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The Just Distribution of Harm Between Combatants and Noncombatants

I. THE DOCTRINE OF THE PRIORITY OF COMBATANTS

The NATO intervention in Kosovo in 1999, led by the United States under the Clinton administration, was remarkable in the annals of warfare for its avoidance of any casualties among the intervening forces. The eighteen U.S. soldiers killed in Somalia earlier in the decade had been a political liability for the administration, which as a consequence gave almost absolute priority to the minimization of casualties among U.S. combatants in Kosovo. This was accomplished by limiting NATO's involvement to high-altitude bombing, which enabled the pilots to fly out of range of Serbian antiaircraft fire. While this enabled NATO combatants to fight with little risk to themselves, it also prevented NATO from being able to locate, identify, and attack its targets with the degree of accuracy and discrimination that would have been possible if its pilots had flown lower and, in particular, if it had deployed ground forces as well rather than relying exclusively on aerial bombardment. As a consequence of its choice of tactics, NATO killed more civilians than it would have if it had exposed its own forces to greater risks. Those who suffered from the less discriminating mode of attack included not only Serbian civilians but also civilians of Albanian ethnicity, whom it was NATO's avowed mission to protect from Serbian forces.

More recently, during the Israeli invasion of Gaza, some Israeli forces seemed to repudiate constraints to which the Israeli Defense Force (IDF)

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had previously adhered, since they appeared to conduct their operations in ways that sought to minimize risks to their combatants, even when that involved foreseeably increasing the harm they caused to Palestinian civilians. While the casualty figures are disputed, virtually everyone accepts that more than one thousand Palestinians were killed, and most observers agree that the majority of them were civilians. By contrast, only ten Israeli soldiers were killed, of whom four were killed by what is bizarrely called "friendly fire." The ratio of Palestinian civilians killed by Israeli combatants to Israeli combatants killed by Palestinian fighters was therefore probably greater than one hundred to one.

Both NATO and Israel were widely criticized for the ways in which they conducted these wars—rightly, I think, in both instances, though the cases were different in relevant respects that made the Israeli action rather less defensible, as I will explain later. Both cases do, however, raise the same general issue, which is how to resolve trade-offs between "force protection" and minimizing the harm one's forces cause to civilians. Many commentators on recent wars have contended that the United States and its allies have become *overly* concerned to avoid harming civilians, at the cost of both the lives of their combatants and the success of their missions. In a *New York Times* editorial commenting on General McChrystal's recent restrictions on air strikes in Afghanistan, one defense analyst asserted that "the pendulum has swung too far in favor of avoiding the death of innocents at all cost. General McChrystal's directive was well intentioned, but the lofty ideal at its heart is a lie, and an immoral one at that, because it pretends that war can be fair or humane."[1] Many who share this analyst's view of killing civilians are not political realists but believe that war should be scrupulously conducted in morally permissible ways. Yet they also believe that states are morally permitted or even required to give a certain priority to the protection of their own combatants over the avoidance of harm to enemy civilians—or, as I will suggest is more coherent, that combatants themselves are permitted or required to give a certain priority to the preservation of their own lives. I will refer to this as the doctrine of the "priority of combatants." This

1. Lara M. Dadkhah, "Empty Skies Over Afghanistan," *New York Times*, February 18, 2010. Note her choice of the phrase "death of innocents" rather than the more accurate "killing of innocents," as well as the curious assumption that it is *immoral* to suppose that war should be conducted humanely.

doctrine cannot be defined with precision; nor would there be any advantage in trying to state it with an artificial or contrived precision that it lacks, since it is a doctrine about trade-offs among risks in situations in which the relevant probabilities cannot be known with even approximate precision. It is perhaps best defined in relation to the dominant view within the just war tradition, which is that when combatants must choose between imposing a certain risk on civilians as a side effect of their action and accepting an even greater risk to themselves, they must, up to a certain point, accept that greater risk. Where the threshold at which combatants are no longer required to accept the greater risk lies is a matter of dispute within the just war tradition. But the important point here is that the priority of combatants may be understood simply as the denial of this traditional just war view. It asserts that soldiers are permitted, and perhaps in some cases required, to impose risks on enemy or neutral civilians if the only alternative is to allow themselves to be exposed to a greater risk—or, on some understandings of the doctrine, even a lesser risk. Avishai Margalit and Michael Walzer provide a helpful illustration of the contrast. As proponents of the traditional view, they claim that "when soldiers . . . take fire from the rooftop of a building, they should not pull back and call for artillery or air strikes that may destroy most or all of the building; they should try to get close enough to the building to find out who is inside or to aim directly at the fighters on the roof."[2] Those who advocate the priority of combatants often do so in defense of artillery or air attacks in just such circumstances.

I will confine my discussion of the priority of combatants to what I think is its most plausible version. Although one would naturally assume that the doctrine should be universal in application, its scope must be restricted if it is to have even minimal plausibility as a moral doctrine. It simply cannot be true as a matter of morality that combatants who fight in a war that is unjust because its aims are unjust are permitted not only to kill enemy combatants in pursuit of those aims but also to kill a greater number of innocent civilians than is necessary to achieve their ends in order to minimize the risks they incur in fighting. I will therefore assume that the doctrine of the priority of combatants applies only to

2. Avishai Margalit and Michael Walzer, "Israel: Civilians and Combatants," *The New York Review of Books* 56 (May 14, 2009): 21–22, at p. 22.

combatants fighting in a just war. If the doctrine proves untenable in this restricted form, it will, a fortiori, be untenable in its universal form as well.

Four other points about the subsequent discussion are also worth noting at the outset. First, the priority of combatants is a *moral* doctrine and as such is compatible with a variety of claims about what the law of war is or ought to be. Second, the discussion will be limited to cases involving harms to civilians that are foreseeable but unintended effects of military operations, which I will refer to as *side effects*. The intentional harming or killing of civilians in war raises quite different issues. Third, although I will generally discuss cases involving killing civilians, allowing civilians to die, or saving civilians' lives, the claims I will make should also apply to cases of inflicting, allowing, or preventing lesser, nonlethal harms. Fourth, I will generally argue on the assumption that all civilians are innocent in the generic sense—that is, that they are not morally liable to suffer the infliction of any harms in war, whether intended or unintended. But I will consider the possibility that some civilians may be liable to suffer certain harms, particularly harms that are side effects of otherwise legitimate attacks on military targets.[3]

Finally, it will help to avoid misunderstanding if I define at the outset some of the terms I will use. Those who fight in just wars are *just combatants*, while those who fight in wars that are unjust because they lack a just cause are *unjust combatants*. (Because I will assume that the doctrine of the priority of combatants applies only to just combatants, *combatants* should be understood to refer to just combatants.) Civilians in a state that is fighting a just war are *just civilians*, while those in a state fighting a war that lacks a just cause are *unjust civilians*. Civilians in neutral states are *neutral civilians*. Although, strictly speaking, *civilian* and *noncombatant* are not synonymous, I will for convenience treat them as if they were.

In the remainder of this essay, I will criticize both the most influential defense and the most influential critique of the priority of combatants. I

3. I have defended the idea that noncombatants might be liable to be harmed in certain ways—for example, to be forced to pay reparations, to suffer the effects of economic sanctions, to endure the burdens of military occupation, and in some cases to suffer harm as a side effect of military action—in *Killing in War* (Oxford: Clarendon Press, 2009), chap. 5.

will then advance what I think is the correct explanation of why that doctrine is mistaken.

II. AN INFLUENTIAL DEFENSE OF THE PRIORITY OF COMBATANTS

In the aftermath of Israel's brief invasion of Gaza in 2008–2009, some of the public debate about the conduct of the war focused on a philosophical theory of the just war that had been advanced in a couple of articles that had appeared in 2005, coauthored by two Israelis, Asa Kasher and Amos Yadlin.[4] These articles had presented arguments in favor of the priority of combatants, specifically with reference to Israeli combatants, and it was widely believed, in Israel in particular, that they had influenced the way that the invasion of Gaza had been conducted. Given that Kasher was an advisor to the IDF College of National Defense and Yadlin was a Major General in the IDF, the former commander of the College of National Defense, and the military attaché to the Israeli Embassy in Washington, it seems reasonable to assume that, at a minimum, their views were taken into account by those who planned the strategy for the invasion.

Kasher and Yadlin advance two arguments for the priority of combatants. The first is simply the repudiation of the moral significance traditionally attributed to the distinction between combatants and noncombatants. "We reject such conceptions," they write, "because we consider them immoral. A combatant is a citizen in uniform. . . . His life is as precious as the life of anyone else."[5] It is, however, consistent with this to suppose that, although the moral reason to protect or preserve the life of a combatant is just as strong as the reason not to kill an innocent noncombatant as a side effect of military action, it is also no stronger than that. So the rejection of the significance traditionally attributed to the distinction between combatants and noncombatants does not entail the priority of combatants. Hence Kasher and Yadlin advance a second, positive argument for that doctrine, based on the claim that the state's duties to people who are under its effective political control are stronger

4. Asa Kasher and Amos Yadlin, "Military Ethics of Fighting Terror: An Israeli Perspective," *Journal of Military Ethics* 4 (2005): 3–32; and "Assassination and Preventive Killing," *SAIS Review* 25 (2005): 41–57.

5. Kasher and Yadlin, "Military Ethics," p. 17.

than its duties to people who are not under its control.[6] If that is right, they claim, then "where the state does not have effective control of the vicinity [in which its forces operate], it does not have to shoulder responsibility for the fact that [its enemies] operate in the vicinity of [innocent bystanders]. Jeopardizing combatants rather than bystanders . . . would mean shouldering responsibility for the mixed nature of the vicinity for no reason at all."[7]

This second argument should not be confused with the related claim that when combatants choose to operate near noncombatants, effectively using them as innocent shields, responsibility for any harms the noncombatants suffer lies with the combatants who have placed them at risk, not with the combatants who may actually have inflicted the harm. No doubt Kasher and Yadlin believe, correctly, that combatants who deliberately place noncombatants at risk deserve most of the *blame* for any harms they suffer. But their second argument appeals to the different claim that "it is the responsibility of the state to protect the life of a person under its effective control."[8] On this view, if unjust combatants of state A make it necessary for just combatants of state B to fight them on the territory of state C, it is state C, not state B, that has the responsibility to protect its own noncombatants from being harmed, even if most of the blame for any harm they suffer will lie with state A and its combatants.

The first of Kasher and Yadlin's two arguments is a non sequitur. No one has argued that combatants should take risks or make sacrifices to avoid killing noncombatants on the ground that their lives have less value. There are various arguments for giving priority to noncombatants over combatants, some of which I will review shortly, but none of them claims that the lives of combatants are less precious than those of noncombatants.

6. One source of this idea is international law. According to Eyal Benvenisti, "human rights treaties define agency by assigning the obligation to respect and to ensure [respect for rights] on states with respect only to individuals 'within their jurisdiction,' a term that was interpreted to extend to all areas of direct 'effective control' of individuals, but not beyond that. . . . The attenuated duties that armies have toward enemy civilians are predicated on their limited and non-exclusive power over enemy territory." See Eyal Benvenisti, "Human Dignity in Combat: The Duty to Spare Enemy Civilians," *Israel Law Review* 39 (2006): 81–109, at pp. 88 and 90.

7. Kasher and Yadlin,"Military Ethics," p. 18.

8. Ibid., p. 17.

One indication that there is something wrong with Kasher and Yadlin's second argument is that it implies that in conflicts in which their cause is just, Israeli combatants are permitted to give priority to their own lives over the lives of Palestinian civilians, but that Palestinian fighters never have this privilege, no matter how just their cause may be. For the permission that Israeli combatants have derives, according to Kasher and Yadlin, from the duty of the Israeli state to give priority to the protection of its own citizens over the protection of people who are not under its control. But Palestinian fighters have no state whose duty to protect them could confer such a permission.

The reason why Kasher and Yadlin's argument has this arbitrary implication is that it presupposes that the state's duty to protect its citizens can be the source of permissions that combatants would not otherwise have. But whatever the state's duties to its combatants are, they are *irrelevant* to what it is permissible for those combatants to do. An analogy may make this clear. Suppose that my mother decides to send me on a dangerous errand. Because she has a special duty to protect me, she instructs me before I depart to be sure that I make every effort to protect myself, even if this involves harming innocent bystanders as a side effect. But this alone cannot make it permissible for me to shift the costs of my action onto innocent bystanders. I could not justify such action to its victims by claiming that it enables my mother to fulfill her duty to protect me. My mother's instructions, issued, as she supposes, in fulfillment of her duty to protect me, cannot create permissions for me that I would not have in the absence of those instructions. She has no right to instruct me to do any more than I would be independently permitted to do.

For the same reason, the state's duty to protect its citizens cannot create permissions for its combatants that they would not otherwise have—with, perhaps, one exception. It may be that when a state has a duty to protect its citizens from an unjust threat, it can then make it permissible for its soldiers to fight when it would otherwise be impermissible for them to do so. To limit the occurrence of unjust wars, procedural constraints must be imposed on the resort to war. One such constraint is the subordination of the military's ability to go to war to civilian control. But for this control to be effective, there must be a strong presumption against the permissibility of soldiers going to war in the absence of authorization from the civilian political authorities. Even

when the other conditions of a just war are satisfied, authorization from the state (which some think is required by the just war criterion of "legitimate authority") may be necessary to make it permissible for soldiers to fight. Note, however, that even if this is so, the state does not really *create* a permission on the basis of its duty to its citizens. It is not the state's authorization that makes *war* permissible. The permissibility of war derives from the satisfaction of the other conditions of a just war. The state merely *distributes* an antecedent permission to fight. Thus, if the political authorities were *unable* to authorize the military to fight (because, for example, the enemy's capture of the capitol had isolated the government from communication), the normal procedural constraints could lapse or be overridden, making it permissible for soldiers to fight without political authorization. It seems clear, therefore, that just as my mother's duty to protect me cannot make it permissible for me to inflict greater harm on innocent bystanders than I would be permitted to inflict were I an orphan, so a state's duty to protect its citizens, including its combatants, cannot make it permissible for its combatants to inflict greater harm on enemy civilians than they would otherwise be permitted to inflict.

It may be possible to interpret Kasher and Yadlin differently. Immediately after observing that "a combatant is a citizen in uniform," they go on to say that the state must "have a compelling reason for jeopardizing a citizen's life, whether or not he or she is in uniform." One might interpret them here as claiming that the responsibilities of the state to its citizens are such that it simply cannot demand of a citizen that he sacrifice his life for the sake of someone who is not a citizen.[9] But if this is what they mean, it does not support their conclusion. The amount of harm that a state may permissibly inflict on innocent civilians in other countries cannot depend on how much sacrifice it may legitimately demand from its own citizens. If a state may demand only a certain level of sacrifice from its combatants but can only avoid defeat either by compelling them to make sacrifices beyond that limit or by inflicting an impermissible level of harm on innocent civilians, it is in the tragic position of having no permissible alternative to the acceptance of defeat. If the costs of their own defense are too great for the state to force its own

9. This understanding of Kasher and Yadlin's argument was suggested by an Editor of *Philosophy & Public Affairs*.

citizens to bear, they are certainly too great for the state to impose on others. It may not force innocent civilians elsewhere to make sacrifices that exceed those it may legitimately demand from its own citizens *for the sake of their own defense*.

If Kasher and Yadlin's arguments, however interpreted, are as readily refuted as these remarks suggest, it is disturbing to reflect that they may have been instrumental in facilitating the killing of hundreds of innocent people in Gaza.

III. AN INFLUENTIAL CRITIQUE OF THE PRIORITY OF COMBATANTS

In the aftermath of the Gaza war, Avishai Margalit and Michael Walzer published a widely discussed article that criticized the doctrine of the priority of combatants, taking the position of Kasher and Yadlin as its immediate target. Margalit and Walzer cite but do not discuss Kasher and Yadlin's positive argument based on an alleged hierarchy of state duties; they focus their criticisms instead on Kasher and Yadlin's rejection of the significance traditionally attributed to the distinction between combatants and noncombatants. Margalit and Walzer defend a traditional understanding of the just war, according to which the moral principles that govern the conduct of war are neutral between just and unjust combatants. Provided they obey these principles, combatants on both sides are permitted to fight and thus to attack opposing combatants. All have the same rights and liabilities. "Combatants," Margalit and Walzer write, "are accountable only for their conduct in war. They do not become criminals because they are fighting in an aggressive war."[10] The central principle they are required to obey is the requirement of discrimination, which holds that while all enemy combatants are legitimate targets of attack, all noncombatants are immune from intentional attack. Yet according to Margalit and Walzer, the significance of the distinction extends beyond the permissibility of intentional killing. Even harms that are side effects of permissible action should, when possible, be suffered by combatants rather than noncombatants. Whether a person counts as a combatant or a noncombatant is, on their view, more a matter of membership than of action, such as participation in combat. A military

10. Margalit and Walzer, "Civilians and Combatants," p. 21. Because they are discussing morality rather than law, they must mean "moral criminals," not "criminals" in the legal sense.

officer who has and will have no role in a particular war is nevertheless a legitimate target in that war, whereas an academic consultant to the government who assists in the formulation of strategy is not. I will thus refer to Margalit and Walzer's view as the *Group Membership Account* of permissible killing in war.

There is a revisionist account of the just war that rejects the central elements of the traditional Group Membership Account. According to this account, the permissibility of conduct in war cannot be isolated from the goals of the war. If the goals are unjust, acts of war intended to achieve those goals are unlikely to be permissible. In particular, combatants who fight in a just war are seldom legitimate targets of attack, as they have normally done nothing to waive or forfeit their right not to be attacked. By contrast, some civilians who are responsible for making significant contributions to an unjust war may be liable to suffer certain harms—for example, harms that result as side effects of necessary military action by just combatants. According to this view, a person is a legitimate target in war only if through his individual action he has made himself morally liable to attack. I will call this the *Individual Liability Account* of permissible killing in war.

Margalit and Walzer believe that the Individual Liability Account supports the doctrine of the priority of combatants while the Group Membership Account entails that this doctrine is false. They explain why the doctrine follows from the Individual Liability Account as follows:

> The position that we . . . oppose is . . . that only the side that is fighting for a just cause (our side) has a right to fight, and that soldiers on the other side have no rights at all. Anything they do is immoral, whether they attack our soldiers or our civilians. And since our soldiers and civilians are equally innocent, we cannot ask our soldiers to take risks to protect enemy civilians.[11]

In their effort to refute the priority of combatants, they therefore argue not only in favor of the Group Membership Account but also against the Individual Liability Account. I will argue, in opposition to this, that their arguments for their interpretation of the requirement of discrimination are unsuccessful and therefore that their appeal to what they refer to as the "categorical distinction between combatants and noncombatants"

11. Ibid., pp. 21–22.

cannot explain why the priority of combatants is mistaken.[12] I will then develop an alternative explanation of why the priority of combatants is wrong that is entirely compatible with, and may even be regarded as a component of, the Individual Liability Account.

Although I will argue that the Individual Liability Account does not support the priority of combatants, I concede that it is understandable that Margalit and Walzer should think that it does. As I noted earlier, the priority of combatants is utterly implausible when applied to unjust combatants as well as to just combatants, as it must be if the Group Membership Account is correct. An understanding of permissible killing in war that has at least some elements of the Individual Liability Account is necessary for the doctrine of the priority of combatants to have even prima facie plausibility.

In defending the Group Membership Account, Margalit and Walzer offer three reasons for thinking that their traditional understanding of the requirement of discrimination is correct. The first suggests that combatants are legitimate targets because of their capacities; the second and third together appeal instead to the instrumental value of treating combatants, but not noncombatants, as legitimate targets.

Margalit and Walzer's first claim is, in effect, that combatants, but not noncombatants, forfeit their right not to be attacked.

> Noncombatants are innocent because they do not participate directly in the war effort; they lack the capacity to injure, whereas combatants qua combatants acquire this capacity. And it is the capacity to injure that makes combatants legitimate targets in the context of war. Men and women without that capacity are not legitimate targets.[13]

Their second explanation of the significance of the distinction between combatants and noncombatants is that combatants are required by their role to take risks that others are not required to take; hence they must expose themselves to those risks rather than impose them on others.

> This is what each side should say to its soldiers: By wearing a uniform, you take on yourself a risk that is borne only by those who have been trained to injure others (and to protect themselves). You should not

12. Ibid., p. 22.
13. Ibid., p. 21.

> shift this risk onto those who haven't been trained, who lack the capacity to injure; whether they are brothers or others.[14]

Their third and final reason is an instrumental explanation of why combatants are required by their role to accept risks that are not required of others.

> The moral justification for this requirement lies in the idea that violence is evil, and that we should limit the scope of violence as much as is realistically possible. As a soldier, you are asked to take an extra risk for the sake of limiting the scope of the war.[15]

The reason why requiring combatants to assume risks and accept harms functions to limit the evil of violence is pragmatic: "The crucial means for limiting the scope of warfare is to draw a sharp line between combatants and noncombatants. This is the only morally relevant distinction that all those involved in a war can agree on."[16] By distinguishing between legitimate and illegitimate targets in a way that attracts general agreement, we can best succeed in insulating significant areas of human life from the destructive effects of war.

Notice that these reasons for seeking to confine the harms of war to combatants make no reference to the idea that their lives have less value than those of noncombatants.

Although I am in agreement with Margalit and Walzer on the major substantive issues, their reasons for rejecting the priority of combatants are, I will argue, largely though not entirely mistaken. They are on the side of the angels, but the angels deserve better arguments than those Margalit and Walzer provide. Their initial claim that combatants may permissibly be killed because they have the capacity to injure others is presumably grounded in the assumption that those who pose a threat to others may permissibly be opposed by necessary defensive violence. But few accept that this is true in forms of conflict other than war. In individual self-defense or third-party defense of others, for example, those who engage in justified defense against culpable aggressors may *not* be opposed by defensive violence. I have argued elsewhere that there is no

14. Ibid., p. 22.
15. Ibid.
16. Ibid., p. 21.

good reason to suppose that this moral asymmetry between wrongful attackers and justified defenders disappears in conditions of war.[17]

Margalit and Walzer's second reason for rejecting the priority of combatants—that combatants are required by their role to expose themselves to risks rather than impose comparable risks on others—is, I think, essentially correct, though the reason for this requirement has little or nothing to do with their capacity to injure. I will indicate in Section V what I think the basis of the requirement is. Just as it does not derive from the capacity to injure, so it is also not based on the assumption that the acceptance of risk by combatants is instrumental in limiting the evil of violence in war. Among other things, limiting "the scope of violence" is only conditionally an appropriate aim in war. It is appropriate only when it is compatible with the overriding aim of just war, which is also the overriding aim of police action: namely, the limitation of violence against the innocent *by wrongdoers*. Or, perhaps more precisely, the aim is not to limit violence overall but to limit the violation of rights. It is sometimes morally permissible, or even required, to employ greater violence against wrongdoers in order to prevent them from inflicting lesser violence on the innocent. If our overriding aim were to limit violence, we ought to accept a doctrine that would permit the resort to war only against enemies, such as those bent on genocide, for whom violence is an end. But in most cases, belligerents in war, including unjust aggressors, use violence only as a means. Their end is to seize land, resources, or wealth, or to impose their favored political, economic, or religious institutions on those they war against. In these cases, the reduction of violence can be best achieved by simply capitulating to their demands without armed resistance. Yet Margalit and Walzer do not argue for a general doctrine of preemptive surrender; hence their qualifying phrase "as much as is realistically possible" presumably means, roughly, "insofar as this is compatible with the achievement of victory."

Note that they cannot more plausibly say "compatible with the achievement of the just cause for war." For they deny that whether a war is just is relevant to the permissibility of conduct in war. Hence the instrumental significance of the distinction between combatants and noncombatants is, as they acknowledge, that it can serve to reduce the *overall* level of violence against both innocent people *and* wrongdoers—

17. I have argued at length for this claim in *Killing in War*, chap. 2.

not that it serves to reduce the evil of violence against the innocent. This further diminishes the moral significance that Margalit and Walzer claim for the distinction between combatants and noncombatants. For the aim of reducing the overall level of violence is not only subordinate to but may even conflict with the aim of reducing *wrongful* violence.

Margalit and Walzer do recognize a further aim that the principles governing war ought to be designed to achieve. They claim that "the point of just war theory is to regulate warfare, to limit its occasions."[18] The point, in other words, is not only to regulate and control war when it occurs but also to prevent its occurrence. But the aim of preventing the occurrence of war is sensible, as a general matter, only when "war" is understood to refer to the series of events comprising the belligerent acts of all the parties to the conflict. It is, for example, plausible that it would have been better if the Second World War had been prevented—though not if the only alternative had been capitulation to Germany. "War" can, however, refer to the belligerent acts of only one side in a conflict. It is only in this sense that war can be just or unjust. The Second World War, for example, was neither just nor unjust, though Britain's war against Germany was just. Let us say that the Second World War was a war in the wide sense, while Britain's war against Germany was a war in the narrow sense. While it is sensible, in general, to try to prevent wars in the wide sense, it is not sensible to try to prevent all wars in the narrow sense. It is in general important to try to prevent unjust wars, but it may be wrong to prevent just wars.[19] Assume, then, that Margalit and Walzer mean that one of the aims of just war theory is to prevent wars in the wide sense. But the most important means of achieving that aim is probably to prevent the occurrence of wars in the narrow sense that are unjust.

Even if general conformity with Margalit and Walzer's doctrine would achieve their first aim of minimizing overall violence when war occurs, it would be counterproductive with respect to their second aim of preventing wars in the wide sense from occurring. According to their view, all combatants, including just combatants, are legitimate targets in war; therefore unjust combatants do no wrong in killing just combatants.

18. Margalit and Walzer, "Civilians and Combatants," p. 21.

19. For a persuasive argument that there can be cases in which it would be wrong to prevent an unjust war, see Saba Bazargan, "The Permissibility of Aiding and Abetting Unjust Wars," *Journal of Moral Philosophy* (forthcoming).

Indeed, they do no wrong in pursuing unjust aims by means of war, provided they obey the *in bello* rules. But if this is right, they cannot refuse to fight on the ground that to do so would be impermissible. There might be a moral reason not to fight (for example, a soldier might have promised his mother he would not fight in an unjust war), but reasons not deriving directly from the war's unjustness would be unlikely to outweigh the soldiers' contractual and professional reasons to fight. Margalit and Walzer's view therefore greatly diminishes our ability to appeal to the consciences of individual soldiers as a means of preventing unjust wars. If just war theory taught that it is seriously wrong to fight in a war that lacks a just cause and wrong to kill people who are merely defending themselves and other innocent people from unjust attack, many of those commanded to fight in unjust wars might be inspired to resist. And the prospect of significant conscientious refusal to fight might deter governments from putting the domestic perception of their legitimacy at risk by initiating an unjust war. Margalit and Walzer's doctrine of civilian immunity and combatant liability is therefore instrumentally effective only for achieving their *in bello* aim—which is, in any case, sensible only as a subordinate aim—and actually impedes or retards the achievement of their more sensible *ad bellum* aim.

Even though Margalit and Walzer's Group Membership Account is mistaken in its claim that all combatants are liable to attack because they possess the capacity to injure, or because they participate directly in the war effort, and even though the goal that the account is intended to serve (diminishing overall violence) is the wrong goal, their view does have one powerful source of intuitive appeal. This is that it categorically repudiates the idea that noncombatants can be liable to attack in war. The only justification it accepts for harming or killing noncombatants is a necessity justification. Walzer has conceded elsewhere that it may be permissible in conditions of "supreme emergency" to kill noncombatants intentionally.[20] But that is because their right not to be intentionally killed has been overridden, not because it has been forfeited. And the same is true in cases in which it is permissible to kill noncombatants as a side effect: their right has been overridden, not forfeited. The Individual Liability Account, by contrast, allows that in some cases noncombatants may be *liable* to be harmed or even killed as a side effect—or

20. Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977), chap. 16.

even, though more rarely, as a means. The Group Membership Account seems therefore to afford significantly greater protection to noncombatants.

It is important to distinguish between two quite different forms of protection: practical and moral. It can be argued that the Group Membership Account offers greater practical protection in that if it is widely accepted and followed, fewer noncombatants will be attacked or killed in war than would be if the Individual Liability Account were followed instead. Or it might be argued that it confers greater moral protection in that it implies that the *moral constraint* against harming or killing noncombatants is stronger than the Individual Liability Account recognizes. I will suggest, however, that neither of these claims is obviously true.

Notice first that the claim that the Group Membership Account provides greater practical protection is irrelevant to the question whether it is *true* as an account of permissible killing in war—unless, *perhaps*, a pragmatist, rule consequentialist, or contractualist account of the nature of morality is true. It is, at any rate, compatible with the truth of the Individual Liability Account that we ought, for *moral* reasons, to try to persuade people that the Group Membership Account is true, so that they will act on it, even if it is false. But that would be unnecessary. Suppose, as I believe, that the Individual Liability Account is true. We should then accept that some unjust civilians (though not just civilians) may be morally liable to be harmed in war, either as a side effect or, more rarely, as a means. But we must also recognize that there is always disagreement about which side has a just cause and that those who are in fact unjust combatants almost always *believe* that they are just combatants and are encouraged in this belief by their government. They will therefore believe that it is permissible for them to do whatever morality says that it is permissible for just combatants to do. If they accept that the Individual Liability Account is true and that it holds that it can be permissible in certain conditions for just combatants to kill noncombatants, unjust combatants will then be likely to believe that morality has given them carte blanche for the killing of civilians, with disastrous results. These results can, however, be avoided. We must recognize that this is an area in which people tend to make bad judgments if they try to act in conformity with morality in conditions of significant moral uncertainty. The proper response to this is not to pretend that morality is other than it is, but to impose *laws* designed to motivate people to act in ways that

are most likely to be morally right. In this case, the solution is to impose an exceptionless legal prohibition of intentional attacks on noncombatants, as well as a stringent proportionality restriction on the killing of noncombatants as a side effect of military action. At least at present, the law of war must diverge from the morality of war.[21] Provided that it does, the effects on the targeting of civilians of recognizing the Individual Liability Account need not be very different from those of accepting the Group Membership Account.

Does the Group Membership Account accord noncombatants greater *moral* protection? It does rule out *intentional* attacks on all noncombatants, except when such an attack is necessary to prevent consequences that would be very substantially worse. Yet it also permits just and unjust combatants alike to pursue their goals by military means that foreseeably harm or kill noncombatants *as a side effect*, provided that the harms are unavoidable and proportionate. The Individual Liability Account, by contrast, extends the permission to harm or kill noncombatants as a necessary and proportionate side effect *only* to just combatants. For they alone pursue goals that are capable of outweighing the causation of harm to the innocent. Unjust goals pursued by unjust combatants cannot morally outweigh harms to the innocent; indeed, they do not weigh against such harms at all. Hence, while the Group Membership Account holds that *all* noncombatants are immune from intentional attack but morally vulnerable to side effect harms, the Individual Liability Account holds *both* that *unjust* civilians can be morally liable to suffer intended or unintended harms *and* that *just* civilians are morally completely immune from intentional attack *and* from being harmed as a side effect of military action. Overall, neither account seems to offer greater moral protection to noncombatants.

21. The situation would be different if there were an authoritative, publicly accessible guide to matters of *jus ad bellum*, such as an international juridical institution that could judge whether wars in progress were just or unjust. For discussion, see Jeff McMahan, "The Prevention of Unjust Wars," in *Reading Walzer*, ed. Yitzhak Benbaji and Naomi Sussman (London: Routledge, forthcoming). But even if unjust combatants could be authoritatively identified, a law that permitted just combatants to kill noncombatants would still be abused by genuinely just combatants. (If one is tempted by the thought that those who fight just wars would shrink from intentionally attacking innocent civilians, one should simply recall the obliteration bombings of German and Japanese cities by British and U.S. forces during the Second World War.)

IV. NONCOMBATANT BYSTANDERS AND NONCOMBATANT BENEFICIARIES

The final objection to the position of Margalit and Walzer is the most important in this context because it bears directly on the issue of the just distribution of harm or risk between combatants and noncombatants. As they understand it, the doctrine of noncombatant immunity involves more than just the denial that noncombatants can be liable to be attacked or otherwise intentionally harmed in war. When Margalit and Walzer claim that combatants are morally required to expose themselves to additional risks in order to spare noncombatants, they are not claiming that combatants are liable to any harms they might thereby suffer. Their conception of immunity goes beyond considerations of liability and the absence of liability. They hold that it is essential for limiting the violence of war that everyone should accept that both intended and unintended harms ought, when possible, to be suffered by combatants, while noncombatants ought to be protected from harm to the greatest reasonable degree. Because noncombatant status is relatively easy to identify, and because people generally agree that it has moral significance (whether or not it really does), it is of instrumental value to assign immunity on the basis of that status. And because noncombatant status is all-or-nothing, noncombatant immunity is not a matter of degree; it is invariant rather than sensitive to context.

This matter is, however, more complicated than Margalit and Walzer's view recognizes. I will argue that noncombatant immunity is a matter of degree and that in some cases it is permissible for just combatants to fight in a way that will foreseeably harm innocent noncombatants as a side effect rather than fight in a different way that would involve greater risks to themselves. There are occasions, in other words, when it is permissible for just combatants in effect to force innocent noncombatants to share in the risks of war.

Noncombatants on whom it may not be unfair for just combatants to impose some of the risks of a war are those who are expected beneficiaries of the war, in the following sense. Wars that are just are often, indeed typically, fought to defend innocent noncombatants from a threat of unjust harm—for example, a threat of death, injury, or significant loss of political liberty. When noncombatants are already at risk in this way, and their overall risk of being harmed (which takes into account both the probability of their being harmed and the magnitude of the harms they

might suffer) would be reduced by a war in their defense, they are expected beneficiaries of that war, even when the war would be fought in a way that would expose them to new and different risks. A noncombatant does not therefore count as an expected beneficiary of a war simply because she can expect some benefit from it (for example, because the combatants will distribute lollipops prior to combat), or even because she can reasonably expect a net benefit (for example, because although she will be exposed to a tiny risk of being killed, this is outweighed by the fact that war will significantly increase her personal wealth). Rather, a noncombatant is an expected beneficiary of a war only if the war would diminish her expected risk of harm. The suggestion, then, is that it may not be wrong for combatants to fight in ways that involve a lower risk to themselves but expose noncombatants to new risks, provided that the noncombatants are nevertheless expected beneficiaries of the defensive action—that is, provided that the action's reduction of the risks they face from the original threat exceeds the risks to which the action itself exposes them.

Suppose, for example, that while a just war of humanitarian intervention is in progress, the government that is the target of the intervention imprisons one hundred innocent civilians and declares its intention to kill fifty of them, selected at random, as an act of reprisal. The intervening forces have only two options for preventing the killings. One will foreseeably kill five of the one hundred potential victims as a side effect. The other will foreseeably kill five neutral civilians who are bystanders to the conflict. If the combatants pursue the first option, no one will ever know whether the five civilians killed would have been among the fifty who would have been killed by their government had the combatants done nothing. It is possible that some or even all of the five would have been among the fifty survivors.

In these circumstances, the just combatants ought to choose the first option. The reason is that, by standard measures of objective probability, the prospect of survival of each of the one hundred potential victims, including the five who will actually be killed, will be significantly enhanced if the combatants choose that option rather than doing nothing. Each potential victim's probability of survival will be increased from 50 percent to 95 percent. All the potential victims are thus the expected beneficiaries of the first option; indeed, they are the expected beneficiaries of *both* options and ought, therefore, to accept the risks

necessary for the overall reduction of their own risk. It would be unjust to impose those risks on neutral civilians instead. The neutral civilians are mere bystanders who do not stand to benefit from either option, and there is, we may assume (that is, we can make this a feature of the example), no special reason why it would be better for five of them to be killed than for five of the potential victims to be killed.

That beneficiaries rather than bystanders ought, if possible, to bear the unavoidable costs of their own defense is clearer in cases involving actual net beneficiaries rather than merely expected beneficiaries. Suppose, for example, that Villain will cause Victim to lose a limb unless a third party, Defender, takes defensive action on Victim's behalf. Defender has two equally effective options, each of which will, however, have as an unavoidable side effect the breaking of an innocent person's arm. One option would break innocent Victim's arm while the other would break innocent Bystander's. It is clear that Defender ought to choose the option that will break Victim's arm. This option would involve harming Victim for his own sake; he would be better off overall for being defended even at the cost of a broken arm. But the second option would involve harming Bystander for the sake of another and would leave him worse off. If Defender breaks Victim's arm, Victim will have no grounds for complaint against Defender. Victim will be owed compensation by Villain, but if Villain cannot be made to pay it, Victim will not be owed compensation by Defender. But if Defender breaks Bystander's arm rather than Victim's and Villain cannot be made to pay compensation, it seems that the duty to compensate Bystander *will* fall to Defender (though perhaps Victim would then be morally required to pay the compensation on Defender's behalf, as this would in effect transfer the cost of the defense to the beneficiary).

Part of the intuitive force of this case derives from the fact that the beneficiary of the defensive action emerges better off even after bearing the cost of the defense. The intuition is weaker in cases, such as the case of humanitarian intervention sketched earlier, in which some of the expected beneficiaries are not made better off, or are even made worse off, in the actual outcome. But the theoretical claim remains strong—namely, that the *risks* of defensive action ought to be borne by those who stand to benefit from the action rather than imposed on uninvolved third parties, even when the risks are realized and some of the expected beneficiaries fail to benefit or are actually made worse off.

One objection to the claim that beneficiaries rather than bystanders ought to bear the risks or costs of their own defense is that in many instances of war, and particularly in instances of humanitarian intervention, the expected beneficiaries have already, through no fault of their own, suffered extensively at the hands of their persecutors. It may thus seem unfair to impose further risks or harm on these already beleaguered people in the process of defending them rather than spreading at least some of the costs among others who have thus far enjoyed the good fortune not to have been victimized by wrongdoers. Principles of equality may actually favor distributing some of the risks or costs to bystanders.

There is some truth in this suggestion, particularly if the victims have already suffered badly and especially if bystanders would be morally required to contribute to the defense, even at some cost to themselves, if they could. But it seems a minimum condition of the permissibility of imposing risks or costs on bystanders rather than beneficiaries that this would significantly decrease the overall expected harm to the innocent. Merely spreading the burden without decreasing it seems impermissible. Suppose, for example, that Victim has already been beaten and injured by Villain. To prevent Villain from now causing him to lose a limb, Victim must defend himself in one of two ways. One way will involve breaking his own arm, while the other will break Bystander's arm. If he chooses to break Bystander's arm, he will be unable ever to compensate her and no one else will compensate her either. In these conditions, it seems impermissible for him to break Bystander's arm rather than his own. He could not justify breaking Bystander's arm by saying to her, "I've suffered quite enough for one day. You must take your fair share." And if Victim is not permitted to shift the harm to Bystander, Defender is not permitted to do it on his behalf.

A second objection to the idea that expected beneficiaries may have diminished immunity concerns the *time* at which people are expected beneficiaries of a war. If it is certain at the outset that *some* noncombatants who are expected beneficiaries at that point will actually be made worse off, there must be some point at which those people will cease to be expected beneficiaries and become expected victims, then actual victims. Why should their being expected beneficiaries early on diminish their immunity if they will, in the actual outcome, be victims rather than beneficiaries?

This objection is right in its assumption that risks are temporally relative, in the sense that as conditions evolve, risks can increase or decrease. This is true even according to what is arguably the best account of objective probability: the relative frequency account.[22] The challenge is to explain why a person's being an expected beneficiary at one time can justify exposing him to risks by going to war and thus, if those risks are later realized, knowingly doing what will make him an *actual* victim. The explanation lies in the nature of war, which requires the implementation of strategies, whose constituent acts are justified not only by their isolated effects but also by the contribution they make to the successful carrying out of the strategy. Suppose that at the time a decision has to be made about whether to fight a war in defense of a group of noncombatants, all those noncombatants are expected beneficiaries of the war, even if the war will be fought in a way that will expose them to new risks. They all have reason, at that time, to want the war to be fought. Yet they know that the strategy will later require acts that will convert some of them from expected beneficiaries into expected or actual victims. They also know that if it were a constraint on the implementation of the strategy that no individual act of war could be done unless all those noncombatants it would expose to risk would be expected beneficiaries of it, it would be impossible to implement the strategy. They therefore know that if their luck is bad, they will have no right to expect the strategy to be abandoned. The strategy can be justified in this way even to those who turn out to be its actual victims. And this explains why what is relevant to the justification of the strategy is whether those whom it will expose to risk are expected beneficiaries when it is adopted, rather than later during its implementation.

The conclusion I think we should draw from this lengthy discussion is that it does make a difference to the degree to which noncombatants are morally immune in war whether they are bystanders to military action or expected beneficiaries of it. Noncombatant bystanders are immune to a greater degree in the sense that the range of cases in which just combatants are permitted to impose some of the risks and burdens of their military action on the civilian beneficiaries of it is more extensive than the range of cases in which they may similarly impose risks and burdens

22. See Stephen Perry, "Risk, Harm and Responsibility," in *Philosophical Foundations of Tort Law*, ed. David G. Owen (Oxford: Clarendon Press, 1995), pp. 327–29.

on civilian bystanders as a side effect of their action. If this is right, Margalit and Walzer are mistaken to suppose that mere noncombatant status is the basis of the immunity that noncombatants enjoy in war, so that the degree of their immunity is invariant. While they are no doubt right that one reason that it is morally objectionable to harm noncombatants in war is that that threatens the aim of reducing the overall level of violence in war, this consideration is only one element of a more complicated account of the moral immunities and liabilities of noncombatants in war. The aim of reducing the overall level of violence in war can conflict with the imperative not to impose an unfair or excessive share of the risks and burdens of war on just combatants, and there is no reason why conflicts of this sort should always be resolved in favor of the aim of reducing violence overall.

Even if one accepts the relevance of the distinction between beneficiaries and bystanders, one may think that there is at least one obvious exception to the claim that the immunity of bystanders is greater. Suppose that just combatants are defending their own fellow citizens from a wrongful attack and must choose between defensive action that will kill a few of the just civilians they are defending as a side effect and an alternative but equally effective defensive act that will kill an equal number of neutral civilians as a side effect. Because the just civilians are the expected beneficiaries of both defensive acts while the neutral civilians are mere bystanders, the view for which I have argued implies that the just combatants ought to choose the course of action that will involve killing a few of their own fellow citizens. But many people will find this implication unacceptable.

I think, however, that it is correct. That the just combatants are specially related to the just civilians and have a duty to defend them is insufficient to make it permissible for them to shift the costs of the defense to innocent bystanders—unless, perhaps, their doing so would greatly reduce the overall number of innocent people killed. Just as the state's duty to protect its citizens cannot make it permissible for its combatants to do what they would not be permitted to do in the absence of that duty, so the duty of just combatants to protect just civilians cannot make it permissible for them to cause more harm to innocent bystanders as a side effect than it would be permissible for the just civilians themselves to cause by acting in self-defense. And it is generally accepted that innocent people are not permitted to defend themselves

against being killed if in doing so they would unavoidably kill an equal or greater number of innocent bystanders as a side effect.

If the moral immunity of civilian beneficiaries is in some respects weaker than that of civilian bystanders, this supports the view that NATO's action in Kosovo was, in one respect at least, less morally objectionable than Israel's action in Gaza. For in Kosovo, many of the victims of NATO's defensive action were expected beneficiaries of the action, whereas in Gaza the noncombatant victims of Israel's action were bystanders trapped in the area of combat.

V. WHY THE DOCTRINE OF THE PRIORITY OF COMBATANTS IS FALSE

I have argued that the difference in immunity between civilian bystanders and civilian beneficiaries undermines Margalit and Walzer's explanation of why the priority of combatants is wrong. It may seem, however, that my argument does more than this, that it actually supports the doctrine of the priority of combatants, at least when just combatants must choose between exposing themselves to certain risks and reducing those risks via action that risks harming or killing civilians who are nevertheless the expected beneficiaries of their military action. Suppose, again, that just combatants fighting in a war of humanitarian intervention discover that the enemy government is holding one hundred innocent civilians from which it will, unless prevented, randomly select fifty to be killed. The just combatants can prevent the killings in either of two ways. One of these would predictably kill five of these same one hundred civilians as a side effect; the other would expose the just combatants to greater risks, making it statistically almost certain that five of them would be killed by unjust combatants. If, as I have argued, the expected beneficiaries of defensive action have reason to bear at least some of the risks of their own defense, it may seem that it would be permissible for the combatants to adopt the first course of action, killing five innocent civilians as a side effect of preventing forty-five others from being killed. It might indeed be permissible for them to pursue this option even if the number of just combatants that would be killed in the alternative would be fewer than five. Although these claims, if true, provide some support for the priority of combatants, that support is limited, since the claims would not apply if the civilians were bystanders rather than beneficiaries.

It is also worth noting that there is one further, pragmatic reason why just combatants ought to be permitted, at least as a matter of law, to shift some of the costs of humanitarian intervention to the intended beneficiaries. If an intervention is morally optional or supererogatory irrespective of how the costs are distributed, it will be in the interests of potential beneficiaries for it to be regarded as permissible for potential interveners to impose some of the costs of the defense on the expected beneficiaries. For if it were thought that once a state had committed itself to intervene, its combatants would be generally required to take whatever risks were necessary to minimize the harm they would cause to noncombatants, including the civilian beneficiaries of their action, states would be less likely to intervene than they would be if they could anticipate sharing the costs with those they would be defending. While this is not the basic moral reason why it is permissible for just combatants to cause greater harm to expected beneficiaries as a side effect of their action rather than to take greater risks themselves, it is a reason to give some recognition to the distinction between beneficiaries and bystanders in law.

While it is true that just combatants may in some instances force the civilian beneficiaries of their action to share in the costs of the defense, there are several independent reasons that just combatants have to pursue their goals in ways that expose them to risk rather than in ways that will cause avoidable harm to innocent civilians, including civilian beneficiaries, as a side effect. There are, in other words, reasons that oppose the reason to force the beneficiaries of defensive action to share the risks and burdens of their own defense. These reasons are not the products of arcane moral theory but are instead rather embarrassingly simple and obvious. Yet together they provide the right explanation of why the doctrine of the priority of combatants is false.

The first component of the explanation is suggested by Margalit and Walzer when they urge that combatants should be told that "by wearing a uniform, you take on yourself a risk." This is right, though their further suggestion that combatants take on this risk because they "have been trained to injure others" is unpersuasive. Combatants would have the same duties even if they had been sent to the battlefield untrained. The reason why combatants are required to expose themselves to risk in the course of defending those who are threatened with wrongful harm is simply that it is their *job* to do that: it is what they have pledged to do and are paid to do. It is part of their professional role. In this respect they are

like other paid professional defenders or rescuers, such as police, firefighters, bodyguards, and lifeguards. All such people have professional role-based duties to take risks and even on occasion to allow themselves to be harmed when that is necessary to fulfill the functions of their role.

To see the importance of the professional role in cases of third-party defense, suppose that an innocent person is being severely beaten by the members of a gang. A police officer is nearby and has two options for stopping the attack. One option would be entirely safe for the officer but would harm the victim as a side effect in a way that would be much less serious than the harm the victim would suffer if the officer did not intervene at all. The other option would involve no harm to the victim but would require the officer to suffer a harm that would be less serious than that which he would inflict on the victim in the other option. Intuitively, it seems that the officer ought to choose the second option. But if the potential rescuer was a mere passerby rather than a police officer, it seems that it would be permissible for him to choose the first option. Certainly, the victim would have no justified complaint about being defended in that way by someone with no professional duty to engage in rescues.

Next consider a hypothetical instance of humanitarian intervention conducted not by combatants but by private individuals. Imagine, for example, that a group of individuals without any official status had been in Kosovo at the time of the Serbian efforts to expel ethnic Albanians from the region and that they had had the ability to prevent a great many Albanian civilians from being killed. Suppose these individuals had had two defensive options, one of which would have required some of them to sacrifice their lives while the other would have killed an equal number of the expected Albanian beneficiaries as a side effect. Assuming that intervention by them was supererogatory, it would have been permissible for them to defend the Albanians in the second way, killing a certain number of Albanians as a side effect of preventing a much larger number of them from being killed by Serbian forces. As the expected beneficiaries of this unofficial defensive action, the Albanians would have had reason to be grateful and would not have been entitled to complain that the intervening individuals ought to have sacrificed their own lives instead.

In many cases, the reason that combatants have a professional duty to take risks is simply that they chose to take the job, along with its

professional requirements. This is true of those who have voluntarily enlisted in a standing army in a time of peace. When they enlisted, they consented to be among those who would assume the risks that it is a combatant's professional duty to incur when called upon to fight in a just war. Yet while many combatants acquire their professional role-based duty to assume risks by free consent, many others do not. Conscripts, for example, do not acquire their professional duties by choice or consent, unless they would have enlisted anyway. But conscripts may have the professional duty to assume risks nonetheless. If the practice of conscription in a society is just—if, for example, a standing army is morally necessary and conscription, whether universal or by lottery, is the fairest means of maintaining such an army—then conscripts may be morally required to serve. In that case they are morally required to adopt a professional role that carries with it a duty to assume risks. The same is true of a certain class of enlistees. Sometimes—for example, when a state without an adequate standing army is suddenly unjustly attacked—civilians who are sufficiently fit to fight may be morally required to enlist. Like those who are justly conscripted, they may acquire the duty to assume risks not by freely given consent but through the fulfillment of a duty to adopt the professional role of a combatant. If a standing army can be adequately maintained through genuinely voluntary enlistment, those who enlist by choice thereby exempt others from a duty to enlist, and thus to assume risks, if a just war arises. (Not all morally optional enlistment is, however, "genuinely voluntary." Sometimes people enlist because that is virtually their only option in conditions of economic deprivation. It seems an open question whether those who enlist only because of economic necessity actually consent to assume the risks that combatants are expected to take. Do they have a duty to take those risks nonetheless? I am uncertain. It may be that some do and some do not, depending on such factors as how coercive the pressures to enlist are and whether those pressures are the result of social injustice.)

There is, of course, a further possibility. Conscription may be unjust and may be enforced by harsh penalties even when the war in which conscripts must fight is a just war. When this is true—that is, when people have no duty to join the military and are coerced to fight against their will—there seems to be no basis for the claim that they have a professional role-based duty to take additional risks when that is necessary to reduce the harm they cause to innocent civilians as a side effect of

their military action. This may be particularly clear when people have been forcibly conscripted to fight in a war that is just but supererogatory, such as a war of humanitarian intervention or collective defense (that is, a war fought in defense of an ally that has been unjustly attacked). This does not mean, however, that they have no reason to give the lives of noncombatants priority over their own, but only that whatever reasons they might have do not derive from their occupancy of the role of combatant, which in their case is neither morally required nor voluntary.

Cases in which just combatants lack the usual role-based duty to take risks seem to be quite rare. For such cases are characterized by three features that are rarely compatible: the war is just, the combatant had no duty to enlist, but he or she was unjustly conscripted. If the war is just and the military is insufficiently staffed to fight it, so that there is a need for conscription, it seems that most eligible people should have a duty to enlist. If conscription is necessary, that is probably because civilians are failing to fulfill their duty to enlist; hence the conscription is unlikely to be unjust. It therefore seems safe to conclude that most just combatants, including conscripts, have a professional role-based duty to take additional risks to avoid harming noncombatants.

The second element of the explanation of why the priority of combatants is mistaken is that the kind of choice that is of most concern—the choice that combatants frequently have between causing greater harm to noncombatants as a side effect and exposing themselves to greater risk—is a choice between doing harm and allowing harm to occur. More specifically, it is often a choice between killing and letting die. Virtually all of us, even consequentialists, act on the presupposition that the constraint against harmful killing is in general stronger than the constraint against harmfully allowing someone to die, when all other relevant factors, such as intention, are the same in both cases. This moral asymmetry between killing and letting die provides, among other things, part of the explanation of why it is impermissible to kill an innocent bystander as a means of preserving one's own life, and perhaps the full explanation of why it is impermissible to kill an innocent bystander as a side effect of defending or preserving one's own life. Although virtually all of us accept that individuals are entitled to a certain degree of self-preference in life-and-death choices, so that a person may be permitted to save herself, or her child, rather than saving two strangers, we also tend to accept that legitimate self-preference is outweighed when saving

oneself requires *killing* even one innocent person, even when the killing is not a means but a side effect.

In just wars of humanitarian intervention, it is not unfair for just combatants to act in certain ways that impose some of the risks and burdens of their action on its expected civilian beneficiaries. But the effect of the noncombatants' beneficiary status stops well short of giving combatants a general priority. For it is offset by the combatants' professional duty and usually by the asymmetry between killing and letting die. Just as a professional firefighter must take risks not only to save those imperiled by fire but also not to harm them in the process, so it is part of a combatant's job to take risks not only to save innocent noncombatants in a war of humanitarian intervention, but also, and especially, to avoid killing precisely those whom it is his professional responsibility to protect. If, for example, he faces a choice between a course of action that will *allow* an innocent person to be killed and an alternative course that will prevent that person from being killed but will *kill* another innocent person as a side effect, he must not kill, even if the person he allows to be killed is himself. This may be true even if the person he might kill in saving himself is an expected beneficiary of his military action.

The potential relevance of the asymmetry between killing and letting die is recognized but dismissed by Kasher and Yadlin. When discussing a choice that just combatants might face between allowing just civilians to be killed and killing unjust or neutral civilians as a side effect of saving the just civilians, they claim that

> under the present circumstances the distinction is of no crucial moral significance. . . . From the point of view of a democratic state, a decision to let citizens die when they can and should be effectively protected is tantamount to a decision to kill them. It is as morally wrong for the state to let its citizens die under such circumstances as it is morally wrong to kill them. In both cases the state makes an explicit decision to exempt itself from its prime duty to protect their life when it can and should do so.[23]

These assertions merely beg the question, both explicitly and implicitly: explicitly in both uses of "should" and implicitly in the claim that the state's "prime duty" is the positive duty to protect its citizens rather than

23. Kasher and Yadlin, "Military Ethics," p. 20.

the negative duty not to kill innocent people. Kasher and Yadlin's rejection of the relevance of the moral asymmetry between killing and letting die in this context is thus entirely unsupported.

Other writers have obscured the relevance of the distinction between killing and letting die by writing as if the relevant choices were between *allowing* enemy civilians to be harmed and *protecting* them in a way that *allows* just combatants to be harmed. For example, in an article that defends the priority of combatants, Eyal Benvenisti writes at certain points as if the issue is whether a state may impose risks on its combatants "to protect enemy civilians."[24] But this just changes the subject: protecting people and refraining from killing them are quite distinct. Yet the tendency to write this way is pervasive. Shlomo Avineri responded to Margalit and Walzer by claiming that "no democratically elected political leader can be imagined to maintain that his government will take the same care, and put its own soldiers in danger in the same way, in *defending* enemy civilians as it does in defending its own civilian population."[25] Margalit and Walzer in fact invited this shift of the discussion to an entirely distinct and easier issue by referring to the "understandable but morally misguided sentiment that creeps into the Kasher-Yadlin paper when they write: 'A combatant is a citizen in uniform'—so as to convince us that we should not ask our soldiers to take risks to *save* the lives of noncombatants on the other side."[26] Later, in response to Avineri, they did try to refocus the debate on the real issue, though not as clearly or explicitly as they might have. To correct Avineri's misunderstanding, they wrote that the state "has to protect its own civilians against any attack, from any quarter. It has to protect foreign civilians only when it is itself attacking"—that is, to protect them from itself by not killing them.[27]

All of the contributors to the debate about the priority of combatants whom I have quoted, both those who defend the doctrine and those who reject it, accept that there is in general a moral asymmetry between

24. Benvenisti,"Human Dignity in Combat," p. 90.

25. Shlomo Avineri, "'Israel: Civilians and Noncombatants': An Exchange," *New York Review of Books* 56 (August 13, 2009), p. 74. (Italics added.)

26. Margalit and Walzer, "Civilians and Combatants," p. 22. (Italics added.)

27. Avishai Margalit and Michael Walzer, "'Israel: Civilians and Noncombatants': An Exchange," *New York Review of Books* 56 (August 13, 2009), p. 74.

killing and letting die. It is curious that they all either reject the relevance of that asymmetry in this context or conceal it by misleadingly redescribing the issue.

I have thus far focused the discussion on wars of humanitarian intervention. But there is another consideration that is relevant to the evaluation of the priority of combatants that does not commonly appear in wars of humanitarian intervention but is always present in wars of national self-defense and, to a lesser extent, in just wars of collective defense.

When just combatants are fighting in defense of their own fellow citizens, they typically are specially related in a variety of ways to those they defend. Among the latter are their relatives, friends, and people with whom they share cultural affinities and often a sense of collective identity. And all those whom they defend are people with whom they share certain political relations. These relations give just combatants special reasons, of varying degrees of strength, to make sacrifices for the sake of the noncombatants they defend and, more importantly for our purposes, special reasons not to harm them. Of course, the moral significance of such relations is often symmetrical: each of two friends may have equal reason to defend the other. But those who elect or are selected to become combatants are generally those who are best able to participate effectively in military action. They are in general younger and fitter and have been trained and armed for combat. It is this combination of being specially related to the noncombatants they defend and being better able to engage in defensive action that gives them a further reason, beyond their professional commitments and the asymmetry between doing harm and allowing harm to occur, to incur additional risks and costs rather than conduct their defensive operations in a way that would harm their compatriots as a side effect.

VI. IMPLICATIONS, OBJECTIONS, AND QUALIFICATIONS

I have identified two factors that may diminish noncombatant immunity: beneficiary status and the possibility of liability to either unintended or intended harms, though I have said little about the latter. I have also identified three factors that may give combatants reason to expose themselves to additional risks rather than act in ways that would cause unintended harm to noncombatants: their role-based duty as

professional defenders, the moral asymmetry between doing and allowing, and the special ways in which they may be related to the noncombatants they defend. But these various factors combine in different ways in different cases.

In just wars of humanitarian intervention, just civilians are rarely at risk. By contrast, noncombatants in the state that is the target of the intervention are often at risk. These latter noncombatants divide into expected beneficiaries and bystanders. In trade-offs between harms to just combatants and harms to noncombatant beneficiaries, the immunity of the noncombatants is diminished by their status as beneficiaries. It is not unfair for them to have to share with their defenders some of the risks and burdens of their own defense. It is therefore in these trade-offs that the doctrine of the priority of combatants has its greatest plausibility. But the effect of the noncombatants' beneficiary status is offset by the just combatants' role-based duties and the moral asymmetry between doing and allowing. So even in these cases, just combatants do not have the priority that defenders of the doctrine claim for them.

This is why the way that NATO conducted its intervention in Kosovo was wrong. The reasons that NATO combatants had to expose themselves to risk were partially counterbalanced by the fact that Albanian Kosovar civilians were the expected and, as a group, actual beneficiaries of the intervention. NATO combatants were therefore entitled to shift some of the costs of the intervention to those who would, unlike themselves, benefit from it. But NATO's tactics went far beyond this, giving virtually absolute priority to the safety of combatants, who killed a great many of their intended beneficiaries as a side effect of the bombings without suffering a single casualty among themselves. While it was permissible for them to impose *some* of the costs on the expected beneficiaries, their professional role and the constraint against doing harm prohibited their shifting *all* of the costs away from themselves.

In just wars of national self-defense, just civilians are expected beneficiaries of the just combatants' military action. It seems to follow, according to the view for which I have argued, that their immunity is weakened vis-à-vis those who defend them. Yet no one who defends the priority of combatants thinks that it applies to combatants in relation to their own fellow citizens. It holds only that the lives of combatants have a certain priority over those of *enemy* civilians and perhaps those of

neutral civilians. If the view I have defended implies that it is in general permissible for just combatants to reduce the risks to themselves by fighting in ways that will *kill* more of their civilian compatriots as a side effect than is necessary to achieve their military goals, it will be universally and rightly rejected.

But it does not have this implication, in part for the obvious reason that just combatants are themselves equally the beneficiaries of their own action. If they did not defend their state against unjust attack, they would suffer whatever harms their civilian fellow citizens would suffer. Just civilians are therefore not distinguished from just combatants by their beneficiary status. But just combatants are distinguished from just civilians by their professional duties and their defensive abilities and are also constrained by the asymmetry between doing and allowing. This explains why combatants in a just war of self-defense must not only take risks to defend just civilians but also take additional risks to avoid harming them.

It is perhaps worth noting, in passing, that the more common type of choice in just wars of national self-defense is not between exposing combatants to greater risk and harming just civilians as a side effect, but between exposing combatants to greater risk and *allowing* more just civilians to by harmed or killed by enemy forces. In these more common choices, in which the constraint against doing harm or killing does not apply, the degree of protection to which just civilians are entitled is correspondingly weakened.

I have argued that the beneficiaries of defensive action can be expected to share the risks and burdens of their defense with their defenders (except when the defenders are equally the beneficiaries of their own action), and that defenders typically have two reasons and sometimes three to fight in ways that expose them to additional risk rather than in ways that would cause more harm to noncombatants as a side effect. There are, however, no corresponding reasons for innocent civilian bystanders to share the costs of the defense of others. They are not liable to be harmed, are not the expected beneficiaries of action that might harm them, have no special duty to sacrifice themselves for others, and so on. They have, one might say, maximum immunity. The only justification for harming them, even as a side effect, is a justification of necessity. In just wars of humanitarian intervention, bystanders include just civilians, neutral civilians, and some unjust civilians (others are

beneficiaries). In just wars of national self-defense, bystanders include neutral civilians and unjust civilians (just civilians are beneficiaries).

The claim that the immunity of civilian bystanders is greater in degree than that of civilian beneficiaries has two apparent implications that are quite counterintuitive. One emerges in wars of humanitarian intervention. Suppose that in Kosovo, NATO combatants had had to choose between two military options that would have been equally effective in reducing the harm that Serbian forces could have done to Albanian Kosovar civilians who were the expected beneficiaries of the intervention. One option would have killed a certain number of Albanian civilians as a side effect, though far fewer than it would have saved. The other option would have killed an equal number of Serbian civilians, who were not threatened by Serbian forces and thus were not beneficiaries of the NATO intervention. According to the view for which I have argued, NATO ought, in the absence of other relevant factors, to have chosen the option that would have killed civilians of Albanian ethnicity, since they were the expected beneficiaries while the Serbs were bystanders. But this seems wrong. The Albanians were already victimized. How could it be justifiable to discriminate against them further even in the act of defending them?

This example may not actually challenge the significance of the distinction between beneficiaries and bystanders, since there is an alternative explanation and defense of our intuitive response. If one's intuition is that NATO combatants ought to have pursued the option that would have killed Serbian civilians rather than Albanians, that may be because one recognizes that many Serbian civilians had been complicit in the persecution of the Albanians and may therefore have been liable to suffer the side effects of a justified military defense of the Albanians—an intuition that supports the Individual Liability Account. Serbian civilians may have been bystanders, but many were not innocent bystanders. To test whether this consideration affects one's intuitions, suppose that the choice had instead been between killing a certain number of expected Albanian beneficiaries as a side effect and killing an equal number of neutral civilians, such as Greeks or Bulgarians, as a side effect, perhaps as Albanian refugees fled across the border. In such a case involving genuinely innocent bystanders, it may seem wrong to force Greeks or Bulgarians to pay with their lives for the protection of an equal number of Albanians. It might have been

permissible to sacrifice innocent bystanders for the sake of the Albanians, but *only* if that would have involved significantly fewer killings of innocent people than the alternative.

A second apparent implication may be even more worrying. In wars of national self-defense, just civilians are beneficiaries while neutral civilians and unjust civilians are bystanders. Suppose that combatants fighting in a just war of national self-defense face a choice between allowing a certain number of their civilian fellow citizens to be killed by unjust combatants and preventing those killings via military action that will kill an equal, or perhaps even a slightly lesser number of neutral or unjust civilians as a side effect. Many people feel intuitively that it would be permissible for the just combatants to defend their fellow citizens in these circumstances, but the moral asymmetry between beneficiaries and bystanders may seem to weigh against the permissibility of such action. Defensive action in these circumstances is also opposed by the asymmetry between killing and letting die, since such action would involve killing innocent people while not acting would involve allowing innocent people to be killed.

The distinction between beneficiaries and bystanders does not, however, play a role in this choice. For there is no option in which harms caused as a side effect of defensive action can be distributed to the beneficiaries of that action rather than to bystanders—no option, that is, that might harm certain civilians as a side effect but of which they would nevertheless be the expected beneficiaries or, as a group, the net beneficiaries. It is only in choices with such an option that beneficiary status makes a moral difference.

The question whether just combatants may defend just civilians at the cost of killing an equal or even a slightly lesser number of innocent civilian bystanders as a side effect is just one instance of the broader question whether a third party may prevent an innocent person to whom he is specially related from being wrongly killed when the defensive action would unavoidably kill an innocent bystander as a side effect. In general, the answer to this second question is "no." As I have observed earlier, a third party acting to defend another person may in general cause no more harm to innocent bystanders than the person he is defending would be permitted to cause by acting in self-defense. And most people agree that it is not permissible for a person to defend her own life if in doing so she would unavoidably kill an innocent bystander

as a side effect. The explanation for this lies principally in the moral asymmetry between doing and allowing. In general, people acting in self- or other-defense may harm innocent bystanders as a side effect only if the harm they prevent significantly exceeds the harm they cause. There may, however, be an exception to these claims in certain cases of other-defense. It seems to many people, myself included, that it is more than merely excusable if a person saves her child when her doing so unavoidably kills an innocent bystander (or perhaps even two innocent bystanders) as a side effect. I am not sure what to say about this rather powerful intuition, except to note that cases of this sort arise only rarely in war, since the relations between just combatants and just civilians are in general far less morally significant than the relation between a parent and child. It seems, therefore, that this possible exception to the general claim about proportionality is largely irrelevant to the case of war.

It seems, therefore, to be *correct* that just combatants may not defend the lives of just civilians by action that would kill an equal or even a slightly lesser number of innocent bystanders, such as neutral civilians or unjust civilians. Yet if the attitudes of people in past wars are any guide, most people are likely to find it profoundly counterintuitive to suppose that just combatants must allow their own fellow citizens to be killed by aggressors rather than take defensive action that would kill an equal number of enemy civilians as a side effect. To the extent that the common intuition is defensible, I think the defense must take the form of an appeal to a theory of noncombatant liability rather than an appeal to national partiality.

Before concluding this section, it is important to note one consideration that does support giving combatants priority in certain conditions, a consideration that may weigh heavily against the factors that I have identified as giving combatants reasons to take risks rather than harm noncombatants as a side effect. This is that in some cases the preservation of the lives of combatants may be necessary for the ultimate achievement of their just cause, so that it becomes justifiable to reduce the risks they face, even at the cost of causing greater harm to noncombatants as a side effect.[28] Many people will find this plausible if the noncombatants who have to be harmed are enemy or neutral civilians.

28. Compare Benvenisti: "The security of the attacking forces may be viewed as part of the military goals of the attacking army" ("Human Dignity in Combat," p. 90).

But there is nothing in the reason given that restricts the priority in this way. It is equally a reason for just combatants to allow just civilians to die or even to kill them as a side effect when the alternative is to allow their own number to be depleted. In all such cases, the justification for giving combatants priority is that this will ultimately result in the wrongful killing of fewer innocent people.

VII. CONCLUSION

One might think that the issues I have discussed in this essay are matters of proportionality in the conduct of war. That is true in the case of certain issues, such as whether just combatants may kill a certain number of unjust civilians as a side effect of defending just civilians, or whether just combatants ought to take defensive action that would have as a side effect the killing of a certain number of the expected beneficiaries or whether they ought to take alternative action that would kill a certain number of civilian bystanders instead. But the central issue I have addressed—whether and to what extent just combatants ought to expose themselves to additional dangers in order to reduce the harm they might otherwise cause to noncombatants—is *not* a matter of proportionality. Nor is it a matter of either discrimination or necessity, the other two principles of the traditional *jus in bello*. To see this, consider an act of war that will kill innocent noncombatants as a side effect. It is discriminate in the traditional sense in that it is not intended to harm any innocent noncombatants. And we can stipulate that it is also proportionate. It might, for example, prevent the killing of several thousand noncombatants, or otherwise make a substantial contribution to the achievement of a highly important just cause for war, and yet will kill only a couple of noncombatants as a side effect. Finally, it might be *necessary* in the sense that there is no alternative means of achieving its aim that would result in fewer killings of innocent people. Yet suppose that there *is* an alternative act of defense that would have an equal probability of success but would kill fewer *noncombatants* as a side effect. Of course, since that alternative would result in the killing of a greater number of *innocent people* overall, it follows that it would result in the killing of a greater number of just combatants than the act that would kill more noncombatants—for example, four rather than none. There is therefore a further moral issue in this case—namely, whether it is permissible for

the just combatants to act in the way that will involve their killing a couple of innocent noncombatants, or whether they ought instead to follow the alternative course of action that will kill fewer or no noncombatants, but will result in four of them being killed rather than none. This issue cannot be a matter of discrimination, proportionality, or necessity, for the first of the two acts is by hypothesis discriminate, proportionate, and necessary in the relevant sense for the achievement of the just aim. If there is still a question whether that first act is permissible—and there is—then the relevant question is not one that is addressed by any of the three traditional principles of *jus in bello*. If we are to answer it, we must appeal, at least implicitly, to a principle that will be entirely new in the theory of the just war. Just war theory must be expanded to include a new principle governing the just distribution of harm between combatants and noncombatants.

The issue of the just distribution of harm between combatants and noncombatants is, however, only one instantiation of a broader issue: the just distribution of risk and harm among defenders, potential victims, and bystanders. And just as there is no principle in the traditional just war theory that addresses that issue, so there is no corresponding principle in the literature on either the morality of self- and other-defense or the law of self- and other-defense. The arguments of this essay therefore call for an expansion not only of our understanding of the just war but also of the principles governing individual self-defense and third-party defense of others.