairs* 1, no. 2 (1972).

harm, but I think it is sufficiently plausible. The eliminative and communicative aims of killing in war are durable and widely used rationales in military operations. It seems reasonable to require just combatants to place the instrumental effectiveness of these rationales in service to the minimization of unjust harms, the prospects of a *modus vivendi*, a possible punitive message, and the conceptualization of their enemy as persons, through the effective communication of reasons to their enemies.

§8: Unjust Communicative Aims

So far, I have argued that just combatants can justify killing to communicate and that, when possible, there are reasons to think scrutable harm is morally required. My argument suggests the message just combatants send when they kill can be a permissible means to achieve just ends and that the instrumental value of the communicative aim can give just combatants decisive moral reasons to pursue those aims. This is not the case for unjust combatants. For, it is theoretically possible that an act of killing in war could be unjust solely on the grounds of its communicative aim. The message can count as a good or lead to a good – but that message can also be something combatants should not do precisely because it harms the persons they kill and uses both the persons they kill and their compatriots as an impermissible means to unjust aims. In short, the infectiousness of a communicative aim is a moral problem that unjust combatants cannot surmount.

If it is true that the presence of a communicative aim screens the moral reasons that justify killing eliminatively, then we will likely have to count the

communicative aim of killing in war as a mark against the intuition that just and unjust combatants share a similar set of moral rights and privileges. What Michael Walzer calls the "moral equality of soldiers" and is now known as the doctrine of the moral equality of combatants (MEC).[108] Walzer offers two succinct arguments for the MEC:

> … when soldiers 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. In both cases, military conduct is governed by rules; but in the first the rules rest on mutuality and consent, in the second on shared servitude.[109]

The MEC follows, according to Walzer, from either the consent of combatants or the status of combatants as tools of the state or group at war. The first argument amounts to a waiver of rights on the part of combatants that renders their killing in war morally permissible. The second argument relies on the moral context of being a combatant in war – soldiers are young, ill-informed, and war is a crucible that greatly diminishes one's moral responsibility – to ground equal permissions to kill other combatants to eliminate the threats of harm they pose. Lazar has recently defended the basic thrust of the MEC along the two lines of consent and the moral context of war. He argues that just combatants consent at least to eliminative killing that protects their compatriot just noncombatants. Furthermore, due to the moral context of war, an unjust combatant's killing of just combatants at least serves an eliminative aim. Namely, the elimination of the threats of harm just combatants can inflict. Lazar's defense of the MEC is limited and nuanced such that the MEC

[108] Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 2015), 34.
[109] Ibid., 37.

is muted. Just and unjust combatants do not enjoy fully symmetrical permissions, but the consent of just combatants and the vagaries of war ground positive moral reasons for unjust combatants to kill just combatants.[110] However, the presence of a communicative aim argues decisively against a strong, Walzerian, interpretation of the MEC, and renders the positive moral reasons Lazar derives effectively screened from a unjust combatant's liability justification to kill just combatants.

Many now doubt that even fully voluntary service as a just combatant amounts to the type of rights waiver Walzer would need to ground the liability of just combatants to eliminative killing. The presence of the communicative aim that attends nearly all killing in war deepens this doubt because, essentially, we would have to hold that just combatants consent not only to their killing, but also the instrumental value their death provides to the unjust side. No one holds that combatants consent to losing the wars they fight. Lazar's use of consent does not depend on this robust kind of consent. Nonetheless, holding that just combatants consent to the communicative aim that attends their killing strains credulity because it would be tantamount to consenting to the wrongful using of their combatant and noncombatant compatriots on the just side. The functional spectrum suggests that when an unjust combatant kills eliminatively, there will be an element of opportunism and manipulation. Killing some to influence others is a central rationale for killing in war, this is often true enough of those who fight for unjust aims. It is easy to doubt just combatants can, even in principle, consent to

[110] Lazar, *Sparing Civilians*, Chapter 5.

having their compatriots influenced and wronged by the eliminative killings inflicted by unjust combatants.

War is indeed a demanding crucible, and this moral context should color our understanding of an unjust combatant's actions. However, many hold this context amounts to nothing more than a set of excusing conditions for the unjust side. Lazar's use of the eliminative aim of the harm unjust combatants inflict discounts the communicative aims that attend nearly all such actions. Moreover, unjust combatant can justify such aims as a means to minimizing unjust harm, as just combatant's plausibly can. In fact, the only option for unjust combatants is to make the eliminative harm they inflict *worse*. For, if unjust combatants were to intend their aims in the practically rational way required for just combatant to justify the communicative aim of killing in war, then they would intend both the wrongful act and the bad aim of the unjust war. Moreover, they not only harm and use the persons they kill; they also harm and use their compatriots by trying to compel them to abandon important just aims that many have sacrificed to achieve. Unjust combatants either employ eliminative harms that have an unjustified communicative aim or, they intend the wrongful act and the bad aim. If killing in war involves eliminative harm that has opportunistic and manipulative effects, then such aims morally infect the grounds of even eliminative killing. This would mean a standard reason we might cite as grounds for unjust combatants to kill just combatants, eliminative self-defense and other defense against lethal attack, might have to be seriously diminished or qualified. At least, we cannot assume most just combatants are liable to eliminative killing in the way most unjust combatants

plausibly are. Moreover, if killing in war is essentially communicative even when it involves eliminative harming, and unjust combatants cannot justify this kind of opportunistic effect, then those who kill in support of unjust aims are possibly closer to terrorists than just combatants. On both scores, we have good reason to doubt that just combatants and unjust combatant have even Lazar's muted set of morally equal reasons that ground eliminative killing.

§9: Conclusion

Killing eliminatively in war often has an opportunistic or manipulative communicative aim. Combatants intentionally kill some persons to send a message to their compatriots. If the best justification for killing in war is an instrumental liability justification based on the defense of rights, then it is important to intend that good effect which grounds the justification of the bad effects one brings about in its pursuit. When just combatants intend the communicative aim that comes by way of the eliminative harm they inflict, they increase the chance of aligning means and ends and place their instrumental rationality in service to their moral judgment. Just combatants are not only morally permitted; they are morally required to kill to communicate when these circumstances arise. Unjust combatants, on the other hand, face a new challenge to the morality of their defensive actions in war. Killing in war often communicates. This means unjust combatants will not only inflict unjust harm; they will also intend a wrongful harm. This would be a new reason to suppose the MEC is mistaken. Killing in war often eliminates threats, but whom we eliminate sends a message to others. We often want this message to persuade, to give those others reason to abandon unjust aims

or their threats of unjust harms. We might object to using the killing of some to communicate to others – such killing both harms and wrongs. Just combatants can meet this objection; they can and should inflict eliminative harm that also communicates reasons to the enemy and minimizes the infliction of unjust harms.

Paper 3: Uncertainty and Killing in War

§1: Introduction

Soldiers face uncertain options when fighting in war. Success in warfare, moral or otherwise, reliably involves soldiers choosing among many available means to achieve their ends. Very often, soldiers and combatants are unsure about whom they ought morally to kill when considering their options. Sometimes, this uncertainty arises out of empirical uncertainty: combatants might not know how much their chances of averting unjust harms will improve by killing enemy combatants. Empirical facts matter to the permissibility of killing, and they are hard to come by in war. In a further turn of the screw, combatants also face moral uncertainty. Here, the uncertainty arises out of not knowing, for example, how to weigh a probability that a small number of individuals will suffer massive, concentrated just harms against a similar risk that a much larger number of individuals will suffer smaller, diffused unjust harms. Moral facts like these matter to the permissibility of killing, and they are hard to come by, not just in war, but at all.

For some moral philosophers, foremost among them Seth Lazar, the massive harms soldiers must invariably inflict and the impossible complexity of the choices they make pose serious challenges to an idea that has dominated just war theory and the ethics of killing in war over the last few decades. The moral philosophers advancing the now dominant view of the just war, reductivists such as Cécile Fabre, Helen Frowe, and Jeff McMahan, have argued that the justifications for killing in war reduce to justifications for killing in self- and other-defense or killing as a lesser evil. Call this reductive individualism. The central idea of reductive individualism

is that killing in war reduces to questions of individual morality. That is, that the morally best option in war is the distribution of unavoidable harms according to individual moral responsibility. In this paper, I will suggest that criticism of reductivist theories along the lines of uncertainty is misguided because the reductivist's focus on individual responsibility fairly distributes the unjust harms and wrongs that arise in the scale and uncertainty of killing in war.

Beyond resolving theoretical debates in the ethics of killing in war, the scale of harms and the uncertainty involved in warfare matter because these two conditions raise concerns about the rights of the persons soldiers kill and concerns about the moral agency of the soldiers who gamble with the lives and rights of others on such massive scales. In both forms, uncertainty raises concerns about a combatant's access to the grounds of their first order moral judgments, like permissibility, about the ability of any normative theory of killing in war to be action-guiding, and about judgments of combatant action in war that are relevant to attributing praise, blame, and moral responsibility. It is, therefore, a matter of some importance to understand how conditions of empirical and moral uncertainty interact with the permissibility of killing in war. I will argue that reductive theories of killing in war meet the challenge posed by the scale and uncertainty of warfare because these theories can coherently account for the rights of individuals and the moral agency of combatants within such circumstances.

I plan to explore the scale and uncertainty of warfare along two tracks. The first track will be a refinement of the necessity constraint within a liability justification for intentional killing in war. I will argue against the dominant

formulation of the necessity constraint as a matter of satisfying some version of a moral principle to minimize harm. In its place, I will offer an expanded version of Jeff McMahan's "tradeoff formulation" of the necessity constraint because this formulation accounts for the wider set of moral considerations relevant to liability justifications when we introduce the scale of warfare.[111] The second track will investigate the interaction of the tradeoff formulation of necessity with the conditions of moral and empirical uncertainty. I will argue that in these conditions, combatants should weight the utility of their options according to the grounds of a liability justification and maximize the expectation that those persons most responsible for the circumstances in which unjust harms and wrongs arise suffer those costs.

In what follows, I will use the terms of art familiar to just war theory: Combatants are, like soldiers, those who directly participate in hostilities. Noncombatants are those who do not directly participate. Wars require belligerent sides, and I will use "just" and "unjust" to distinguish between these. A just combatant, therefore, is a combatant who fights with a just cause and not for unjust aims. An unjust combatant is one who fights for unjust aims. Just and unjust noncombatants are simply noncombatants on the just and unjust sides, respectively. My focus on liability justifications leaves to one side other types of justifications for inflicting lethal harm that are relevant to killing in war. For example, the killing of some persons might, in the circumstances, represent a

[111] McMahan, "Proportionality and Necessity in Jus in Bello" in *The Oxford Handbook of Ethics of War;* McMahan, "The Limits of Self-Defense," in *The Ethics of Self-Defense*.

substantially lesser evil than killing others. While the scale and confusion of war may be relevant to other ways of justifying the infliction of harm, I do not consider them here. I am interested in the relevance of scale and uncertainty to the balance of moral reasons that ground permissible killing in war based on liability. I will also understand the first order moral judgment of permissibility in the following way: an action φ is morally permissible if there is no moral reason, all things considered, not to φ. An action φ is morally justifiable if there is no moral reason, all things considered, against φ and a positive moral reason to φ. Finally, an action φ is morally required if φ is justifiable, and there is a decisive moral reason to φ. I do not defend this account of permissibility but assume it throughout.[112]

§2: The Role of Necessity

To begin the first track, I will discuss a few general features of the necessity constraint's theoretical role within plausible accounts of defensive harm. The concept of necessity is a familiar constraint on justified intentional killing in war. Most philosophers recognize that satisfying the necessity constraint is a matter of two judgements that follow from the instrumental nature of the justifications for killing in war. The first judgment concerns the effectiveness of defensive harms. Killing a combatant is necessary if that killing contributes to an outcome that is morally important enough to offset the harm inflicted. For example, killing the

[112] This understanding of permissibility is common and follows, among others, Derek Parfit and Jeff McMahan. Cf. Parfit, *On What Matters*; McMahan, *Killing in War*. Also, I acknowledge from the outset that liability does not, in every case, amount to a decisive moral reason to kill in war. Therefore, when I use the phrase "liability justification" I mean the grounds relevant to establishing a person's liability to defensive harm in a given set of circumstances. While this provides a positive moral reason to distribute unavoidable harms to the liable person, that reason can be overridden by other moral reasons.

persons most responsible for the circumstances in which the threats of unjust harm arise is necessary if those defensive harms avert the infliction of unjust harm on innocent persons. Necessity, therefore, is in part a matter of the effectiveness of a harm a person might inflict in self or other defense. The second judgment follows from the widely held intuition that combatants should minimize the intentional harm they inflict and the unintentional harm they foreseeably allow while pursuing such outcomes. Killing a combatant is necessary if that killing is the least harmful option available to avert unjust harms to innocent persons. For example, if a defender can avert the unjust harms above by pinching those most responsible instead of killing them, then, as a matter of necessity, that defender should pinch.

Standardly, a person is liable to be killed only when the infliction of that harm is a proportionate and necessary means of averting unjust harms for which she bears sufficient moral responsibility.[113] How much a defender's moral agency matters to the necessity constraint depends on how much it involves the grounds of a liability justification, that is, the degree to which a defender's moral agency involves the facts that constitute what Jeff McMahan has called the agential and circumstantial conditions of a liability justification.[114] It is also important from the outset to distinguish the moral reasons that ground a liability justification, the agential and circumstantial conditions, from the judgment that a given act is necessary, given those moral reasons. Philosophers often explore the necessity

[113] The account of liability I use through most of the paper is meant to be accommodating to most of the plausible accounts of liability to killing in war. Cf. Jeff McMahan, *Killing in War* (Oxford: Clarendon Press, 2009); Cécile Fabre, *Cosmopolitan War* (Oxford: Oxford University Press, 2012); Helen Frowe, *Defensive Killing* (Oxford: Oxford University Press, 2014).
[114] McMahan, "Proportionality and Just Cause," 433; McMahan, "Liability, Proportionality, and the Number of Aggressors," in *The Ethics of War : Essays*.

constraint on a liability justification in the following kinds of contexts:

> *Necessity*: Culpable threatens unjustly to kill Victim. Victim can either kill Culpable or break his arm to avert the unjust killing. Therefore, Victim, as a matter of necessity, can permissibly only break Culpable's arm to avert the unjust killing.

For many philosophers, cases like *Necessity* demonstrate the two judgments that the necessity constraint is supposed to capture. First, there is a judgment that the defensive harm a defender is about to inflict will, in fact, contribute to the morally important outcome. In this case the options are φ, killing Culpable, and ψ, breaking Culpable's arm. Each option, implied by the facts of the case, instrumentally serves the morally important outcome of saving Victim's life and is therefore, according to this first judgment, necessary. The first judgment makes the necessity constraint sensitive to the circumstantial conditions of a liability justification, like those surrounding the effectiveness of defensive harms. Second, there is a judgment that the defensive harm a defender inflicts is the least harmful means by which to achieve the morally important outcome. In this case, φ represents significantly more harm than ψ. Only ψ, then, accounts for the strong intuition that Victim should minimize the harm she inflicts or allows in the pursuit of saving her life. Therefore, ψ, according to this second judgment, is necessary. The second judgment makes the necessity constraint sensitive to our moral concerns about the circumstances in which threats of unjust harm arise. These conditions generate moral reasons, for example those reasons that follow from the minimization of harm, that we think the necessity constraint should capture for defenders. The result is two necessary criteria that are only jointly sufficient to satisfy the necessity

constraint within a liability justification. For many, cases like *Necessity* suggest a formulation of necessity as a matter of selecting the least harmful means that instrumentally contribute to defense.[115] That is, a defensive act φ is necessary if and only if φ averts unjust harms with the least amount of total harm inflicted or foreseeably allowed.

However, cases like *Necessity* do not sufficiently capture the scale of warfare suggested above. Just combatants often face a number of options that vary according to the amount of harm they inflict and the actions that bring that harm about. For example, consider:

> *Tradeoffs*: Two Hitmen culpably threaten to kill Victim unjustly. Defender has three options: (1) release a boulder blocking Victim's escape that foreseeably kills both Hitmen and breaks Victim's toe, (2) Shoot both Hitmen, and (3) throw a grenade that stuns both Hitmen and gives Bystander a non-lethal but significant wound.

There are a few features of the role of the necessity constraint within a liability justification evident in these two cases that are worth spelling out. The first feature we can draw from cases like *Necessity* and *Tradeoffs* is that necessity compares alternate means of defense. The judgments of necessity require a potential defender to consider the moral costs across all their defensive options. This role helps explain why necessity is sensitive to considerations of defensive harming, like effectiveness, and distinct from other constraints on a liability justification, like proportionality. In *Necessity*, the distinction between necessity and effectiveness is clear. The facts of the case imply that killing Culpable and breaking Culpable's arm are equally

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[115] Frowe, *Defensive Killing;* Rodin, *War and Self-Defense*; McMahan, *Killing in War*; Seth Lazar, "Necessity in Self-Defense and War," *Philosophy & Public Affairs* 40, no. 1 (2012): 3-44.

effective means to avert the unjust harm. While killing Culpable remains effective, it is unnecessary. The same is true in *Tradeoffs*. All three options provide effective means of defense, but only one is necessary.

Necessity and *Tradeoffs* also show how judgments of proportionality and necessity are distinct in both the types of moral costs they consider and the terms of those judgments. The types of moral costs involved in proportionality calculations are the absolute moral costs of action φ compared against doing nothing. For example, in *Necessity*, the absolute costs of φ (killing Culpable) and ψ (breaking Culpable's arm) are both proportionate. Proportionality is more complicated in *Tradeoffs*. This is because it is a case in which two distinct kinds of proportionality calculations that bear on a liability justification are present. "Narrow proportionality" is a matter of the proportionality of inflicting a defensive harm on a liable person. "Wide proportionality," on the other hand, is a matter of the proportionality of the harm caused to an innocent person as a side effect.[116] The distinction between narrow and wide proportionality highlights the relationship between the proportionality constraint and the moral responsibility of the persons who will suffer from intentional and foreseen defensive harms. That relationship helps to explain why the types of moral costs considered in both narrow and wide proportionality are the absolute costs. When Defender considers each option on its own – (1) the boulder, (2) shooting the Hitmen, (3) the grenade – each remains narrowly and widely proportionate in absolute moral costs.

The cases also show that the terms of proportionality calculations are

[116] Jeff McMahan, *Killing in War* (Oxford: Clarendon Press, 2009), 19-29.

impartial but not impersonal. The moral value of the outcome, the averted unjust harms, must be goods for some person or group of persons that sufficiently offset the infliction of defensive harms on liable persons or allow side-effect harms on other persons. In *Necessity*, both φ and ψ are proportionate in the narrow sense because the outcome of each action is good for Victim. In *Tradeoffs*, all three options are narrowly and widely proportionate because the outcome of each action is good for Victim. Moreover, the proportionality calculations in each case are insensitive to impersonal goods. For example, suppose in *Tradeoffs* that Defender knows that using the boulder will trample the last of a rare and beautiful species of flower. Intuitively, this impersonally bad outcome does little to affect any proportionality calculation. In fact, it suggests a stronger claim: The moral reasons we generate from these impersonal value judgments simply do not matter to our narrow or wide proportionality calculations. There is support for this claim as well within the ethics of killing in war. Many philosophers hold that only certain goods – those associated with the achievement of just causes – can count in both narrow and wide proportionality calculations.[117] The impersonal benefits of waging war – such as a thriving economy, or weapons programs that advance scientific knowledge – are screened out of our proportionality calculations. Understanding the role of proportionality calculations as comparisons of absolute moral costs in impartial terms explains and supports this position.

The role of the necessity constraint requires that defenders consider

[117] McMahan, *Killing in War*; McMahan, "Proportionality and Just Cause."; David Rodin, "Justifying Harm," *Ethics* 122, no. 1 (2011): 74-110.

impersonal value because of the instrumental nature of the liability. Within a liability justification, the justified harms inflicted on even highly culpable persons remain intrinsically bad from the impersonal point of view.[118] This is a key difference between necessity and proportionality. Satisfying the necessity constraint is different from proportionality because defenders must compare the marginal costs amongst the set of defensive options available to them in the circumstances.[119] It is worth noting from the outset that marginal costs also include the moral costs of not acting. As is true of both cases above, the circumstances in threats of unjust harm include options of not acting in self or other defense. In *Necessity*, the marginal cost arises from a marginal comparison of the defensive options: φ (killing Culpable), ψ (breaking Culpable's arm), or δ (submitting to Culpable). The marginal costs amongst these options resolve to the death of a person or the breaking of a person's arm. In this case, the increased harm inflicted on Culpable or Victim through their respective deaths is a higher marginal cost than the breaking of Culpable's arm. This helps explain why ψ is the necessary option in *Necessity*. It provides the morally best trade for the harm inflicted on Culpable because it achieves the good outcome at a lower moral cost.

In contrast to proportionality calculations that are restricted to the impartial value of absolute moral costs set by the moral responsibility of those who suffer

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[118] There is wide support for this claim in the literature. Cf. McMahan, *Killing in War*; Rodin, "The Lesser Evil Obligation," in *The Ethics of War : Essays*; McMahan, "Liability, Proportionality, and the Number of Aggressors," in *The Ethics of War : Essays*.

[119] Following the philosophical literature on uncertainty, I borrow the term "marginal" from economics. The term has different uses, but I use it here to capture the marginal costs and benefits of an option compared to the costs and benefits of alternative options. Cf. Seth Lazar, "Deontological Decision Theory and Agent-Centered Options," *Ethics* 127, no. 3 (2017): 579-609; Brian Weatherson, "Running Risks Morally," *Philosophical Studies* 167, no. 1 (2014): 141-63; Lara Marie Buchak, *Risk and Rationality* (Oxford: Oxford University Press, 2014).

defensive harm, the judgments of necessity in the cases above require Victim and Defender to compare the impartial and impersonal moral value of the marginal costs of each option. This suggests that, unlike proportionality, the necessity constraint is sensitive to the moral responsibility of defenders. This allows us to explain why the marginal costs of (1) satisfy the necessity constraint and the others do not. Options (1) – (3) are impartially better trades between the harm inflicted and the harm averted and as such are narrowly and widely proportionate. However, given Defender's capacity to act and the options available in the circumstances of *Tradeoffs*, only option (1) is an impartially better trade *and* the impersonally best trade in the circumstances. This suggests that the necessity constraint is sensitive to a defender's moral responsibility.

§3: The Formulation of Necessity

However strong our intuition that just combatants should minimize harm might be, the prior discussion suggests a revision of the second judgment above. To be sure, this will often be the option that minimizes the harm one inflicts. However, there is much more to say that suggests that the scope of considerations relevant to the necessity constraint is much wider.[120]

The formulation of the necessity constraint is meant to capture our intuitions about the importance of minimizing harms. But the importance of minimizing harm can conflict with our intuitions about the rights and agency of aggressors and defenders once we return to judgments about instrumentality and the least harmful

[120] Patrick Tomlin suggests a similarly wide scope for the necessity constraint. Cf. Patrick Tomlin, "Distributive Justice for Aggressors," *Law and Philosophy* (Forthcoming).

means above. Consider how Tradeoffs above provides an example of decisive counterexamples to understanding the formulation of the necessity constraint in terms of minimized harm *simpliciter*. Consider:

> *Tradeoffs*: Two Hitmen culpably threaten to kill Victim unjustly. Defender has three options: (1) release a boulder blocking Victim's escape that foreseeably kills both Hitmen and breaks Victim's toe, (2) Shoot both Hitmen, and (3) throw a grenade that stuns both Hitmen and gives Bystander a non-lethal but significant wound.

It remains intuitively clear that Defender should not choose (3). However, (3) is the least harmful means. However, it is intolerable to think that morality demands that Bystander should bear such harms to the benefit of the Hitmen. So, the "least harm" formulation gets the wrong result in cases like *Tradeoffs*. This is because the necessity constraint often involves morally important features that go beyond concerns of the total amount of harm involved.

To account for examples like *Tradeoffs*, many philosophers have followed the work of McMahan and Seth Lazar and now hold a revised formulation of the necessity constraint. We can revise the first judgment concerning the instrumental role of a defensive harm after considering how that judgment interacts with the agential and circumstantial conditions that ground a liability justification. McMahan notes that the instrumental effectiveness of defensive options often comes in degrees: a defensive act can have both a "higher probability of successful defense," and offer a "more complete defense."[121] These degrees of effectiveness can be a circumstantial consideration that matter to the morality of our actions. If

[121] McMahan, "The Limits of Self-Defense," in *The Ethics of Self-Defense*, 186.

all else is equal, morality allows defenders to choose the defensive option that is more effective than others. For example, suppose that in the case of *Necessity* above Victim knows option φ has a 99 percent chance of completely saving her life and option ψ has a 50 percent chance of completely saving her life. For many, this change in the probability of success supports an intuition that ψ is no longer the necessary option. Completeness of defense also matters. For example, suppose Victim knows option φ and ψ have the same probability of success but that ψ will result in Victim breaking her back. For many, this change in the degree to which ψ completely averts the unjust harm supports an intuition that ψ is no longer the necessary option.

The second revision makes necessity sensitive to our nonconsequentialist concerns about who is harmed. Following Lazar and McMahan, the necessity constraint should be sensitive to nonconsequentialist constraints on harming. Lazar argues that the morally better option is the defensive option that minimizes the "morally weighted harm" inflicted by a defender.[122] Morally weighted harm avoids the counterintuitive results of construing necessity in the absolute terms of the least harmful option, *simpliciter*, and explains our intuitions in *Tradeoffs*. Simply put, there is no good reason to think that Bystander should bear such harms to the benefit of the Hitmen or Victim. Viewed from a moral perspective, then, the harms inflicted on those responsible for the fact that someone must be harmed, like the Hitmen, count for less than the harms inflicted on those persons who remain comparatively non-responsible, like Victim and Bystander. Also, *Tradeoffs* suggest

[122] Lazar, "Necessity in Self-Defense and War."

that the harms suffered by those who stand to benefit from a defensive action, like Victim, count for less than harms suffered by those who will not benefit from the defensive action, like Bystanders above. Finally, the case suggests that the moral agency required by the defender affects the weighting of the harm inflicted. It seems plausible, though not decisively so, to suppose Victim should bear the cost of a broken toe so that Defender can minimize intended harms in favor of merely foreseen harms. Not all harms are morally equal, and necessity should account for this. So, objective necessity should "morally weight" the harms across defensive options.

Lazar and McMahan stop at trades between effectiveness and morally weighted harm. But there is a bit more work to do with the necessity constraint because even minimizing morally weighted harms can produce counter intuitive results in cases like *Tradeoffs.* Consider a more complicated case:

> *Tradeoffs2*: Defender has two means of preventing 100 innocent people from being killed by ten responsible but non-culpable Threateners. (1) Defender can kill all ten Threateners, which would have a 99 percent probability of saving all 100 victims. (2) Defender can kill one Threatener as a means, that would have a 100 percent probability of saving all 100 victims but would also kill two innocent Bystanders as a side effect.[123]

It is intuitively clear that Defender should choose (1). This is puzzling because option (2) inflicts the least morally weighted harm. Since the Threateners are not culpable, but merely responsible, we cannot completely discount the harm they suffer. So, one intentional killing as a means along with two unintended side effect

[123] I adapted *Tradeoffs2* as an instance of other defense from Jeff McMahan's Case 3 that he uses to argue for the tradeoff formulation of necessity. Cf. McMahan, "The Limits of Self-Defense," in *The Ethics of Self-Defense*, 187.

killings is less morally weighted harm when we add the additional innocent life saved. We can remedy this with an expanded understanding of McMahan's formulation of objective necessity. He argues objective necessity should require the option that "has the morally best trade-off between the harm prevented and the harm caused."[124] Focusing necessity judgments on the morally best tradeoff helps explain our intuition that the necessity constraint should require Defender to inflict option (1) in *Tradeoffs2*. Increasing the probability that Defender will save all 100 victims by 1 percent and saving nine Threateners is an insufficient marginal gain in effectiveness to offset the marginal cost of the harms caused to both Bystanders.

McMahan's tradeoff formulation may at first appear like Lazar's account of the necessity constraint and the judgments it requires; this is not the case. Lazar's formulation of the necessity constraint is:

> Defensive harm H is necessary to avert unjustified threat T if and only if a reasonable agent with access to the evidence available to Defender would judge that there is no less harmful alternative, such that the marginal risk of morally weighted harm in H compared with that in the alternative is not justified by a countervailing marginal reduction in risked harm to the prospective victims of T[125]

The similarity is that both McMahan and Lazar require tradeoffs, but there are two important differences between these accounts. First, Lazar's account of necessity is explicitly subjective, and McMahan's is objective. I will return to this point below, but for now we can note Lazar insists that objective necessity is a matter of only the least harmful means and not a matter of morally better tradeoffs amongst

[124] Ibid.
[125] Lazar, "Necessity in Self-Defense and War," 15.

options.[126] A second difference is that Lazar implies that the only tradeoffs that fall under necessity judgments involve comparisons of "the marginal risk" of morally weighted defensive harm and the "marginal reduction" in the risk of unjust harm. As he states: "Necessity judgments are reached by comparing options along two axes, harms inflicted and harms averted. On each axis, those harms are subject to moral weighting."[127] Understood this way, Lazar's formulation restricts the tradeoffs to those between morally weighted harm and the effectiveness of a given defensive option.

Restricting trades in this way is insufficient given the discussion above. The sensitivity of the necessity constraint to impersonal value judgments suggests that it is sensitive to other kinds of trades. For example, we might also be interested in trading considerations of how proportionate it is for defenders to inflict a given defensive harm. This seems most relevant in cases of defensive harm that are morally required, like other defense. To make this point I will focus on tradeoffs in narrow proportionality amongst options. Consider:

> *Narrow Tradeoffs*: Hooligan1 and Hooligan2 separately threaten Victim. If Defender does nothing, Hooligan1 will paralyze Victim and Hooligan2 will break Victim's ankles. Defender knows averting one attack will avert the other. She has two options: (1) Defender can break Hooligan1's legs. (2) Defender can break Hooligan2's ankles. Defender chooses (1).[128]

Defender's action in *Narrow Tradeoffs* is not only justified but morally required if

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[126] Lazar emphasizes that necessity is objectively concerned with the minimization of harm in other work. Cf. Seth Lazar, "In Dubious Battle: Uncertainty and the Ethics of Killing," *Philosophical Studies* 175, no. 4 (2018): 863.

[127] Lazar, "Necessity in Self-Defense and War," 13.

[128] This case adapted from Patrick Tomlin's Case 11. Cf. Tomlin, "Distributive Justice for Aggressors," 11.

the costs of defending Victim are negligible. This teaches us two things about the relationship between objective necessity and narrow proportionality. First, there are some instances of defensive harm, like other defense, where narrow proportionality judgments may not be a matter of comparing the absolute moral costs of action φ with doing nothing. So long as Defender has defensive options, like (1) and (2), that are narrowly proportionate and effective, doing nothing is impermissible as a matter of other defense. So, when a defensive action is morally required, the baseline for narrow proportionality must come from within the set of morally permitted actions.[129] In *Narrow Tradeoffs*, the natural baseline is (2) because it is the least harmful means in the absolute sense. However, it seems that (1) remains the morally better option. But it cannot be because (1) is the least morally weighted harm, or an effective reduction in the risks to Defender or Victim. Hooligan1 and 2 are both culpable, so the harm Defender inflicts on either is discounted heavily and seems roughly on a par. Option (1) is the morally best trade between the harm inflicted and the harm averted because when Defender breaks Hooligan1's legs, her actions are further below the limit on defensive harm set by narrow proportionality and Hooligan1's culpability. Hooligan1 is liable, on most standard accounts, to be at least paralyzed, if not killed, to avert Victim's unjust paralysis. Hooligan2, on the other hand, is liable to broken ankles, but also considerably less maximal harm when compared to Hooligan1. Patrick Tomlin has called this difference between the harm inflicted in (1) and (2) a "narrow

[129] McMahan makes a similar observation when treating narrow proportionality as a theoretical devise. I think we can make the same comparisons when defensive action is morally required. McMahan, "The Limits of Self-Defense," in *The Ethics of Self-Defense*, 189.

proportionality shortfall."[130] We could also explain this result in terms of Hooligan1's increased culpability. The harm inflicted is, in this sense, more proportionate to the harm Hooligan1 poses and the fact that he is more culpable than Hooligan2. Whether through a proportionality shortfall, or being a more proportionate option, the considerations of proportionality help explain why (1) is the morally better option, and therefore necessary. It also suggests that necessity is sensitive to a wide variety of tradeoffs between morally relevant considerations beyond the minimization of morally weighted harms.

Finally, the moral quality of a defender's agency also suggests that necessity judgments are sensitive to more than trades between morally weighted harms and reduction in risks. In *Tradeoffs*, the marginal cost arises from a comparison of the defensive options: (1) releasing the boulder, (2) shooting the Hitmen, (3) throwing the grenade, and (4) omitting to defend Victim. The marginal costs amongst these options is more complicated than in the case of *Necessity* because the amount of harm is not the only relevant moral variable across the options. This suggests that the terms of the necessity constraint include both impartial and impersonal value judgments. A familiar variable in these options is the impartial differences in harm that correspond to the moral weight of harm in each option – the deaths of the Hitmen count for less than the death of Victim or the serious injury to Bystander. However, there is also a moral difference between (1) and (2) relative to Defender's moral agency. That is, in (1) Defender is killing the Hitmen as a side effect of saving Victim and in (2) he intends to kill them eliminatively. Other things being equal, it

[130] Tomlin.

is worse from an impersonal perspective intentionally to kill than allowing to die. So, the outcome of (1) could be a morally better option, impersonally considered, than (2). This would depend on if it is reasonable to suppose Victim should bear the costs of a broken toe so that Defender does not intentionally kill the Hitmen. Finally, there is a moral consideration in (4) that is important. That is, in the circumstances of *Tradeoffs*, Defender has an obligation of other defense and is therefore morally responsible for the fate of Victim and Bystander. It is impartially worse for Defender to fulfill this obligation in a way that harms Bystander. Also, (4) is an outcome that is impersonally bad because it includes the violation of an important moral duty. The necessity constraint should require persons inflicting intentional defensive harm to choose the morally best marginal cost associated with the exercise of their moral agency.

This suggests that a defender's moral responsibility involves the agential and circumstantial conditions of a liability justification. This would extend the agential conditions of liability beyond how McMahan uses the term. While it still refers to the moral agency of persons potentially liable to defensive harm, I am here expanding it to include the agency of the person inflicting a defensive harm. I think this suggests that the relationship between a defender's moral responsibility and the necessity constraint is similar in scope and importance to the relationship between an aggressor's moral responsibility and the proportionality constraint.[131] In short, a defender's moral responsibility – their capacity to act in the

[131] There are many who recognize the relationship between proportionality and the moral responsibility of aggressors. Cf. McMahan, *Killing in War*; Rodin, "Justifying Harm."

circumstances in which threats have arisen and the moral characterization of those acts – is the dominant agential consideration and limits the circumstantial conditions that matter to the necessity constraint.

It is overly restrictive to limit the considerations of objective necessity to those derived from the minimization of absolute harms, morally weighted harms, or even tradeoffs between effectiveness and morally weighted harms. So, we should reject the absolute, morally weighted, and Lazar's risked based formulations of objective necessity in favor of McMahan's "morally best tradeoff" formulation. One caveat: the tradeoff formulation of objective necessity still makes use of morally weighted harms in these trades but rejects the idea that the scope of these trades is a matter of tradeoffs between weighted harms and risk. Objective necessity requires judgments about which defensive option offers the morally best tradeoff between the harms inflicted and the harms averted. The revised formulation of objective necessity is:

> Defensive option φ is necessary to avert threat of unjust harm x if and only if φ is the morally best tradeoff between the inflicted defensive harm y and the morally important feature of outcome x. Option φ is the morally best tradeoff when the marginal moral costs of inflicting y are justified by a comparable marginal moral gain in x.

On this formulation, the judgments of necessity look something like this. I could either φ or ψ to avert unjust attack x. If the marginal cost of ψ is morally better than φ when compared to x, then, as a matter of necessity, I must choose ψ. Moving beyond risks of morally weighted harms and focusing on tradeoffs amongst the "marginal moral costs" of defensive options allows the necessity constraint to be sensitive to all the morally relevant facts in the outcomes just combatants pursue

through defensive killing.

§4: The Implications of Necessity

The discussion so far also suggests the necessity constraint has implications for the concerns about rights and agency I raised above. The role and formulation of the necessity constraint will have implications for the rights of aggressors like Culpable. If the necessity constraint is external to a liability justification, then Culpable's rights are forfeit whether or not Victim can satisfy the necessity constraint. Externalists hold that some or all of the circumstantial conditions of proportionality and necessity operate externally to the question of liability.[132] This means that Culpable may remain liable in the sense that his actions have rendered his rights against being killed forfeit. However, in cases like *Necessity*, considerations of necessity morally constrain Victim's options because breaking Culpable's arm is the only necessary option. If the necessity constraint is internal to a liability justification, then Culpable's rights are forfeit only if Victim can satisfy the necessity constraint. Internalists hold that the constraints of necessity and proportionality are internal to a liability justification.[133] So, a person's actual rights against killing are forfeit only when there is a liability justification because this justification entails that rights against killing are forfeit. This implies that Culpable is only liable to defensive harm that is necessary. On either view, the role and formulation of the necessity constraint has implications for the rights of those

[132] Cf. Frowe, *Defensive Killing*; Rodin, *War and Self-Defense*; Rodin, "The Lesser Evil Obligation," in *The Ethics of War : Essays*.
[133] McMahan, *Killing in War*; McMahan, "Liability, Proportionality, and the Number of Aggressors," in *The Ethics of War : Essays*.

persons – aggressors like Culpable – that are morally responsible for the circumstances in which unjust harms arise.[134]

The role and formulation of the necessity constraint will have implications for the rights and obligations of defenders like Victim. If necessity is external to liability, these circumstantial conditions provide moral reasons that affect the overall permissibility of killing Culpable. For externalists, killing Culpable remains unnecessary, and so, impermissible. However, Victim does not wrong Culpable. She is not, therefore, morally responsible for unjust harms, merely unnecessary harms. If necessity is internal to liability, this implies that if Victim kills Culpable instead of breaking his arm, she wrongs Culpable. For internalists, Culpable is not liable to lethal defensive harms in the circumstances because that harm is unnecessary. Victim would therefore be morally responsible for unjust harms. The formulation and role of necessity thus has implications for Victim's moral agency as well. If Culpable is not liable to be killed because it is unnecessary and Victim kills Culpable, then we have grounds for holding her blameworthy, or morally responsible for unjust harms, or both. This also implies there might be grounds for claiming that Victim is liable to counter-defensive harming by aggressors like Culpable or by third parties acting in other defense. A full discussion of these implications will occupy the discussion below. For it is these implications for the rights, duties, and moral agency of aggressors and defenders that become difficult when we move from the conditions of objective certainty to those that more closely approximate the conditions of war.

[134] Patrick Tomlin notes this relationship as well. Cf. Tomlin, "Distributive Justice for Aggressors."

§5: The Direct Approach

With the revised formulation of necessity adequate to the scale of war in view, we can consider an approach to uncertainty I will call the Direct Approach. Advocates of this approach to uncertainty apply it to killing in war by bracketing questions of moral uncertainty and objective permissibility in favor of focusing directly on the subjective empirical evidence one has for the moral reasons that ground permissible killing.[135] There are three considerations in favor of the Direct Approach, and understanding each will also serve to clarify our terms and the issues uncertainty raises for killing in war. It will also lay the ground for the vindication of reductive theories of killing in war.

Advocates of the Direct Approach, like Seth Lazar, take the problem posed by empirical uncertainty to be a central problem for the permissibility of killing in war. Uncertainty is endemic to war and so it seems acting with certainty, knowing all the relevant moral and non-moral facts *and* knowing one is in command of all the morally relevant facts, is impossible. Taking the pervasive nature of uncertainty on board is a primary motivation behind the Direct Approach and why, on this view, we should separate the subjective permissibility of an action from the objective status of that action. As Lazar puts it, holding subjective permissibility to be a matter of trying to "do what is objectively right" fails to provide what should be a substantive aim of any account of the ethics of killing in war, namely, a description of what option a morally skilled agent should choose in conditions of

[135] Seth Lazar is an exemplar of this approach. There are others. Cf. Lazar, "Deontological Decision Theory and Agent-Centered Options;" Lazar, "In Dubious Battle: Uncertainty and the Ethics of Killing."

uncertainty. In these conditions, agents with moral skill do not choose what is objectively right, "because to do the objectively right thing when the facts are in doubt involves luck, not skill."[136] Advocates of the direct approach think we describe the skill required with an account of subjective permissibility that answers at least three criteria: (i) grounds first order moral judgments like permissibility in facts accessible to the agent, (ii) enables a normative theory to be action-guiding, and (iii) connects in the right way with our reactive attitudes of praise and blame. These criteria, we might suppose along with advocates of the Direct Approach, are among the necessary conditions a normative theory of killing in war must have to say something meaningful about the permissibility of killing under conditions of uncertainty.[137]

Before moving from the motivation for the Direct Approach to the three considerations in its favor, I need to introduce some precision into the objective/subjective distinction. I will start with a familiar and influential account of the objective/subjective distinction in the context of first order moral judgments like permissibility, justifiability, and excuse with an aim of revising it to the purposes of the necessity constraint. For the sake of brevity throughout this discussion, I will only discuss the senses in which action φ is justifiable, but the same terms can be used for almost any first order moral judgment about a person, an action, or an outcome: for example, objectively permissible, or, subjectively

[136] Lazar, "In Dubious Battle: Uncertainty and the Ethics of Killing," 879.
[137] Brian Hedden, "Does Mite Make Right?: On Decision-Making under Normative Uncertainty," in *Oxford Studies in Metaethics* (Oxford: Oxford University Press, 2016).

wrong, etc.

Jeff McMahan offers the following account of the objective/subjective distinction. He first distinguishes between permissibility and justification. An action is "morally justified" when it is both "permissible" and "there is a positive moral reason" in favor of the action. So, X is justified in φ-ing if X is permitted to φ and there is a positive moral reason to φ. Second, he distinguishes between the objective and subjective senses of justification. An action is objectively justified "when what explains its … justifiability are facts independent of the agent's beliefs." So, φ is objectively justified on the grounds that facts independent of X's beliefs justify φ. Finally, an action is subjectively justified if the "agent acts on the basis of … justified beliefs that are false" and the action would be objectively justified "if those beliefs were true." So, φ is subjectively justified when (1) X does φ on the basis of reasonable, but false beliefs, and (2) φ would be objectively justified if X's beliefs were true.[138] The first distinction recognizes justification as a specific kind of permission, and this is surely correct. McMahan is also offering an account that prioritizes an agent's theoretical reasoning over their practical, or moral, reasoning. If the agent, on this account, is to act with objective justification, then she should first determine the world as it is. Once she possesses adequate knowledge of the facts, she may then decide what she ought morally to do. This also seems largely correct. There are, however, two concerns we can raise about McMahan's account and these concerns help us better understand the

[138] I do not think McMahan now holds the view as originally stated in *Killing in War*, but it is a good place to start in order to understand the Direct Approach. McMahan, *Killing in War*, 43.

considerations in favor of adopting the direct approach.

McMahan's use of the objective/subjective distinction implies two results that render it problematic as an account of our first order moral judgements like justifiability. The first problematic result arises when we reflect on what first order moral judgements like justification, permissibility, and excuse imply for an individual's rights and liabilities. Many hold that a person posing a threat of harm is not liable to defensive harm only if she is objectively justified in doing so. Moreover, when persons that pose threats are merely excused for those actions, they incur liabilities to defensive harm. But if McMahan's account as stated above is right and objective justification is a matter of facts that are independent of a person's beliefs, then a person's epistemic status is irrelevant to their objective justification or excuse. This also implies one's epistemic practice, such as acting only according to reasonable beliefs, is irrelevant to one's justification or excuse. If an agent's epistemic position and practices are irrelevant to their objective justification, these facts are also irrelevant to the rights and liabilities of that agent. We have strong intuitions that an individual's epistemic practices are relevant, so we should revise this account to accommodate these concerns.

The cases below suggest a line of revision that accounts for why a person's beliefs, motives, and intentions affect their rights and liabilities even when acting with an objective justification:

> *Just Combatants*: Racist kills in war ψ because he knows he can kill people of other races and get away with it. Nobel kills in war ψ

because he reasonably believes it is just. War ψ is, in fact, just.[139]

McMahan now holds an account of objective justification that implies Racist and Nobel are equally justified in an objective sense but hold a different set of rights and liabilities.[140] This avoids the counter-intuitive result that Racist and Nobel are morally on a par for their objectively justified actions. While it is not always true that one's epistemic practices are relevant to the objective justifiability of one's actions, it does seem clearly relevant to one's rights and liberties. Consider:

> *Just Combatants2*. Suppose in war ψ that there are two Racists. Together, the racist just combatants act in a way that will kill many unjust combatants but will also kill Bystander, an innocent noncombatant that is not party to either side, as a side effect. Bystander is threatened with death as a side effect by a large piece of debris that has been hurtled at him as a result of an explosion that was necessary for killing the unjust combatants. Unless Bystander acts defensively, she will be killed. Bystander saves herself without preventing the killing of the many unjust combatants by deflecting the debris back so that it will kill both Racists.

> *Just Combatants3*. Suppose in war ψ that there are two Nobels. Together, the noble just combatants act in a way that will kill many unjust combatants but will also kill as a side effect Bystander, an innocent noncombatant that is not party to either side. Bystander is threatened with death as a side effect by a large piece of debris that has been hurtled at her as a result of an explosion that was necessary for killing the unjust combatants. Unless Bystander acts defensively, she will be killed. Bystander saves herself without preventing the killing of the many unjust combatants by deflecting the debris back so that it will kill both Nobels.

It is intuitively clear that Bystander acts justifiably in *Just Combatants2*. It is, however, at least controversial that Bystander is similarly justified in *Just Combatants3*. It is the difference between the beliefs and intentions of the two

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[139] These cases are adapted from a personal anecdote related to the author by Christopher Case as well as Jeff McMahan's helpful discussion of the moral issues raised by culpability.

[140] Jeff McMahan relayed this position in correspondence with the author. I owe much of the argument I relate here to this discussion, his helpful suggestions, and revisions of the cases.

Racists and the beliefs and intentions of the two Nobels that explains this difference. There is no conflict between the claim that Bystander is objectively justified to deflect the debris back so that it will kill the Racists and the claim that she is not justified in deflecting it back so that it will kill the two Nobels. The difference between the Racists and the Nobels is one of culpability. In both cases, circumstances have arisen that require either the just combatants or Bystander must die. Because the Racists acted culpably it is only fair that they bear the costs of killing the unjust combatants. This is a question of fairness in the distribution of unavoidable harms. The response here emphasizes the moral reasons to impose the costs of war as a "matter of justice in *ex ante* distribution"[141] of unavoidable unjust harms based on the comparative responsibility of those persons involved.

The problem is deeper than the impact of epistemic practices on rights and liabilities. There are circumstances in which the objective justification for which one acts is also affected by reasonable, but false, beliefs. Consider the following example:

> *The Resident Defender:* The identical twin of a notorious mass murderer is driving in the middle of a stormy night in a remote area when his car breaks down. Twin is nonculpably unaware that his twin brother, the murderer, has within the past few hours escaped from prison in just this area, and that the residents have been warned of the escape. The murderer's infamy stems from his *modus operandi*: he violently breaks into people's homes and kills everyone living there instantly. Resident spies Twin along the road and sends his spouse and children upstairs. Operating under the reasonable belief that he has an obligation to defend his spouse and children from Twin, Resident takes up a firing position. As Twin approaches the house to request to use the telephone, Resident takes aim to shoot

[141] McMahan, "Individual Liability in War: A Response to Fabre, Leveringhaus and Tadros." Pg. 299. Cf. McMahan, "Who Is Morally Liable to Be Killed in War."; McMahan, "The Limits of Self-Defense," in *The Ethics of Self-Defense*.

him, preemptively, believing him to be the murderer. [142]

If rights and liability to defensive harm are only a matter of the objective facts, Resident forfeits his right to life because he is posing a threat of harm that is objectively unjust. While the circumstances above are tragic, it is nonetheless intolerable to think that morality should hold Resident's rights forfeit for acting on the reasonable belief that he was morally required to defend his children from Victim. It would seem that our rights are sensitive to subjective considerations that can overcome acting in ways that are nonculpably objectively unjustified.[143] Cases like *Resident Defender* and *Just Combatants* above suggest a substantive problem for holding a strong conceptual relationship between our objective and subjective first order moral judgments that is related to the distribution of our rights, liabilities, and justification. If we define subjective justification in terms of objective justification, we run the risk of disconnecting a person's rights and liabilities from their agency because it makes justification largely a matter of luck. These cases suggest there are a wide range of facts that could render a person's rights and liberties a matter of brute luck in the context of defensive harm and killing in war. This is the first consideration in favor of the Direct Approach. Making subjective permissibility parasitic on objective permissibility disconnects a person's rights from their agency because it renders a person's practices, like epistemic due diligence, irrelevant to the rights and liabilities they have.

There is another issue with McMahan's original account of the

[142] This case adapted from Jeff McMahan's case *The Resident* and from his helpful comments. Joseph Chapa also uses discussions of this case to argue for similar implications of the obligations of other defense. Cf. McMahan, *Killing in War*, 164.
[143] McMahan now holds this view.

subjective/objective distinction that suggests a second consideration in favor of the Direct Approach. Recall that McMahan defines subjective justification as: φ is subjectively justified when (1) X does φ on the basis of reasonable, but false beliefs, and (2) φ would be objectively permissible or justified if X's beliefs were true. Thus, he does define subjective justification exclusively in terms of objective justification. Derek Parfit's case of *Mine Shafts* suggests this formulation of subjective justification fails to capture every kind of justification available:

> *Mine Shafts:* A hundred miners are trapped underground with flood waters rising. We are rescuers on the surface who are trying to save these men. We know that all of these men are in one of two mine shafts, but we don't know which. There are three flood-gates that we could close by remote control. The results would be these:

		The miners are in Shaft A	Shaft B
We close:	Gate 1	We save 100 Lives	We save no lives
	Gate 2	We save no lives	We save 100 lives
	Gate 3	We save 90 lives	We save 90 lives[144]

It seems intuitively clear that we are justified in flipping gate 3 in *Mine Shafts*. This presents a problem for McMahan's account. On the assumption that all the miners are in Shaft A, McMahan's account implies we are objectively justified only if we close Gate 1. Moreover, we would only be subjectively justified if we acted according to beliefs that, if true, would be objectively justified. But we seem clearly justified, despite there being no evidence to indicate this, in closing Gate 3. McMahan's account fails to capture the kind of justification we clearly have in *Mine*

[144] Parfit, *On What Matters vol. I*, 159.

Shafts. The justification that is implied by *Mine Shafts* is outside the scope of the objective/subjective distinction above.[145]

Mine Shafts suggests another important revision to McMahan's account of the objective/subjective distinction and reinforces the considerations in favor of the Direct Approach. The lesson of *Mine Shafts* reinforces the importance of our epistemic practices, beliefs, and intentions to our first order moral judgments like justification. This recalls the first reason to adopt the Direct Approach. Our judgments about closing Gate 1, 2, or 3, are connected to our sense of the evidence of the empirical facts that make these actions morally permissible, justifiable, or required. True, there is no fact of the matter that tells in favor of Gate 1, 2, or 3. Nonetheless, part of our epistemic practices is a responsible attention to a lack of evidence and being sensitive to probabilities in those cases.

For Parfit, the lesson of *Mine Shafts* is that there is no univocal sense in which we use our first order moral judgments like permissibility. For the advocates of the Direct Approach, the lesson is a bit different. *Mine Shafts* raises the second reason to adopt the Direct Approach: aiming for the objectively justified action leads to the wrong choice because it values objective justification instead of the moral reasons that ground justification. For example, if we think that liability to defensive harm is a matter of the moral reasons that apply to defensive killing, then we might follow Lazar and "focus on those reasons, and weight them directly for their probability of being actual, rather than fetishize the objective verdicts."[146] Parfit's

[145] I am thankful to Jeff McMahan for suggesting this response to Parfit's *Mine Shafts*.
[146] Lazar, "In Dubious Battle: Uncertainty and the Ethics of Killing," 875.

Mine Shafts demonstrates that McMahan's formulation of subjective justification exclusively in terms of objective justification does just this. Because it requires agents to act the way that seems objectively justified, it perversely values objective justification over the 90 lives we can expect to save by closing Gate 3.

We now have two substantive problems with McMahan's account of justification in view. The first is the problem of divorcing a person's rights and liabilities from their moral agency. This is the first consideration in favor of the Direct Approach. The second is the problem that arises from the perverse valuing of objective moral judgments over the moral reasons that ground those judgments. This would fetishize the objective status of an action over the actual expected moral value of that action. This is the second consideration in favor of the Direct Approach. Making subjective permissibility parasitic on objective permissibility fetishizes objective justification over the direct evidence we have for the moral reasons that provide the grounds for that justification.

The first two issues above focus on epistemic uncertainty. However, the presence of moral uncertainty also raises the third consideration in favor of the Direct Approach. The permissibility of killing seems insensitive to one's ignorance of the relevant moral principles and so moral uncertainty is irrelevant to subjective permissibility. Sam is not permitted to kill Joe because Sam lacks knowledge of the moral principles that killing Joe in fact violates. Ignorance of the relevant moral facts is, at most, an excusing condition and so not directly relevant to subjective

permissibility.[147] This gives us reason to think that moral uncertainty is not directly analogous to empirical uncertainty and so might not engage with the criteria (i)-(iii) above. Our concern with (i) above was about grounding first order moral judgments in facts accessible to the agent. But moral facts are more readily accessible in a way that empirical facts are not, so our concerns about an agent's access to these facts seems considerably less profound. Our concern with (ii) above was about action-guidance. But acting under conditions of moral uncertainty could be an objectionable form of "moral hedging" that only minimizes an agent's "expected degree of wrongness" in a way that is itself a type of blameworthy activity.[148] It would be strange to value action-guiding accounts because these accounts provided a way to morally hedge one's bets. Finally, our concern with (iii) above was about connecting our reactive attitudes of praise and blame with the conditions of uncertainty. But if it is blameworthy to act despite one's ignorance or uncertainty about moral facts, then the connection between moral uncertainty and praise and blame is rather mundane. The Direct Approach takes all this on board by bracketing concerns about moral uncertainty.

We can now recast the motivation behind the Direct Approach to killing in war under conditions of uncertainty with some more precision. In these conditions we should want a theory that: (i) grounds the permissibility of defensive killing φ in facts accessible to the agent, and so is properly an account of subjective justification; (ii) offers action-guidance to a morally skilled agent, and so provides

[147] I use "moral facts" as a matter of convenience, these could be moral principles, truths, etc. Cf. Hedden, in *Oxford Studies in Metaethics*.
[148] Ibid.

the right responses to our intuitions about these difficult cases; (iii) adequately connects an agent's actions with praise and blame, and so does not render rights and liability a matter of brute luck.

Advocates of the Direct Approach suggest a solution that attempts to follow Parfit by appealing to the distinctions amongst an action being permissible, justifiable or required in one of three senses. According to Parfit we can describe the justification of φ in a fact-relative, evidence-relative, or belief-relative sense. So, φ is justifiable in the fact-relative sense if and only if φ is justified in light of all the morally relevant facts; φ is justifiable in the evidence-relative sense only if φ is justified when the best available evidence grounds reasonable, true beliefs that φ is justified; and finally φ is justifiable in the belief-relative sense only if φ is justified were the beliefs we have about φ true.[149] We can read the Direct Approach as taking the three considerations in favor of this approach as a straightforward reduction of subjective justification to evidence-relative justification. First, separating evidence-relative permissibility from fact-relative permissibility retains the connection between a person's rights and their moral agency because it makes a person's practices, like epistemic due diligence, relevant to the rights and liabilities they have. Second, separating evidence-relative permissibility from fact-relative permissibility rightly values the direct evidence we have for the moral reasons that are the grounds of a justification over the fact-relative or objective status of the action. Finally, the permissibility of an action seems insensitive to one's ignorance of the relevant moral facts, and so moral uncertainty is irrelevant to evidence-

[149] Parfit, *On What Matters vol. I*, 149-51.

relative permissibility.

For some, Parfit's evidence-relative distinction explains the kind of justification we have when we close Gate 3 in *Mine Shafts*. It also accounts for the lesson drawn from *Mine Shafts* about the kinds of justification we can expect to have when deciding what we ought morally to do. However, it is not clear from the case that *Mine Shafts* is an instance of evidence-relative justification. Recall above that what we are responding to is not a fact of the matter that tells in favor of closing Gate 3. It is a response to probabilities and expected values based on the weight we place on the lives of the trapped miners. There are a few reasons to think that the Direct Approach is wrong to reduce subjective justification to Parfit's evidence-relative sense of justification.

It is true that rather than aiming at fact-relative justification, Parfit suggests what he calls Expectabilism. We might think that expectabilism is just evidence-relative justification and so a good place to start for subjective justification. Expectabilism requires that "[w]hen the rightness of some act depends on the goodness of this act's effects or possible effects, we ought to act … in the way whose outcome would be expectably-best."[150] Because our moral agency is limited to the scope of our knowledge and abilities, we can rarely know all the facts or even *if* we know all the facts. Moreover, Parfit rightly observes that it is impossible to "base our decisions on the facts except by basing our decisions on what we now believe to be the facts."[151] This suggests that the evidence and belief-relative senses of

[150] Parfit, *On What Matters vol. I*, 160.
[151] Ibid., 161.

justification are relevant to deciding what we have most reason to do in any actual decision. We also have ready answers to the first two substantive problems raised by empirical uncertainty above by leaving the "fishiness" of fact-relativity behind.[152] Distributing rights and liabilities according to evidence-relative justification appears to answer the luck objection by making one's rights and liabilities a matter of *inter alia*, one's responsibly held beliefs and exercise of agency in light of those beliefs. Expectabilism also appears to avoid the fetish objection by focusing our attention on what we have most reason to believe will go expectably-best according to evidence we have of the moral reasons that apply to our action. Therefore, the fact-relative, evidence-relative, and belief-relative distinctions appear to be a superior account of our first order moral judgments in comparison to the objective/subjective distinction, at least as McMahan has defined this distinction above.

I think it is important to retain the objective/subjective distinction by revising it and using it within a sense of justification that would be distinct from Parfit's tripartite distinctions: the expectation-relative sense.[153] By this I mean that φ is justifiable in the expectation-relative sense only if φ is justified when it is reasonable to believe that φ maximizes the expected value of the possible outcomes. The expectation-relative sense of justification I am advocating here is familiar in the literature on decision making under conditions of uncertainty. We could say that when an agent acts in a way that is expectation-relative justified, that agent is

[152] Tadros, *The Ends of Harm : The Moral Foundations of Criminal Law*, 220.
[153] I owe this observation about the need for a fourth sense of justification and the formulation of that sense presented here to Jeff McMahan.

maximizing expected choiceworthiness.[154] What is different, I think, is that choiceworthiness needs a different sense of justification because it involves all three senses of justification in Parfit's tripartite distinctions.

This would be different than the way most reconcile the distinction with Parfit's arguments: understanding "objective" in fact-relative terms and understanding "subjective" in evidence-relative and belief-relative terms.[155] Parfit suggests the straightforward reduction of subjective permissibility to evidence-relative terms is on the wrong track when he claims that there are two ways to understand the evidence-relative sense, and that the evidence-relative and belief-relative senses are "not well-called 'subjective'."[156] There are three reasons to think Parfit is right. First, the relationship we might draw between all these terms is far from simple. For example, objectivity and evidence-relativity seem related. Evidence-relative claims are grounded in what counts as a reasonable belief about φ being a justified option given the evidence available. Such claims appeal to objective standards of belief.[157] While there is a natural association between

[154] The term "choiceworthiness" is a term of art within the literature on uncertainty that can have different meanings. As I use it here, I am following those philosophers that use the term to capture the results of decision-theoretic judgments given probable outcomes and the moral values we assign to those outcomes. Cf. Buchak, *Risk and Rationality*; Jacob Ross, "Rejecting Ethical Deflationism," *Ethics* 116, no. 4 (2006); William MacAskill, "The Infectiousness of Nihilism," *Ethics* 123, no. 3 (2013); Lazar; Seth Lazar, "Anton's Game: Deontological Decision Theory for an Iterated Decision Problem," *Utilitas* 29, no. 1 (2017); Christian Barry and Patrick Tomlin, "Moral Uncertainty and Permissibility: Evaluating Option Sets," *Canadian Journal of Philosophy* 46, no. 6 (2016).

[155] More than a few that write on defensive harm defend, or imply, as much. Cf. Jeff McMahan, "Proportionality and Time," *Ethics* 125, no. 3 (2015); Cécile Fabre, *Cosmopolitan Peace* (Oxford: Oxford University Press, 2016); Patrick Tomlin, "Subjective Proportionality," *Ethics* 129, no. 2 (2019); Lazar, "In Dubious Battle: Uncertainty and the Ethics of Killing."

[156] Cf. Parfit, *On What Matters vol. I*, 461.

[157] Victor Tadros makes a similar claim, admittedly in favor of replacing the objective/subjective distinction with Parfit's tripartite distinction and not revising it. Cf. Tadros, *The Ends of Harm : The Moral Foundations of Criminal Law*, 225.

objectivity and fact-relativity, it is not obvious that the later captures all that is at stake when we use the former. We can raise similar issues about subjectivity and evidence-relativity and belief-relativity.

A second reason to think Parfit is right follows from the distinction we can make between our first order moral judgments and the grounds of those judgments. For example, consider the role of empirical facts within Parfit's account. An action is fact-relative justifiable only if it is justifiable in light of all the morally relevant facts. However, the moral relevance of a given empirical fact is contextual to the circumstances in which that fact arises. This is just a truism that the moral significance of some fact clearly depends on what the other empirical facts happen to be in the circumstances, but this truism can have an important moral upshot. Recall the case of *Just Combatants2* and *Just Combatants3* above and how these cases suggested the importance of the comparative dimension of liability to defensive harm. These comparative differences give grounds to inflicting the massive and concentrated harms of lethal defensive force on the basis of facts that in other circumstances would not matter very much at all. Determining a fact's moral salience is a different kind of judgment than determining an action's justifiability given that fact. We should not conflate these two kinds of judgments. In the context of killing in war, this would be to conflate a liability justification that renders a defensive killing justified and the agential and circumstantial conditions that are the grounds of that liability justification. A judgment that the defensive killing φ satisfies the necessity constraint in the present circumstances is different from the judgment that φ is justified.

Finally, Parfit's tripartite distinction relates to an agent's epistemic position, and this can obscure issues of moral uncertainty, at least as it might apply to the grounds of a liability justification to kill in war. This offers a third reason to think we should not reduce "objective" to fact-relative terms and "subjective" to evidence-relative and belief-relative terms. It is certainly true that some forms of moral uncertainty do not pose anything beyond mundane lessons about subjective justification. The permissibility of killing seems insensitive to one's ignorance of the relevant moral principles, so moral uncertainty is irrelevant to subjective permissibility. Sam is not permitted to kill Joe because Sam lacks knowledge of the moral principles that killing Joe in fact violates. However, there are other forms of moral uncertainty that remain even once we have command of the moral principles, like liability justifications, that ground killing in war.

The best example here brings us back to the necessity constraint. Recall that the necessity constraint requires just combatants to choose the morally best trade between the harm inflicted and the outcome achieved by inflicting that defensive harm or the morally best marginal cost among their defensive options. There are two morally contentious judgments involved here. First is the judgment that must evaluate the moral worthiness of each option. Here just combatants must perform proportionality calculations that weigh the infliction of concentrated and massive lethal defensive harms against averted unjust harms that are often widely distributed and slight. For example, just combatants often kill some unjust combatants to decrease the risks that other unjust combatants will inflict future threats of unjust harm. Just combatants also add to these proportionality

calculations the other judgments of impersonal value that matter to necessity judgments. For example, weighing the difference in moral choiceworthiness between a defensive option that inflicts intentional harm on ten liable unjust combatants and one that achieves the same outcome by allowing twenty unjust combatants to die. Second, even after just combatants have determined the choiceworthiness of each option, there are reasons to doubt the ordering of these outcomes from morally worst to morally best is simple. Dealing with the issues posed by these trades is beyond the scope of the present argument. It is enough to suggest that even if a just combatant is in good command of the morally relevant principles that guide killing in war, there remain some moral facts that are hard to come by – such as how to trade massive concentrated harms against harms that are slight and diffused.[158]

To take stock at this point: It is important to keep our first order moral judgments, like permissibility and justifiability, and the grounds of those judgments distinct in the following discussion because the grounds will sometimes be a matter of empirical facts and sometimes a matter of moral facts. If the best way to deal with uncertainty is for agents to aim for expectation-relative justification, then we cannot reduce the subjective/objective distinction to Parfit's fact-relative, evidence-relative, and belief-relative senses. Determining the option that maximizes choiceworthiness and is thereby expectation-relatively justified involves accounting for how the objective grounds of our justification matter to the

[158] The moral uncertainty involved in the necessity constraint is a species of a general problem. Cf. Larry S. Temkin, *Rethinking the Good : Moral Ideals and the Nature of Practical Reasoning* (New York: Oxford University Press, 2015).

subjective characterization of our actions and thus, the sense in which we can claim an action is justified. I will understand first order moral judgments as Parfit does, in terms of facts, evidence, beliefs, and with the addition of expectations to keep the distinction between the judgment that defensive killing φ is permissible and the grounds of that judgment clear. However, I will still discuss the grounds of that judgment in terms of subjective and objective conditions. I think this requires a rejection of the Direct Approach for the permissibility of killing in war and suggests that reductive theories of killing in war can handle the scale and uncertainty of warfare. The Direct Approach is, in fact, looking to find what Parfit suggests is impossible – a univocal sense of justification. Reductive theories, however, can acknowledge the many senses of justification and how that influences the choiceworthiness of each option.

§6: Expectation-Relative Liability Justifications

Recall that the formulation of objective necessity as a matter of the "least harmful means" is problematic. But the revision of objective necessity to the marginal moral costs met these worries. The revised formulation of objective necessity is:

> Defensive option φ is necessary to avert threat of unjust harm *x* if and only if φ is the morally best tradeoff between the inflicted defensive harm *y* and the morally important feature of outcome *x*. Option φ is the morally best tradeoff when the marginal moral costs of inflicting *y* are justified by a comparable marginal moral gain in *x*.

On this formulation, the judgments of necessity look something like this. I could either φ or ψ to avert unjust attack *x*. If the marginal cost of ψ is morally better than φ when compared to *x*, then, as a matter of necessity, I must choose ψ. Moving

beyond risks of morally weighted harms and focusing on tradeoffs amongst the "marginal moral costs" of defensive options allows the necessity constraint to be sensitive to all the morally relevant facts in the outcomes just combatants pursue through defensive killing.

If the marginal moral costs formulation of objective necessity is correct, what does this imply for necessity judgments under conditions of uncertainty? I think the result is that necessity judgments cannot be a matter of only the evidence available to an agent, as the Direct Approach requires, because disconnecting necessity from our fact-relative and objective concerns merely moves the issues of luck and fetish to other areas at the cost of implying an incoherency when just combatants act in ways that are fact-relative unjustified. We can see this by considering cases in which empirical and moral uncertainty arise in defensive killing.

If we adopt the Direct Approach and make expectation-relative justification insensitive to fact-relative and objective concerns, then we will perversely value action-guidance in favor of fact-relative concerns. The suggestion that expectation-relative justification and deliberations of choiceworthiness should leave all fact-relative and objective conditions behind is one I think we should dismiss because it conflates knowing that an action satisfies the necessity constraint with knowing how to do the fact-relative least harmful defensive option. We can see an example of this suggestion by considering Lazar's argument for his formulation of the necessity constraint. First, Lazar rightly argues that necessity should be sensitive to conditions of empirical uncertainty. This means for Lazar that the standard of

subjective necessity is "a reasonable agent with access to the evidence available to Defender." This is best interpreted as making the necessity a matter of only evidence-relative claims. Lazar's argument for abandoning fact-relative judgments and objective conditions is that: "in almost every realistic case of defensive killing, there will in fact be some less lethal option that Defender could use, if he only knew *how* to do so."[159] But we can distinguish between knowing *that* φ satisfies the necessity constraint in the present circumstances given Agent X's capabilities from knowing *how* to do ψ, an option that satisfies necessity in a fact-relative sense for an ideal agent. If we do not make this distinction, we will conflate omniscience, which is clearly implied by fact-relativity and objective conditions with omnipotence, which is not so implied. McMahan highlights this kind of mistake in thinking about necessity stating "it would be a mistake to say that in all those instances in which" some unknown less harmful means "could have been effective, self-defense was unjustified" because it was unnecessary.[160]

Lazar conflates omniscience with omnipotence when he claims necessity judgments should abandon fact-relative conditions because he conflates knowing that with knowing how. But does this perversely value action-guidance ahead of fact-relative concerns? I think we can see this through analysis of a case of self-defense under fact-relative empirical uncertainty offered by Lazar:

> *RPG:* Ruth culpably threatens Bruce's life. He has time to fire one weapon at her before she kills him. Before him are a rocket-propelled grenade (RPG) and two pistols. With a loaded pistol Bruce, a crack shot, could halt Ruth's attack without killing

[159] Emphasis added. Lazar, "Necessity in Self-Defense and War," 8.
[160] McMahan's example of a less harmful means is Mr. Spock's Vulcan nerve pinch. Jeff McMahan, "Self-Defense and Culpability," *Law and Philosophy* 24, no. 6 (2005).

> her. The RPG will certainly kill her. Bruce knows Ruth is culpable, and knows one of the pistols is loaded, but he does not know which one.

Along with Lazar, I agree that it is intuitively clear that Bruce can permissibly kill Ruth with the RPG in these circumstances. There is a puzzle according to Lazar, however, because it seems that using the RPG is also unnecessary according to the facts of the case. To see this, first consider RPG under the "least harm" formulation of necessity and without the epistemic uncertainty imposed by the two pistols. If Bruce's options were between a loaded pistol and an RPG, then killing Ruth with the RPG would inflict gratuitous harm on Ruth. Since the loaded pistol offers Bruce a less harmful means, killing Ruth with the RPG is wrong because it would be unnecessary.

Lazar claims that killing Ruth with the RPG remains unnecessary even under the conditions of fact-relative uncertainty. If Bruce knew which of the two pistols were loaded, he could avert the unjust harm without killing Ruth. According to Lazar, our intuition suggests that Bruce can, along with those considering the case, reasonably hold two beliefs. First, Bruce believes that killing Ruth with the RPG is "objectively impermissible" because he could merely wound her if he knew which pistol to pick up. Second, Bruce believes that killing Ruth with the RPG is "subjectively permissible" because he "need not run a 50% risk of death to save a culpable attacker the difference between being killed and being wounded."[161] According to Lazar, RPG is an intuitively clear example of an agent that knows their action is fact-relatively impermissible and yet remains evidence-

[161] Lazar, "In Dubious Battle: Uncertainty and the Ethics of Killing," 866.

relative permissible. Thus, Bruce knows there is a morally relevant fact – which pistol is loaded – which makes using the RPG unnecessary. This is what seems puzzling about the case. *RPG* seems like Parfit's *Mine Shafts.* There is a sense in which Bruce is clearly unjustified in killing Ruth and a sense in which Bruce clearly is justified.

We can explain the intuition in *RPG* in two ways. First, we can give an argument for why killing Ruth with the *RPG* remains objectively necessary. The conclusion that choosing the RPG is objectively unnecessary relies on two assumptions we are free to doubt. The first assumption is that judgments of objective necessity are matters of choosing the least harmful defensive option. Lazar emphasizes this assumption when he claims that defensive harm "is necessary … when there is no other less harmful" option available, and that the least harmful formulation is how "the necessity constraint should be understood for the objective permissibility of killing."[162] As we have seen, there are good reasons to doubt that the necessity constraint is a matter of choosing only the least harmful option in either the absolute or morally weighted senses. RPG recalls the intuitive results of *Tradeoffs* and other cases above that led to the revision of the necessity constraint. Of the two, viewing necessity as a comparison of absolute harms among options is the most controversial. This is also the formulation of necessity that entails that using the RPG is objectively unnecessary. If we make the highly plausible refinement of an absolute necessity constraint to the formulation I argue for above – that necessity is a matter of the morally best trade between the

[162] Ibid., 863 and note 10.

marginal costs amongst options – it is no longer as clear that using the RPG remains objectively unnecessary. Since Ruth is culpably threatening Bruce's life, any moral weighting of the harm that befalls her is heavily discounted. It could be the case that the harm to Ruth is so heavily discounted that killing her with the RPG satisfies the objective necessity constraint. Cases like *RPG* and *Tradeoffs* are not demonstrations of a need for a separate account of the necessity constraint at the objective and subjective levels. These cases are counterexamples to the absolute formulation of the necessity constraint that insists that necessity is a matter of only the minimization of harm, *simpliciter*. This could offer a better explanation of the intuitive results of Lazar's RPG case. But it also highlights the role of moral uncertainty within the necessity constraint. Many will still share Lazar's suggestion that RPG remains objectively unnecessary even if the tradeoff formulation is correct.

So, for the sake of argument, suppose RPG remains objectively unnecessary because it is a morally worse trade between the harm inflicted and the outcome achieved. Lazar suggests that accounting for the result of *RPG* leads us to the Direct Approach that maximizes choiceworthiness based on the evidence-relative sense of justification. The mistake Lazar makes, however, is to take this intuition as grounding the further inference that Bruce is subjectively justified. This inference overlooks the possibility of expectation-relative justification and raises concerns about luck. Sharply dividing our fact-relative and evidence-relative concerns is as problematic as making evidence-relative concerns parasitic on fact-relative or objective concerns.

Bruce cannot reasonably believe that using the RPG is objectively or fact-relatively permissible. The Direct Approach implies that he can and thus tempts a kind of incoherence. The issue here is similar to the one raised by Parfit's *Mine Shafts*. In *RPG*, if we are not convinced that the tradeoff formulation of necessity allows Bruce to ignore the pistols, then using the RPG is fact-relative impermissible because it is unnecessary. But this does not imply that using the RPG is "subjectively permissible" as Lazar claims. It also does not imply that the evidence suggests that using the RPG is objectively or fact-relatively permissible. Rather, according to the evidence, using the RPG is objectively or fact-relatively wrong. But using the RPG is expectably best – that is, it has the best expected outcome given the subjective or epistemic probabilities. We can explain this only if we use the expectation-relative sense of justification and weight those values according to reductive theories of liability. In what follows, I assume, for the sake of simplicity, that necessity is internal to liability.

It is true that in *RPG* Bruce knows that if he does what is expectably best and uses the RPG, he will wrong Ruth by inflicting unnecessary harm on her. He also knows that if he chooses a pistol, he will not wrong anyone. This means that Bruce can permissibly allow Ruth to kill him and thereby run no risks of acting impermissibly in any sense. This is not true of every option available to Bruce. RPG poses four options to Bruce: (1) firing gun 1, (2) firing gun 2, (3) using the RPG, and (4) doing nothing and letting Ruth kill him. Some might claim that none of these four options runs a moral risk. That may be, but only three of the options run no risk of acting permissibly in any sense; fact-relative, evidence-relative, or,

otherwise. The first two options will either permissibly disable Ruth or permissibly allow her to kill Bruce, so there is no moral risk to either option in any sense of permissibility. There is no moral risk in 4 either. But I think there is a moral risk in 3, as Bruce still knows that it is fact-relatively impermissible but permissible in the expectation-relative sense weighted for considerations that are relevant to liability. Self-defense remains morally optional. This means Bruce's reasons for action in option 3 are now prudential and not, strictly speaking, moral reasons. We need some justification for why Bruce can run the risk posed by option 3 without simply making the risk disappear under the rubric of expectation-relative justification.

This means we need to explain why option 3 maximizes choiceworthiness in all the relevant senses of justification. There has to be some marginal gain that makes a moral difference that can offset the fact-relative impermissibly of using the RPG. Here, reductive individualism has a ready reply in the appeal to the comparative dimension of liability and distribution of harms based on the moral responsibility of the persons involved. Ruth has made it unavoidable that either she or Bruce may be wronged. Bruce would be wronged by Ruth if he submits and chooses option 4. Ruth would be wronged if Bruce acts prudentially and uses the RPG. Ruth, based on the facts implied by the case, is fully culpable. Bruce, on the other hand, can at least appeal to an excuse based on the duress imposed by Ruth to claim a diminished amount of responsibility for the circumstances in which Bruce and Ruth find themselves. Therefore, as a matter of justice, it is permissible for Bruce to choose a 100 percent probability that she will be wronged rather than a 50 percent probability that he will be wronged by her. This result, derived from

the reductive accounts of killing in war, is a better explanation of our intuitions in this case because it does not imply incoherent beliefs for Bruce. Rather, it justifies Bruce's action despite his knowledge that using the RPG is fact-relatively impermissible.[163]

The Direct Approach cannot alleviate worries about the influence of luck on our rights. There is no reason to think the evidence-relative standard does a better job with luck. Simply put, our rights are subject to luck even if we adopt an evidence-relative account of necessity and permissibility because our rights remain subject to the reasonable beliefs of others. Consider the problems we can derive from the Direct Approach under the following conditions:

> *High-Value Target (HVT):* A CIA pilot has a man in the sights of her predator drone. She is hunting the second-in-command of ISIL. Killing him is likely to save many lives. She is not sure that the person in her sights is her man.
>
> *Low-Value Target (LVT):* Same as High-Value Target, but this time she is hunting a low-level ISIL operative. Killing him will save fewer lives. She is again uncertain whether this is her man, to just the same degree as in High-Value Target.[164]

In HVT, we trade a risk killing an innocent person for a much larger benefit than in LVT, but as single acts these cases subject the rights of the targeted person to the same kind of luck but in a different direction. According to the Direct Approach, because we accept tradeoffs between goods achieved and harms to innocent persons as a matter of fact-relative justification, then we should accept them as a matter of evidence-relative justification. Moreover, these trades should be sensitive

[163] I owe much the argument in the preceding two paragraphs to helpful discussion of this case with Jeff Mcmahan.
[164] These are Lazar's cases. Lazar, "In Dubious Battle: Uncertainty and the Ethics of Killing," 867.

to the stakes of the case at hand. So, our tolerance for evidence required in HVT should be lower than the tolerance for evidence required in LVT. Suppose this is true and that in one instance of HVT, the man in the sights is, in fact, innocent. Given the evidence, the pilot might still be justified in killing him, but his rights are not connected in any meaningful way to his agency. Rather, they are dependent on some other fact of the case. Issues of luck are bound to turn up in killing in war because killing in war is, in part, a matter of circumstantial conditions. Such tradeoffs as those suggested by HVT and LVT are circumstantial conditions that can turn on a matter of luck that is importantly disconnected from the control of the person or persons in question.

The role of luck in the Direct Approach is aggravated when we consider HVT and LVT as sets of acts and not simply one-off cases. Suppose the Pilot in each case can reasonably believe that she will have to iterate each case 100 times. Suppose that Pilot knows, because of the probabilities, that HVT100 will kill two innocent persons and LVT 100 will kill one innocent person. The tradeoffs in these cases seem the same as the original single cases on the evidence-relative view, they have just become lesser evil justifications. The advocate of evidence-relative justification seems committed to treating individual killings the same as campaigns given a certain set of probable outcomes. This is an implausible result of the Direct Approach for at least two reasons. First, there is some objectionable moral sandbagging or double counting going on by iterating the cases this way. Suppose in HVT1 Pilot killed one liable person to save 25 innocent persons. It seems impermissible to reintroduce the lives saved in HVT1 to justify a killing in HVT2,

where Pilot killed one innocent mistakenly to save only 5. Second, it seems doubtful that Pilot in HVT100 can intend the good result of HVT 100 that justifies any one intentional killing that was a mistake as a lesser evil. The Direct Approach and its commitment to evidence-relative justification brings up issues of luck and rights that are just as profound as a commitment to fact-relativity and objective concerns.

§7: Conclusion

Soldiers face uncertain options when fighting in war. But just combatants can face the scale and uncertainty of killing in war and still make morally skilled decisions. When facts are hard to come by and evidence is clouded by the fog of war, just combatants should maximize the moral value of their choices by maximizing the chances that the unavoidable harms and wrongs of an unjust war are inflicted on those persons who bear the most responsibility for the circumstances in which these unjust harms and grave wrongs arise. This means that just combatants should attend to expectation-relative justification that weights outcomes according to reductive theories of killing in war. Reductive individualism, with its focus on the comparative dimension of liability to and fairness in the distribution of the unjust harms and grave wrongs that attend warfare, can meet the scale and uncertainty of warfare. It remains the case that the morally best option in war is the morally best option in other circumstances: the distribution of unavoidable harms and wrongs to those most responsible for the fact that anyone faces such harms and wrongs.

Bibliography

Altman, Andrew and Christopher Heath Wellman. *A Liberal Theory of International Justice*. Oxford: Oxford University Press, 2009.

Ashworth, Andrew, Lucia Zedner, and Patrick Tomlin. *Prevention and the Limits of the Criminal Law*. Oxford: Oxford University Press, 2013.

Axelrod, Robert M. *The Complexity of Cooperation: Agent-Based Models of Competition and Collaboration*. Princeton, N.J.: Princeton University Press, 1997.

Axelrod, Robert M. and Richard Dawkins. *The Evolution of Cooperation*. Harmondsworth: Penguin, 1990.

Barry, Christian and Patrick Tomlin. "Moral Uncertainty and Permissibility: Evaluating Option Sets." *Canadian Journal of Philosophy* 46, no. 6 (2016): 898-923.

Bazargan-Forward, Saba. "Accountability and Intervening Agency: An Asymmetry between Upstream and Downstream Actors." *Utilitas* 29, no. 1 (2017): pp110-24.

Bazargan-Forward, Saba. "Vesting Agent-Relative Permissions in a Proxy*." *Law and Philosophy* 37, no. 6 (2018): 671-95.

Bazargan, Saba. "Complicitous Liability in War." *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition* 165, no. 1 (2013): 177-95.

Bazargan, Saba. "Morally Heterogeneous Wars." *Philosophia* 41, no. 4 (2013): 959-75.

Bazargan, Saba. "Killing Minimally Responsible Threats." *Ethics* 125, no. 1 (2014): 114-36.

Benbaji, Yitzhak and Naomi Sussman. *Reading Walzer*. 1st ed. Taylor & Francis Ebooks. New York: Routledge, 2014.

Bourke, Richard. *Peace in Ireland : The War of Ideas*. 2nd ed. London: Pimlico, 2012.

Braithwaite, John. "Restorative Justice: Assessing Optimistic and Pessimistic Accounts." *Crime and Justice* 25 (1999): 1-127.

Bratman, Michael. "Shared Intention." *Ethics* 104, no. 1 (1993): 97-113.

Bratman, Michael. "Intention, Practical Rationality, and Self-Governance." *Ethics* 119, no. 3 (2009): 411-43.

Bratman, Michael. "The Fecundity of Planning Agency." In *Oxford Studies in Agency and Responsibility Volume 1*, edited by David Shoemaker: Oxford University Press, 2013.

Bratman, Michael. *Shared Agency : A Planning Theory of Acting Together*. New York: Oxford University Press, 2014.

Bratman, Michael. "Précis of Shared Agency: A Planning Theory of Acting Together." *Philosophical Studies* 172, no. 12 (December 01 2015): 3375-78.

Bratman, Michael. "Shared Agency: Replies to Tenenbaum, Copp, and Schapiro." *Philosophical Studies* 172, no. 12 (December 01 2015): 3409-20.

Bratman, Michael. *Planning, Time, and Self Governance : Essays in Practical Rationality*. New York, NY: Oxford University Press, 2018.

Brennan, Jason and Peter Martin Jaworski. "Markets without Symbolic Limits." *Ethics* 125, no. 4 (2015): 1053-77.

Buchak, Lara. "Taking Risks Behind the Veil of Ignorance." *Ethics* 127, no. 3 (2017): 610-10.

Buchak, Lara Marie. *Risk and Rationality*. Oxford: Oxford University Press, 2014.

Buchanan, Allen. "Social Moral Epistemology and the Tasks of Ethics." In *Ethics and Humanity: Themes from the Philosophy of Jonathan Glover*, edited by N. Ann Davis, Richard Keshen, and Jeff McMahan. New York: Oxford University Press, 2010.

Buchanan, Allen. "A Richer Jus Ad Bellum." In *The Oxford Handbook of Ethics and War*, edited by Seth Lazar and Helen Frowe. New York: Oxford University Press, 2015.

Buchanan, Allen and Russell Powell. "The Limits of Evolutionary Explanations of Morality and Their Implications for Moral Progress." *Ethics* 126, no. 1 (2015): 37-67.

Buchanan, Allen and Russell Powell. "Toward a Naturalistic Theory of Moral Progress." *Ethics* 126, no. 4 (2016): 983-1014.

Clausewitz, Carl von. *On War*. edited by Michael Howard, Peter Paret, and Bernard Brodie. Princeton: Princeton University Press, 1976.

Cole, Hugh M. *The Ardennes : Battle of the Bulge*. Washington: Office of the Chief of Military History, Dept. of the Army, 1965.

Coogan, Tim Pat. *The IRA*. New York: Palgrave, 2000.

Dill, Janina. *Legitimate Targets? : Social Construction, International Law and Us Bombing*. Cambridge Studies in International Relations. Cambridge: Cambridge University Press, 2015.

Dill, Janina and Henry Shue. "Limiting the Killing in War: Military Necessity and the St. Petersburg Assumption." *Ethics & International Affairs* 26, no. 3 (2012): 311-33.

Duff, Antony. *Punishment, Communication and Community*. Oxford: Oxford University Press, 2001.

Duff, Antony and Stuart P. Green. *Philosophical Foundations of Criminal Law*. Oxford: Oxford University Press, 2013.

Duff, Antony and Zachary Hoskins. "Legal Punishment." Last modified 2018. Accessed November 26, 2018, 2018.

Fabre, Cécile. "Guns, Food, and Liability to Attack in War." *Ethics* 120, no. 1 (2009): 36-63.

Fabre, Cécile. *Cosmopolitan War*. Oxford: Oxford University Press, 2012.

Fabre, Cécile. *Cosmopolitan Peace*. Oxford: Oxford University Press, 2016.

Fabre, Cécile and Seth Lazar. *The Morality of Defensive War*. Oxford: Oxford University Press, 2014.

Farrell, Daniel M. "The Justification of General Deterrence." *The Philosophical Review* 94, no. 3 (1985): 367-94.

Farrell, Daniel M. "Deterrence and the Just Distribution of Harm." *Social Philosophy and Policy* 12, no. 2 (1995): 220.

Farrell, Daniel M. "Using Wrongdoers Rightly: Tadros on the Justification of General Deterrence." *Criminal Law and Philosophy* 9, no. 1 (2015/03/01 2015): 1-20.

Feinberg, Joel. *Doing and Deserving : Essays in the Theory of Responsibility*. Princeton: Princeton University Press, 1974.

Finlay, Christopher J. "Fairness and Liability in the Just War: Combatants, Non-Combatants and Lawful Irregulars." *Political Studies* 61, no. 1 (2013): 142-60.

Frowe, Helen. *Defensive Killing*. Oxford: Oxford University Press, 2014.

Frowe, Helen. "Lesser-Evil Justifications for Harming: Why We're Required to Turn the Trolley." *The Philosophical Quarterly* 68, no. 272 (2018): 460-80.

Frowe, Helen. "Symposium on Seth Lazar's Sparing Civilians: Introduction." *Law and Philosophy* 37, no. 3 (2018): 229-41.

Frowe, Helen and Gerald R. Lang. *How We Fight : Ethics in War*. Oxford: Oxford University Press, 2014.

Giubilini, A and N Levy. "What in the World Is Collective Responsibility?" *Dialectica* 72, no. 2 (2018): 191-217.

Glover, Jonathan. *Humanity : A Moral History of the Twentieth Century*. London: Pimlico, 2001.

Gray, J. Glenn. *The Warriors : Reflections on Men in Battle*. Lincoln, Neb. London: University of Nebraska Press, 1998.

Haque, Adil Ahmad. *Law and Morality at War*. Oxford: Oxford University Press, 2017.

Harnden, Toby. *'Bandit Country' : The IRA and South Armagh*. London: Coronet, 2000.

Hedden, Brian. "Does Mite Make Right?: On Decision-Making under Normative Uncertainty." In *Oxford Studies in Metaethics*. Oxford: Oxford University Press, 2016.

Hugh, LaFollette and R. A. Duff. "Punishment." In *The Oxford Handbook on the Ethics of Punishment*, edited by R.A. Duff: Oxford University Press.

Kamm, Frances. "The Doctrine of Triple Effect." *Proceedings of the Aristotelian Society* 74 (2000): 21.

Kamm, Frances. *Intricate Ethics : Rights, Responsibilities, and Permissible Harm*. Oxford: Oxford University Press, 2007.

Kamm, Frances. *The Moral Target : Aiming at Right Conduct in War and Other Conflicts*. Oxford: Oxford University Press, 2016.

Kamm, Frances. "The Trolley Problem and Aggression." *Social Philosophy and Policy* 32, no. 2 (2016): 1-17.

Kotz, Nick. *Wild Blue Yonder: Money, Politics, and the B-1 Bomber*. New York: Pantheon Books, 1988.

Lazar, Seth. "The Responsibility Dilemma for Killing in War : A Review Essay." *Philosophy & Public Affairs* 38, no. 2 (2010): 180-213.

Lazar, Seth. "Necessity in Self-Defense and War." *Philosophy & Public Affairs* 40, no. 1 (2012): 3-44.

Lazar, Seth. "Risky Killing and the Ethics of War." *Ethics* 126, no. 1 (2015): 91-117.

Lazar, Seth. *Sparing Civilians*. New York: Oxford University Press, 2015.

Lazar, Seth. "Complicity, Collectives, and Killing in War." *Law and Philosophy* 35, no. 4 (2016): 365-89.

Lazar, Seth. "Anton's Game: Deontological Decision Theory for an Iterated Decision Problem." *Utilitas* 29, no. 1 (2017): 88-109.

Lazar, Seth. "Deontological Decision Theory and Agent-Centered Options." *Ethics* 127, no. 3 (2017): 579-609.

Lazar, Seth. "Evaluating the Revisionist Critique of Just War Theory." *Daedalus* 146, no. 1 (2017): 113-24.

Lazar, Seth. "Just War Theory: Revisionists Versus Traditionalists." *Annu. Rev. Polit. Sci.* 20 (2017): 37-54.

Lazar, Seth. "In Dubious Battle: Uncertainty and the Ethics of Killing." *Philosophical Studies* 175, no. 4 (2018): 859-83.

Lazar, Seth and Helen Frowe, eds. *The Oxford Handbook of Ethics and War*. New York, NY: Oxford University Press, 2015.

MacAskill, William. "The Infectiousness of Nihilism." *Ethics* 123, no. 3 (2013): 508-20.

McMahan, Jeff. *The Ethics of Killing : Problems at the Margins of Life*. Oxford: Oxford University Press, 2003.

McMahan, Jeff. "Self-Defense and Culpability." *Law and Philosophy* 24, no. 6 (2005): 751-74.

McMahan, Jeff. *Killing in War*. Oxford: Clarendon Press, 2009.

McMahan, Jeff. "The Just Distribution of Harm between Combatants and Noncombatants." *Philosophy & Public Affairs* 38, no. 4 (2010): 342-79.

McMahan, Jeff. "Who Is Morally Liable to Be Killed in War." *Analysis* 71, no. 3 (2011): 544-59.

McMahan, Jeff. "Individual Liability in War: A Response to Fabre, Leveringhaus and Tadros." *Utilitas* 24, no. 2 (2012): 278-99.

McMahan, Jeff. "Proportionality and Just Cause." *Journal of Moral Philosophy* 11, no. 4 (2014): 428-53.

McMahan, Jeff. "Self-Defense against Justified Threateners." In *How We Fight : Ethics in War*, edited by Helen Frowe and Gerald R. Lang, 104-37. Oxford: Oxford University Press, 2014.

McMahan, Jeff. "Proportionality and Time." *Ethics* 125, no. 3 (2015): 696-719.

McMahan, Jeff. "The Limits of Self-Defense." In *The Ethics of Self-Defense*, edited by Christian Coons and Michael Weber, 185-210. New York, NY: Oxford University Press, 2016.

McMahan, Jeff. "Proportionality and Necessity in Jus in Bello." In *The Oxford Handbook of Ethics of War*, edited by Seth Lazar and Helen Frowe, 418-37: Oxford University Press, 2016.

McMahan, Jeff. "Liability, Proportionality, and the Number of Aggressors." In *The Ethics of War : Essays*, edited by Saba Bazargan and Samuel Charles Rickless. New York: Oxford University Press, 2017.

Miller, David. *National Responsibility and Global Justice*. Oxford: Oxford University Press, 2007.

Moore, Michael S. *Placing Blame : A General Theory of the Criminal Law*. Placing Blame : A Theory of the Criminal Law. Oxford: Oxford University Press, 2010.

Nagel, Thomas. "War and Massacre." *Philosophy & Public Affairs* 1, no. 2 (1972): 123-44.

Nagel, Thomas. *Mortal Questions*. Canto ed. Cambridge: Cambridge University Press, 1991.

Oppenheimer, A. R. *IRA : The Bombs and the Bullets : A History of Deadly Ingenuity*. Dublin: Irish Academic Press, 2009.

Orwell, George. *George Orwell : Essays*. Penguin Classics. London: Penguin in association with Secker & Warburg, 2005.

Parfit, Derek. *Reasons and Persons*. 2nd repr. with corrections of 1984 ed. Oxford: Clarendon Press, 1987.

Parfit, Derek. *On What Matters*. Vol. I. Oxford: Oxford University Press, 2011.

Parfit, Derek. "Future People, the Non-Identity Problem, and Person-Affecting Principles." *Philosophy & Public Affairs* 45, no. 2 (2017): pp118-57.

Parry, Jonathan. "Liability, Community, and Just Conduct in War." *Philosophical Studies* 172, no. 12 (2015): 3313-33.

Parry, Jonathan. "Defensive Harm, Consent, and Intervention." *Philosophy and Public Affairs* 45, no. 4 (2017): 356-96.

Parry, Jonathan. "Legitimate Authority and the Ethics of War: A Map of the Terrain." *Ethics & International Affairs* 31, no. 2 (2017): 169-89.

Pettit, Philip. "Responsibility Incorporated." *Ethics* 117, no. 2 (2007): 171-201.

Rodin, David. *War and Self-Defense*. Oxford: Clarendon Press, 2002.

Rodin, David. "Justifying Harm." *Ethics* 122, no. 1 (2011): 74-110.

Rodin, David. "The Myth of National Self-Defence." In *The Morality of Defensive War*. Oxford: Oxford University Press, 2014.

Rodin, David. "The Lesser Evil Obligation." In *The Ethics of War : Essays*, edited by Saba Bazargan and Samuel Charles Rickless, 28-45. New York: Oxford University Press, 2017.

Ross, Jacob. "Rejecting Ethical Deflationism." *Ethics* 116, no. 4 (2006): 742-68.

Ryan, Cheyney. "The Hard Hand of War." *Law and Philosophy* 37, no. 3 (2018): 269-87.

Sagan, Scott D. and Benjamin A. Valentino. "Revisiting Hiroshima in Iran: What Americans Really Think About Using Nuclear Weapons and Killing Noncombatants." *International Security* 42, no. 1 (2017): 41-79.

Schelling, Thomas C. *The Strategy of Conflict*. Rev. ed. Cambridge, Mass.: Harvard University Press, 1980.

Scott, James. *Target Tokyo : Jimmy Doolittle and the Raid That Avenged Pearl Harbor*. New York: W. W. Norton & Company, 2015.

Stephens, Christopher. "Modelling Reciprocal Altruism." *The British Journal for the Philosophy of Science* 47, no. 4 (1996): 533.

Stilz, Anna. "Collective Responsibility and the State." *Journal of Political Philosophy* 19, no. 2 (2011): 190-208.

Tadros, Victor. *The Ends of Harm : The Moral Foundations of Criminal Law*. Oxford Legal Philosophy. Oxford: Oxford University Press, 2013.

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

Tadros, Victor. "Wrongful Intentions without Closeness." *Philosophy & Public Affairs* 43, no. 1 (2015): 52-74.

Tadros, Victor. "Dimensions of Intentions: Ways of Killing in War." In *The Oxford Handbook of Ethics of War*, edited by Seth Lazar and Helen Frowe: Oxford University Press, 2016.

Tadros, Victor. "Causal Contributions and Liability." *Ethics* 128, no. 2 (2018): 402-31.

Tadros, Victor. "The Moral Distinction between Combatants and Noncombatants: Vulnerable and Defenceless." *Law and Philosophy* 37, no. 3 (2018): 289-312.

Tadros, Victor. "Past Killings and Proportionality in War." *Philosophy & Public Affairs* 46, no. 1 (2018): 9-35.

Temkin, Larry S. *Rethinking the Good : Moral Ideals and the Nature of Practical Reasoning*. New York: Oxford University Press, 2015.

Tomlin, Patrick. "Subjective Proportionality." *Ethics* 129, no. 2 (2019): 254-83.

Tomlin, Patrick. "Distributive Justice for Aggressors." *Law and Philosophy* (Forthcoming).

Walzer, Michael. *Just and Unjust Wars*. New York: Basic Books, 2015.

Weatherson, Brian. "Running Risks Morally." *Philosophical Studies* 167, no. 1 (2014): 141-63.

Zedner, Lucia. "Reparation and Retribution: Are They Reconcilable?" *The Modern Law Review* 57, no. 2 (1994): 228-50.