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Necessity and Proportionality in Morality and Law

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I. **Introduction**

If an act would harm someone, there is a moral presumption against doing it. For the act to be permissible, there must be a justification for the harm it would cause. There are various types of moral justification for harming someone. Several of these are based on what the person has done. Most people believe, for example, that by culpably engaging in wrongdoing, a person can deserve to be harmed. If this is so, there can be a *desert justification* for harming that person. Or, if one person is responsible for making it unavoidable that someone will be harmed, there may be a *liability justification* for harming that person as a means or side effect of preventing an innocent or nonresponsible person from being harmed instead. Finally, there may be a *consent justification* for harming a person who has freely and rationally consented to be harmed as a means or side effect of the achievement of some good aim.

There are other types of justification for harming a person that may apply independently of what that person has done. The most important of these applies when harming a person is necessary to prevent a greater harm. In the least controversial case of this sort, it can be permissible to harm a person when that is necessary to prevent that same person from suffering a greater harm. Certain forms of consequentialism also imply that it is permissible to harm a person when that is necessary to prevent a greater harm to *another* person or persons, even if the harm prevented is only slightly greater. The more common view, however, is that there is a moral constraint against harming people that is stronger than any corresponding constraint against allowing people to suffer equivalent harm. Thus, for there to be a justification for harming an innocent person as a necessary means or unavoidable side effect of preventing greater harm to others, the harm prevented must be *substantially* greater than that inflicted. Only then is the constraint overridden. In moral philosophy, this form of justification is often referred to as a *lesser-evil justification*.

Sources of justification for harming people that are rather more controversial include duties derived from authoritative commands, permissions to give some degree of priority to one's own interests over those of others, and permissions or duties to give some degree of priority to the interests of those to whom one is specially related. Although I will briefly discuss the last two of

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[*] This chapter provides a condensed explanation, intended primarily for legal theorists, of various claims about proportionality that I have defended in other publications that would normally be seen only by philosophers. Although there is a substantial amount of new material here, my main aim has been to collect together a unified set of views about proportionality that would otherwise remain scattered throughout a number of mainly philosophical publications. References to these publications are provided in the notes.

these forms of justification in section VI, I will be primarily concerned with liability justifications, lesser-evil justifications, and, for purposes of comparison, desert justifications.

All justifications for harming people are subject to certain constraints. One of the two most important of these constraints is proportionality. With the exception of the consequentialist justification, which is explicitly constrained in its own formulation (the harm prevented must be greater than that caused), all the forms of justification for harming that I have cited are subject to a proportionality constraint. Much of this chapter will be concerned with explaining the nature of these different proportionality constraints and the ways in which they differ from one another.

But before I distinguish and elucidate these forms of proportionality, I should note a potential source of confusion, which is that there is a type of justification that shares the same label with a type of constraint: "necessity." In criminal law, a person who has harmed another person may be charged with a criminal offense but not be convicted if he has one of two defenses against the charge: an excuse or a justification. If the person can show that, in harming the other person, she acted in the only way possible to prevent a greater harm, she may be deemed to have acted with legal justification and will not be convicted. The particular form of justification or, in common-law terminology, "affirmative defense" that rebuts the charge against her is referred to as a "necessity defense," or necessity justification.

In criminal law, in other words, a person may have a necessity justification for an act that would otherwise be criminal *if* the consequences of her action have been better than those that would have ensued had she not done the act. A necessity justification in law thus has the form of a lesser-evil justification, except that it may in principle apply even when the difference in the possible consequences is slight; so in this respect it is relevantly like the consequentialist form of justification.

Similarly, in the law of armed conflict, there can be a justification of *military necessity* for harming innocent civilians as an unavoidable side effect of an attack on a military target. This too is a form of justification that in moral philosophy might be called a lesser-evil justification.[1]

These forms of justification in domestic and international law bear the label "necessity." But that is also the label of the second of the two most important *constraint*s on moral justifications for harming people. This constraint, which is often called the *requirement of necessity*, is quite complicated and difficult to state with both clarity and precision. A familiar, though crude, statement is that one must not cause more harm than is necessary to achieve one's aim. There are, in effect, two such necessity constraints in the law of armed conflict. One is that one must not cause more harm to civilians than is necessary to achieve one's military

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[1] The principle of military necessity is regarded by some legal theorists as a matter of *in bello* proportionality. I suspect that this is because they assume that, when an act of war is necessary for a certain military advantage that outweighs the harm to civilians, the act is proportionate and therefore justified. But, while this overall judgment may be correct, a claim of military necessity is best analyzed as a claim that there is a lesser-evil justification for harming innocent civilians, which presupposes that the harms inflicted satisfy both the necessity and proportionality constraints. More on these matters in subsequent sections.

goals. The other is that it is prohibited to employ means of fighting that cause "unnecessary suffering" or "superfluous injury" to enemy combatants—that is, to cause more harm to enemy combatants than is necessary to achieve one's military aim. These are both clear instances of what I call a *necessity constraint*.

Surprisingly, however, the requirement not to cause unnecessary suffering or injury is often referred to in writings on international law as a matter of *proportionality*. Judith Gardam, for example, observes that "the relevance of proportionality to the assessment of weapons is borne out by the fact that many articulations of the test of superfluous injury or unnecessary suffering use this term."[2] But the use of the word in this way by some legal writers does not show that the tests for unnecessary suffering and superfluous injury are matters of proportionality. Indeed, it might show only that these writers use the word "proportionality" in a confusing way. Gardam cites as an instance of "the proportionality equation" the claim of another legal theorist that "the crucial question is whether other weapons or methods of warfare available at the time would have achieved the same military goal as effectively while causing less suffering or injury."[3] Yet this question is about whether the use of some weapon or method of warfare and all the suffering and injury it would cause are *necessary* for the achievement of the military goal, not about whether the goal is sufficiently important to justify the suffering and injury.

Gardam also cites a passage from the ICRC commentary on antipersonnel mines, which says that it is a "basic rule" of international humanitarian law that "it is prohibited to use weapons which cause unnecessary suffering. Therefore, the use of weapons whose damaging effects are disproportionate to their military purpose is prohibited." [4] But, again, it is not that the bad effects are disproportionate in relation to the military purpose but that they are unnecessary for the achievement of that purpose. Suppose, for example, that unless one combatant fighting for unjust goals (an "unjust combatant") is not incapacitated, he will launch a weapon that will kill 1000 combatants fighting for just goals ("just combatants"). The just combatants have a choice between two weapons, each of which would be wholly effective in incapacitating the unjust combatant. One would inflict an injury from which he would soon recover, while the other would inflict a disability that would cause chronic pain for the rest of his life. The second weapon is ruled out because it would cause unnecessary suffering. The suffering would be unnecessary because the military aim could be equally well achieved by the use of the other, less damaging weapon. The second weapon is clearly *not* ruled out because its "damaging effects are disproportionate to their military purpose"; for causing a single unjust attacker to have a painful disability is not a disproportionately bad effect in relation to the purpose of preventing him from killing 1000 morally innocent just combatants.

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[2] JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 69 (2004). She also remarks that "commentators constantly use the word 'proportionate' in relation to the regulation of weapons to protect combatants." *Id.* at 15 n.37.

[3] *Id.* (quoting CHRISTOPHER GREENWOOD, COMMAND AND THE LAWS OF ARMED CONFLICT 24 (1993)).

[4] *Id.* (quoting INT'L COMM. OF THE RED CROSS, ANTI-PERSONNEL LANDMINES—FRIEND OR FOE?: A STUDY OF THE MILITARY USE AND EFFECTIVENESS OF ANTI-PERSONNEL MINES 24 (March 1, 1996)).

These uses of the term "proportionality" are, I believe, a potential source of confusion. There is no general understanding of the concept of proportionality with which I am familiar that can coherently encompass a requirement not to cause suffering solely on the ground that it is unnecessary. In international law, for example, article 51(5)(b) of the 1977 First Additional Protocol to the Geneva Conventions (Additional Protocol I) is widely recognized as a statement of the proportionality constraint on acts of war. And in international criminal law, there is a similar statement in article 8(2)(b)(iv) of the Rome Statute.[5] These statements of the proportionality constraint are quite different in form and substance from rules, such as article 8(2)(b)(xx) of the Rome Statute, that prohibit the infliction of unnecessary suffering and superfluous injury.

Principles that prohibit the infliction of unnecessary suffering or superfluous injury are principles of *jus in bello*. But there seems to be a similar tendency in the law of *jus ad bellum* to conflate principles of proportionality with principles of necessity. There is general agreement that "the exercise of the right of self-defence under international law is governed by principles of necessity and proportionality" and that the source of these principles in the law of *jus ad bellum* is the 1837 Caroline incident.[6] Gardam, for example, comments that the understandings of necessity and proportionality in the exchanges between Daniel Webster and Lord Ashburton on that occasion now "represent the position under the United Nations Charter system."[7] Yet the relevant passages in that correspondence, including those cited as references to proportionality, are concerned more with matters of necessity. Gardam, for example, cites as an "allegation of disproportionate conduct" Webster's statement that the claim that there was "[a] necessity for all this [the British military action], the Government of the United States cannot believe existed." To Webster's skepticism, Ashburton responded that the British chose their means "for the express purpose of preventing injury to persons or property" and that "the time of night was purposely selected as most likely to ensure the execution with the least loss of life."[8] These claims rebut an accusation that the British action was unnecessary, not that it was disproportionate. Much of the subsequent legal discussion supposedly concerned with proportionality in the resort to force has similarly been concerned with whether the resort to force, or the resort to a particular level of force, is necessary.

Even in constitutional law, "proportionality" is sometimes used to refer to a requirement of necessity. Thomas Hurka has called my attention to the fact that the Canadian Charter of Rights and Freedoms has an interpretive provision that explains when legislation that infringes a Charter right may nonetheless be constitutional. The conditions cited closely parallel the conditions of *jus ad bellum* in just war theory. Legislation must have a "pressing objective" (that is, a just cause), be rationally connected to that objective (hope of success), involve minimal impairment of Charter rights (necessity), and not have costs that exceed

[5] Each is quoted in section V. below.

[6] Claus Kreß, *The International Court of Justice and the 'Principle of Non-Use of Force,' in* THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 586 (Marc Weller ed., 2017).

[7] GARDAM, *supra* note 2, at 40.

[8] *Id.*

its benefits (proportionality). The standard terminology refers to the last three conditions together as the "proportionality" test and to the last condition on its own as "proportionate effects." This has led some legal scholars to argue that the last condition is redundant, as proportionality is covered by the first two of the three. But, as Hurka observes, it clearly is not.[9]

There have, however, been clearly expressed concerns with proportionality in the law of *jus ad bellum*. In 1980, for example, Roberto Ago, Special Rapporteur of the International Law Commission, distinguished between proportionality in reprisals and proportionality in self-defense when he wrote that the resort to force in self-defense "may well have to assume dimensions disproportionate to those of the attack suffered. What matters in this respect is the result to be achieved by the 'defensive' action."[10] *Ad bellum* proportionality also seemed to be clearly recognized by the International Court of Justice when it wrote in 2005 that "the Court cannot fail to observe . . . that the taking of airports and towns many hundreds of kilometres from Uganda's border would not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defence, nor to be necessary to that end."[11]

These are hopeful developments. There are conditions in which a just cause cannot be pursued without causing harms to innocent people that would be disproportionate in relation to the importance of the cause. Wars involving the use of weapons of mass destruction, such as nuclear weapons, or likely to escalate to the use of such weapons, are likely to be disproportionate in this sense. It is imperative that the law should have the resources to condemn such wars even when they are necessary for the achievement of a just and important cause.

In this chapter, I will distinguish carefully between the constraints of necessity and proportionality and will classify constraints that forbid the infliction of harm on the ground that it is ineffective or unnecessarily harmful as *necessity* constraints. The necessity and proportionality constraints are conceptually and morally distinct and we should avoid terminology that conflates them.

A necessity *constraint* is also quite different from a necessity *justification*. They are of course related, in that necessity justifications are always subject to a necessity constraint. But a necessity constraint, like a proportionality constraint, applies to virtually all forms of justification for harming. The conspicuous exception is a desert justification, since giving a person what she deserves is an end in itself; hence desert justifications apply even when giving a person what she deserves is not instrumental to, or necessary for, any good effects. Thus there cannot be a necessity constraint on a pure desert justification.

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[9] This is based on personal communication. My thanks to Hurka for citing this instance of the conflation of proportionality with necessity in another area of the law.

[10] Kreß, *supra* note 6, at 587 (quoting Roberto Ago, Addendum to the 8th Report on State Responsibility, *reprinted in* [1980] 2 (pt. 1) Y.B. INT'L L. COMM'N 69 (1980)) I return briefly to proportionality in reprisals in section VI below.

[11] *Id.* (quoting Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶ 147 (Dec. 19)). The final clause in this quotation shows that the Court has taken care to distinguish proportionality from necessity. Kreß's article contains an illuminating general discussion of the ICJ's attention to proportionality in its case law.

II. **How the Proportionality Constraint Differs from the Necessity Constraint**

Despite the way the labels are often used in international law, the constraints of proportionality and necessity impose different requirements because they are based on different comparisons. To determine whether an act of harming satisfies the necessity constraint one must compare the act's expected consequences with those of *alternative means* of achieving the *same* goal or end. Only if an act of harming is the morally best means of achieving a just aim—taking into account the probability of success, the expected cost to the agent, the expected harm to others as a side effect, and the expected harm to the threatener—can it satisfy the necessity constraint. I will not attempt to elucidate these complexities here.[12]

To determine whether an act of harming is proportionate, one does not compare its effects with those of alternative possible acts. One instead compares the act's good effects (generally, the prevention of harms, protection of rights, etc.) with its bad effects (generally, the infliction of harms, infringement of rights, etc.). If the bad effects would outweigh or be excessive in relation to the good, the act is disproportionate and therefore impermissible.

This claim is, however, deceptively simple. Suppose we want to know not only what the consequences of person *P*'s doing act *A* would be but also how to evaluate those consequences as good or bad. We must determine what would happen were *P* to do *A and* what would happen were *P not* to do *A* and then compare the two sets of possible consequences. Only then can we know whether *P*'s doing *A* would be *better* or *worse*, and by how much, than *P*'s not doing *A*. But *P* cannot *not do A* without doing something else, even if it is only to remain entirely motionless. So the question arises which of the courses of action that *P* might undertake instead of doing *A* is the one with which one should compare *P*'s doing *A* in order to assess the good and bad effects of doing *A*.

There has been considerable discussion of this issue in the literature on proportionality in self-defense and war.[13] Particularly in the literature on war, various proposals have been defended that specify the alternative with which a state's resort to war should be compared in the assessment of *ad bellum* proportionality. These include what the state would have done, or been most likely to do, if it had not gone to war, what it would have been most likely to do among its permissible alternatives, and whatever it might have done among its permissible alternatives that would have produced the least good consequences.[14] All these suggestions are vulnerable to what seem to be decisive objections.[15] Until recently I thought that it might be sufficient to say that the

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[12] For discussion, see Seth Lazar, *Necessity in Self-Defense and War*, 40 PHIL. & PUB. AFF. 3 (2012); Jeff McMahan, *The Limits of Self-Defense*, *in* THE ETHICS OF SELF-DEFENSE 185 (Christian Coons & Michael Weber eds., 2016).

[13] *See, e.g.*, Jeff McMahan & Robert McKim, *The Just War and the Gulf War*, 23 CAN. J. PHIL. 501, 507-10 (1993); David Mellow, *Counterfactuals and the Proportionality Criterion*, 20 ETHICS & INT'L AFF. 439 (2006); Thomas Hurka, *Proportionality and Necessity*, *in* WAR: ESSAYS IN POLITICAL PHILOSOPHY 127, 127, 130 (Larry May ed., 2008).

[14] The last of these is suggested by Hurka. *See* Hurka, *supra* note 13.

[15] Jeff McMahan, *Proportionate Defense*, *in* WEIGHING LIVES IN WAR 131, 132-34 (Jens Ohlin, Larry May & Claire Finkelstein eds., 2017).

assessment of proportionality requires only a comparison between the bad effects that an act or policy would cause and those that it would prevent, the latter being those bad effects that would occur were the agent to do nothing to prevent them. But recent work by Ben Bronner has convinced me that rather technical problems in understanding "counterfactual conditionals," such as problems of causal overdetermination and preemption, show that there is unlikely to be any general formula for identifying the precise alternative to which a war or act of war must be compared to determine whether it would be proportionate. According to Bronner, the harm that an act or policy would prevent "*is* picked out by some counterfactual or other," but "different counterfactuals are relevant in different cases."[16]

I will not pursue this problem further here except to note that the assessment of whether an act by some agent would be proportionate does not take into account good or bad effects that the agent might cause, or good or bad effects that she might prevent, were she to do some other act. Such "opportunity costs" and "opportunity benefits" may well be relevant to the moral evaluation of her act, but they are not relevant to whether it would be proportionate.

Nor are they relevant to whether her act satisfies the necessity constraint, which is concerned with alternative means of achieving the *same* end that the act is intended to achieve, such as the prevention of a particular harm. Opportunity costs and benefits are concerned with *alternative ends* one might pursue. Again, doing an act as a means of achieving a certain good end might well be wrong if one could, at no more cost to oneself or others, instead achieve a *different* and much better end by doing some other act. But, I know of no discussion in traditional just war theory of the idea that it could be wrong to go to war because of the war's opportunity costs.[17]

The claim that an act intended to achieve one end cannot be judged *unnecessary* because of the possibility of instead achieving a *different end* requires qualification. Just war theorists have sometimes claimed that an act of war intended to destroy one military target is ruled out as unnecessary if combatants could instead destroy a *different* but equally important target at lesser cost in harm to civilians as a side effect.[18] If the destruction of the one target is understood as a different end from the destruction of the other, this claim conflicts with my understanding of the comparisons required in the assessment of necessity. But there is no serious conflict given that the destruction of each target, while in one sense an end, is also a means of achieving the ultimate end, which is the achievement of the just cause for war. A choice of this sort thus

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[16] Ben Bronner, The Modal Fog of War (unpublished). This paper is a component of Bronner's PhD dissertation (Rutgers University).

[17] For discussion, see Peter Singer, *Bystanders to Poverty*, *in* ETHICS AND HUMANITY: THEMES FROM THE PHILOSOPHY OF JONATHAN GLOVER 185 (N. Ann Davis, Richard Keshen & Jeff McMahan eds., 2010); Jeff McMahan, *Humanitarian Intervention, Consent, and Proportionality*, *in* ETHICS AND HUMANITY, *supra*, at 44.

[18] *Cf.* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I) art. 57(3), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I] ("When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.").

raises two issues of necessity: first, for each target one must determine what the morally best means of destroying it is; then, assuming that it is not possible, or perhaps not desirable, to destroy both, one must compare the best way of destroying one with the best way of destroying the other to determine which of the two is the morally better means of contributing to the achievement of the just cause. The act of war that is the morally best means of destroying the target whose destruction is the morally better means of advancing the just cause is the act that satisfies the necessity constraint.

III. Proportionality in Defense and Proportionality in Punishment: Liability and Desert

Even before there were any formal legal systems, it was possible for one person's harming of another to be disproportionate. The legal concept of proportionality thus derives from the more general moral concept, which is logically prior. In law, "proportionality" has various meanings. In constitutional law, for example, it refers to a relation between the social benefit of limiting the scope of the protection afforded by a constitutional right and the social harm occasioned by the restriction of the right. This is quite different from the meaning of proportionality in criminal punishment, which is in turn different from various other forms of proportionality in the law, such as proportionality in private defense, in law enforcement through police action, and in war or armed conflict. Similarly, there are different notions or forms of proportionality in moral theory that must be carefully distinguished. Although my primary concern in this chapter is with proportionality in defensive harming, it will be helpful to elucidate that notion by contrasting it with proportionality in the morality of punishment.

Some philosophers believe that punishment is justified only if, and because, it protects innocent people from wrongful harm through defense (restraining dangerous offenders) or deterrence.[19] According to this view, an offender's desert is irrelevant to the justification for punishing him. Although I think this view is probably correct as a matter of morality, it is uncommon in legal thinking and I will not discuss it here. According to the more common, retributivist view, even though social defense and deterrence of wrongdoing are welcome and often intended effects of punishment, punishment is justified only when an offender *deserves* to be punished. Although retributivists believe that desert is not only necessary but also sufficient for punishment to be justified, there are other theorists who believe that, although desert is a necessary condition of justified punishment, its effect is only "negative," in that it merely negates a constraint against harming and is not itself a reason for harming.[20] On this view, desert is necessary but not always sufficient for state punishment to be justified. This view

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[19] *See, e.g.*, Daniel Farrell, *The Justification of General Deterrence*, 94 PHIL. REV. 367, (1985); PHILLIP MONTAGUE, PUNISHMENT AS SOCIETAL DEFENSE (1995); VICTOR TADROS, THE ENDS OF HARM (2011).

[20] The most prominent recent exponent of this view is H.L.A. Hart. *See* H.L.A. HART, *Prolegomena to the Principles of Punishment*, *in* PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 1 (2nd ed. 2008).

of desert is, however, inconsistent with the common view of *positive* desert. If, for example, a person deserves our gratitude, or deserves a benefit, it is commonly accepted that that alone is a justification for our expressing gratitude or providing the benefit. No further good effects are required. If this is true of positive desert, it seems it should be true of negative desert as well.

Suppose that the justification for punishment is purely retributive, so that proportionality in punishment is a constraint on a desert justification. On this view, punishment is proportionate only to the extent that it is deserved. Proportionality in punishment is a relation between the harm inflicted on a wrongdoer and the gravity of his past wrongdoing, which itself is a function of the degree to which his action was wrong or morally objectionable and the degree of his culpability in doing it. These latter two considerations determine how much harm the wrongdoer deserves. An instance of punishment is thus disproportionate if the harm it inflicts exceeds that which the offender deserves. Although it is rarely invoked, there is another way in which punishment might be disproportionate—namely, by failing to inflict *as much* harm as the offender deserves.[21] If this is indeed a form of disproportionality, then punishment is proportionate only if the harm it inflicts is neither greater nor less than that which the offender deserves, taking into account the unavoidable imprecision in judgments of desert.

Desert is not an important moral justification for attacking people in war. Indeed, some moral philosophers argue that it is never an acceptable justification for military action in war.[22] The main moral justification for harming and killing people in war is instead what I have referred to as a liability justification. This is also the main moral justification for harming and killing people in individual self-defense and defense of others ("other-defense"). This form of justification is subject to certain constraints, of which proportionality is one.

Desert justifications and liability justifications are related in that both typically appeal to the idea that the person who may justifiably be harmed has forfeited the right not to be harmed in certain ways. Yet a person who forfeits her right not be harmed may either deserve to be harmed without being liable to be harmed or she may be liable to be harmed without deserving to be harmed. Or she may both deserve to be harmed and be liable to be harmed. If so, she may be liable to suffer more harm than she deserves or she may deserve more harm than she is liable to suffer.

Desert justifications and liability justifications are also similar in that the bases of desert and the bases of liability—or at least those bases of liability that consist in facts about the agent (the "agential conditions" of liability)—are much the same. Just as an offender's beliefs, motives, and intentions are relevant to the determination of his desert and the severity of the punishment he might deserve, so a threatener's beliefs, motives, and intentions are also relevant to the amount of defensive harm to which he might be liable.

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[21] For discussion, though without reference to the notion of proportionality, see SHELLY KAGAN, THE GEOMETRY OF DESERT (2012).

[22] Jeff McMahan, *Aggression and Punishment*, *in* WAR: PHILOSOPHICAL PERSPECTIVES 67 (Larry May ed. 2008).

Yet liability differs from desert in various ways. First, whereas one can deserve to be harmed even when it is possible for no one to suffer further harm, one can be liable to be harmed only when harm is unavoidable, such as when a threatener will harm a victim unless the victim or a third party harms the threatener. Liability is a matter of justice in the distribution of harm when *some* harm is unavoidable. It thus constitutes a *justification* for harming (albeit a defeasible one) and not just the lowering of a barrier to the permissibility of harming; for if the person who is liable to be harmed is not harmed, someone else will be harmed instead. That is, harming a person who is liable to that harm always prevents harm to someone who is not liable to it. Liability is thus always instrumental.

Retributive or purely punitive harming is, by contrast, not instrumental. That a person deserves to be harmed is generally regarded, at least among philosophers who believe in desert, as a sufficient justification for punishment in the absence of special reasons not to inflict it. Although further effects, such as defense, deterrence, or the reform of the wrongdoer are often sought through punishment, they are generally not thought necessary for the infliction of *deserved* punishment to be morally justified.

A second difference between liability and desert is that liability is sometimes a comparative matter, whereas desert is not. According to the view of liability that I have defended, the moral basis of liability to defensive harm is moral responsibility for a threat of wrongful harm, and the amount of harm to which a person may be liable varies, when other things are equal, with the degree of the person's responsibility.[23] Suppose that two people, *A* and *B*, both bear responsibility for the fact that someone will suffer a harm that cannot be divided—that is, it must all be suffered by only one person. If *A* bears greater responsibility than *B*, then *A* is liable to suffer the harm and *B* is not, though *B* would have been had *A* been less responsible than *B*. Yet if both are culpably responsible and culpability grounds desert, what *B* deserves is unaffected by *A*'s greater culpability, and the total harm they together deserve may be greater or less than that to which one of them is liable.

A third and closely related difference is that liability is sensitive to circumstantial conditions in ways that desert is not. Suppose that a wrongdoer culpably attempts to kill an innocent person in a way that is certain to fail. That he causes no harm is arguably irrelevant to his desert; but that he will cause no harm does exempt him from liability to be harmed. (Not all philosophers accept this last claim. Some believe that at least certain forms of culpability can make a person liable to be harmed as a means or side effect of averting a threat for which that person is in no way responsible. This view narrows the gap between desert and liability but does not close it, assuming that liability is always instrumental whereas desert is not.[24])

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[23] *See, e.g.*, JEFF MCMAHAN, KILLING IN WAR ch. 4 (2009).

[24] *See* TADROS, *supra* note 19, at 186-96; Lars Christie, Harming One to Save Another (unpublished PhD thesis, University of Oslo, 2015); Matthew Oliver, Liability and Culpability (unpublished DPhil thesis, University of Oxford, 2018). The arguments in these and other texts have convinced me that causal responsibility for a threat is not a necessary condition of liability to be

A fourth and final difference is conceptual. It is a conceptual truth that desert of punitive harm requires or presupposes culpability, but there is no corresponding conceptual truth about the conditions of liability. Although some philosophers argue that culpability is indeed a necessary condition of liability, their claim is substantive rather than conceptual, as is the claim, which I accept, that morally responsible agency is a necessary condition of liability.

Both desert justifications and liability justifications are retrospective in certain ways. Although the constraints on desert justifications, such as those concerned with side effects, can be prospective in character, desert itself is arguably determined entirely by what a person has done in the past. Similarly, what one has done in the past is often relevant to one's liability in the present. This is most obvious when one is morally liable to the harm involved in having to compensate the victim of one's earlier harmful action.

One may also be liable to be harmed in defense of another on the basis of action done entirely in the past. In one of the familiar examples involving runaway trolleys, a trolley will hit and kill five innocent people unless a person is toppled off a bridge into its path, in which case the trolley will be stopped when it hits and kills her. Most people believe it is impermissible to kill this person as a means of saving the five. But their intuition changes if we stipulate that she has maliciously set the trolley in motion and stationed herself on the bridge to get a good view of her intended victims being killed. In these circumstances, it is permissible to kill her as a means of saving the five, not because she deserves to be killed but because justice demands that she be the one to be killed when it is her own voluntary, wrongful action that has made it unavoidable that someone will be killed. Although she now poses no threat, killing her is necessary to prevent her from killing the five through action she did in the past.

IV. Wide Proportionality, Narrow Proportionality, and Proportionality in the Aggregate

I have argued that, given the common assumption that justified punishment must be *deserved*, proportionality in punishment is quite different from proportionality in defense. This claim is, however, an oversimplification. Both justified punishment and justified defense are subject to more than one proportionality constraint. Although this is seldom recognized, justified punishment is constrained by two distinct proportionality requirements. And justified defensive harming is, I believe, constrained by three.

Punishment is governed by two proportionality constraints because the harms it inflicts must satisfy two distinct forms of justification. There is first the proportionality constraint on the desert justification: the harm intentionally inflicted on the offender must be proportionate in relation to his desert. But the infliction of punishment often harms people other than the offender. If, for example, one of the states in the United States executes a middle-aged man, he may have parents, a wife, and children who love him and who will all suffer great and lasting harm because of what is done to him. These harms are side

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harmed as a means or side effect of averting the threat. Yet no one, to my knowledge, has provided a plausible account of the limits of liability in the absence of causal responsibility.

effects of the punishment. While the law may ignore them, morality does not. For an instance of punishment to be morally justified, all things considered, there must be a justification for the harms it causes to people other than the offender. Because these people normally bear no responsibility for the offender's wrongdoing, the justification for harming them cannot be a desert justification or a liability justification. It must instead be a lesser-evil justification. That is, for the act of punishment to be justified, the harms it inflicts on innocent people as a side effect must be substantially outweighed by whatever is achieved by punishing the offender (such as giving him what he deserves, preventing him from causing further harm, and preserving deterrence).

The specification of what constitutes the lesser evil in the circumstances is a matter of proportionality. This form of proportionality governs acts of causing people harm or allowing people to be harmed when those people neither deserve nor are liable to suffer that harm. It is often referred to as "wide proportionality," as it applies to a wide range of harms—namely, those for which there is neither a desert justification, a liability justification, nor a consent justification. A harm inflicted on an innocent person that exceeds what can be justified as the lesser evil is disproportionate in the wide sense.

The standard that determines what constitutes the lesser evil, and thus how much harm is proportionate in the wide sense, varies with certain factors. These include whether the person harmed by an act is also the beneficiary of that act or whether the beneficiary is instead a different person, whether the good effect of the harmful act is the prevention of a harm or the conferral of a benefit, whether the harm is inflicted as an intended means or as an unintended side effect, whether the harm inflicted is all suffered by one innocent person or is divided and dispersed among many innocent people, and so on. Whereas it might, for example, be proportionate to inflict a harm of a certain magnitude on a person as a *side effect* of preventing that *same* person from suffering an only slightly greater *harm*, it might nevertheless be disproportionate in the wide sense to inflict the same harm on that same person as a *means* of conferring even a vastly greater *benefit* on a *different* person.

Wide proportionality contrasts with "narrow proportionality," which governs a narrower range of harms—namely, those for which there is either a desert justification, a liability justification, or a consent justification. A harm inflicted on a person that exceeds the harm he deserves, to which he is liable, or to which he has consented is disproportionate in the narrow sense.

Harms that the victim deserves, is liable to suffer, or has consented to suffer, and which are thus proportionate in the narrow sense, do not wrong the victim or infringe the victim's rights; for both desert and liability involve the forfeiture of certain rights not to be harmed, and consent constitutes the waiving of those rights. By contrast, harms inflicted on the innocent that are justified as the lesser evil, and are thus proportionate in wide sense, often do infringe the rights of the victims. Although the infringement is permissible, so that the right is overridden rather than violated, the victim may nevertheless be owed compensation. Yet not all harms that are justifiably inflicted on the innocent as the lesser evil involve the infringement of a right. Even though the parents of an offender who is severely but justly punished may, for example, be grievously harmed by what is done to their child, they may have no moral right not to be harmed in that way and thus may have no right to compensation. Although there is a moral reason

not to inflict this harm on the parents, so that the harm weighs in the assessment of whether the punishment is proportionate in the wide sense, the reason not to inflict it is not as strong as it would be in a case in which the infliction of the same amount of harm would violate the victims' rights.

Suppose that an act of self-defense by a victim (*V*) against a threatener (*T*) is disproportionate in the narrow sense, in that the harm it inflicts on *T* exceeds that to which he is liable. This does not entail that the act is impermissible; for the harm that *V* inflicts on *T* beyond that to which *T* is liable may be differently justified—for example, as the lesser evil. This may be easier to appreciate if we consider a related example. Suppose that what is necessary for the successful defense of *V* is the infliction of a certain harm on *T* to which *T* is liable (and which is therefore proportionate in the narrow sense) *and* the infliction of a further harm on an innocent bystander (*B*), either as a means or as a side effect. It is possible that there is both a liability justification for the harming of *T* and a lesser-evil justification for the harming of *B*, so that the defensive action is overall justified. If this is so, it should also be permissible to inflict both harms on *T* if that would be equally effective.[25] In both cases, the harm beyond that to which *T* is liable would be inflicted on someone who is not liable to it, but there would be a lesser-evil justification for the infliction of this further harm. In the case in which the additional harm would be inflicted on *T*, this harm would be disproportionate in the narrow sense but proportionate in the wide sense, just as it would be proportionate in the wide sense if it were inflicted on *B* instead.

Although the infliction of harms that are disproportionate in the narrow sense may be permissible all things considered, the infliction of harms that are disproportionate in the wide sense is always impermissible. Lesser-evil justifications are justifications of last resort. One appeals to them only when no other form of justification applies. If, for example, there is a liability justification for harming a person, the claim that harming that person would be the lesser evil is otiose. Thus, when the harming of an innocent person cannot be justified even as the lesser evil, it cannot be justified at all.

In both morality and law, proportionality in individual self-defense and defense of others is primarily narrow proportionality. This is because acts of individual self- and other-defense seldom cause serious harms to innocent people as a side effect. Wide proportionality is therefore rarely a serious issue in these cases. But it is, of course, a very serious issue in war. In traditional just war theory, both the *ad bellum* and *in bello* proportionality constraints are wide proportionality constraints only. Neither in the resort to war nor in the conduct of war is there a proportionality constraint on the harming of enemy combatants—though the *in bello necessity* constraint applies to both harm to noncombatants and harm to combatants. (This is true in the law of armed conflict

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[25] For discussion of this form of "combined justification," see McMahan, *Proportionate Defense*, *supra* note 15, at 136-38. A complication would arise if the additional harm to *T* would be intended as a means, whereas the equivalent harm to *B* would be inflicted only as a side effect. For more extensive discussion of combined justifications and certain challenges to them, see Jeff McMahan, *Liability, Proportionality, and the Number of Aggressors*, *in* THE ETHICS OF WAR: ESSAYS 3, 18-24 (Saba Bazargan-Forward & Samuel C. Rickless eds., 2016).

as well, as I indicated in the discussion of the prohibition of weapons that cause unnecessary suffering or superfluous injury.[26])

Proportionality in the law of war is arguably even more limited in scope. Not only is there no *ad bellum* or *in bello* narrow proportionality constraint—that is, there is no proportionality constraint on the harming of combatants—but also the references to *ad bellum* proportionality are usually, as we saw, about necessity rather than proportionality.[27] There has been comparatively little legal discussion of whether a state's resort to force in self-defense can be in violation of the law on the ground that the harm this would cause to civilians would be excessive in relation to the importance of the defensive action.

Recently-developed variants of "revisionist" just war theory tend, by contrast, to recognize a rich range of proportionality constraints. Like traditional just war theory and the law, they of course recognize an *in bello* wide proportionality constraint. They also, like traditional just war theory, recognize an *ad bellum* wide proportionality constraint—that is, they recognize that a war as a whole could be disproportionate because of the harms it would cause to people who are not liable to those harms. But many revisionist just war theorists also argue that there is an *in bello* narrow proportionality constraint, according to which an act of war may inflict harms on enemy combatants—particularly unjust combatants—that are disproportionate in relation to their good effects. This is denied by both traditional just war theory and the law.

There is, moreover, one further type of proportionality constraint that is still under-recognized even in revisionist just war theory. We can appreciate the necessity of recognizing this further constraint by considering what the other proportionality constraints fail to take into account. Both *ad bellum* and *in bello* wide proportionality take into account the *number* of innocent victims who are harmed. If other things are equal, the more people who are harmed by an act of war who are not liable to the harms inflicted on them, the more seriously disproportionate the act of war is, in the wide sense. But because narrow proportionality is a constraint on a liability justification and liability justifications apply to individuals one-by-one, an act of war cannot be disproportionate in the *narrow* sense on the ground that it harms *too many* people. But both wars as wholes and individual acts of war can be disproportionate because the number of combatants—even unjust combatants—they would kill would be excessive in relation to the good effects they would produce. I call this form of proportionality "proportionality in the aggregate."[28]

V. ***Jus in Bello*** **Wide Proportionality**

I believe the revisionist just war theorists are right to claim that war is morally constrained by various requirements of proportionality. These do not include a requirement of *ad bellum* narrow proportionality; for it is true almost by definition that if there is a just cause for war, some substantial proportion of the unjust combatants must be individually liable to be killed in its pursuit. It is

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[26] *See supra* pp. 3-4.
[27] *See supra* pp. 4-5.
[28] *See* McMahan, *Liability, Proportionality, and the Number of Aggressors*, *supra* note 25.

therefore impossible in practice that a war with a just cause could be impermissible on the ground that it would unavoidably inflict harms on individual unjust combatants that would exceed the harms to which they are liable. There is, however, a constraint of proportionality in the aggregate that applies to the killing even of unjust combatants. There are both *ad bellum* and *in bello* versions of this constraint and the *ad bellum* version could in principle rule out the resort to war, or the continuation of war, simply because the *number* of unjust combatants who would have to be killed is disproportionate in relation to the importance of the just cause. For example, even though I believe the Falkland Islands belong to Britain, I think the Falklands War would have been clearly disproportionate if it had been necessary to kill 100,000 Argentine combatants to preserve British sovereignty.

Both traditional and revisionist just war theory agree, moreover, that there is an *ad bellum* requirement of wide proportionality. For the resort to or continuation of war to be morally justified, the achievement of the just cause must be sufficiently important to outweigh the harm to innocent people that the war would cause. Traditional just war theory and revisionist just war theory are also largely in agreement about what good effects can weigh against and potentially offset the harms that a war would inflict on innocent people. These good effects consist mainly in those that are constitutive of the achievement of the just cause for war. But other good effects that might be brought about either intentionally in the course of the war or as side effects may also weigh against and potentially offset harms to the innocent that the war would cause.

In the morality of *jus in bello*, there is more scope for a requirement of narrow proportionality. There can be occasions in war when attacking and, in particular, killing unjust combatants is disproportionate. These include occasions when attacking them would make only a negligible contribution to the achievement of the just cause (for example, when they are soon to be demobilized and replaced by other soldiers) or when the unjust combatants bear little or no responsibility for the threat they pose, as may be true of some child soldiers. (This second basis of disproportionality presupposes that whether a person is liable to be harmed, as well as the amount of harm to which he can be liable, depend on whether and to what degree he is responsible for his action.) These same considerations can, moreover, contribute to making large-scale attacks on unjust combatants disproportionate in the aggregate.

The most important form of proportionality in war, though, is of course *in bello* wide proportionality. And on this matter, traditional and revisionist just war theory are in deep disagreement, with the law of armed conflict firmly aligned with traditional just war theory. A core tenet of the traditional theory of the just war is the "moral equality of combatants"—the view that combatants all have the same permissions, rights, and liabilities irrespective of whether their cause is just.[29] And just as this doctrine is at the core of the traditional moral theory of *jus in bello*, so what might be called the "legal equality of combatants" is at the core of the law of armed conflict. According to these doctrines, combatants who fight for unjust aims are neither morally nor legally guilty of wrongdoing

[29] The classic statement and defense of this view in the modern literature is Michael Walzer's *Just and Unjust Wars*. MICHAEL WALZER, JUST AND UNJUST WARS 34-37 (1977).

provided they obey the rules governing the conduct of war—that is, the rules of *jus in bello*—among which is a requirement of wide proportionality. Both traditional just war theorists and international lawyers have, moreover, insisted that it must be possible for unjust combatants to fight in obedience to the *in bello* rules without in general incurring a burden greater than that which conformity with the rules imposes on just combatants. Unjust combatants must, in other words, be able to obey the rules without exposing themselves to systematic military disadvantages vis-à-vis their adversaries.

The reason for this insistence is, I believe, that both legal and moral theorists have thought it essential that both law and morality should impose *effective* constraints on those who fight in unjust wars. These theorists have thought that if law and morality both say to unjust combatants that, because their aims are unjust, virtually every act of war in which they engage is impermissible, the response of the unjust combatants may be simply to turn a deaf ear to the voices of both law and morality. Even if unjust combatants recognize, or suspect, that the aims for which they have been ordered to fight are unjust, they may nevertheless continue to fight for fear of the social and domestic legal sanctions they would suffer for refusing to continue. If they believed that their every harmful act in continuing to fight would be both illegal and immoral, they might feel effectively unconstrained. If everything they might do other than refuse to fight would be wrong, they might think—though in my view mistakenly—that there are no good reasons other than those of self-interest to do one wrong act rather than another. Many legal and moral theorists have therefore insisted on saying to unjust combatants that, while it is permissible for them to fight, there are various types of belligerent action that are legally and morally impermissible. And the use of force that is disproportionate in the wide sense is one of these. These legal and moral theorists have thus insisted that the *in bello* requirement of wide proportionality must apply symmetrically to the action of both just and unjust combatants.

It is natural to suppose that, when just combatants are considering whether some act of war they might do would be proportionate, they should reason about the individual act of war in the same way that they should reason about whether the war as a whole would be proportionate. That is, they should weigh the harms that the act would cause to people who are not liable to those harms against the probable contribution that the act would make to the achievement of the just cause, together with any other good effects the act might have that are capable of morally offsetting the harms. According to this understanding, whether the war as a whole is proportionate in the wide sense is an aggregative function of the extent to which each of the many acts of war that together constitute the war is or is not proportionate in the wide sense. In the simplest cases, if every act of war is disproportionate in this sense, then the war as a whole must be disproportionate, and if every act of war is proportionate, then the war as a whole must be proportionate.[30] This is because the good and bad effects that determine whether

[30] There are complexities here that arise from the Non-Identity Problem, a notorious problem in population ethics that was discovered by Derek Parfit. These complexities are illuminatingly discussed by Patrick Tomlin in two important but as-yet-unpublished papers: "The Impure Non-Identity Problem" and "Proportionality in War and Fallacies of Composition."

the war as a whole is proportionate are just the sum totals of the good and bad effects of the individual acts of war that together constitute the war.

This understanding of *in bello* wide proportionality cannot, however, be accepted by those legal and moral theorists who insist that the requirements of *jus in bello* be in general satisfiable by unjust combatants at no greater cost in military effectiveness than that incurred by just combatants in their obedience to the same requirements. This is of course because unjust combatants have no just cause to weigh against the harms their acts of war inflict on those who are not liable to those harms. According to these theorists, there must be a type of good effect that just and unjust combatants are equally capable of producing through military action that can weigh against the harms that military action often causes to innocent people as a side effect. The effect they have settled on is "military advantage."

In both international law and international criminal law, the determination of *in bello* proportionality requires the weighing of harms to civilians against military advantage. Although it confusingly describes the following type of act as "indiscriminate" rather than "disproportionate," Additional Protocol I prohibits "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[31] Similarly, the Rome Statute includes in its list of war crimes "intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated."[32]

One can perhaps make sense of these statements of the *in bello* proportionality requirement by designing—or stipulating—two finite, cardinal scales, one that measures harm to civilians and another that measures military advantage. These two scales would be isomorphic, in that there would be a one-to-one correspondence between the points on each. For every point on one scale, in other words, there would be a precisely corresponding point on the other. An act of war that is expected to cause an amount of harm to civilians at a particular point on the scale that measures harm would then be proportionate only if it is also expected to yield a degree of military advantage at a point that is some distance higher up the scale that measures advantage. It might then be a matter of dispute whether an act of war would be proportionate if the military advantage it is expected to provide were only one point higher than the harm to civilians it is expected to cause, or whether the military advantage would have to exceed the harm by some greater number of points.

One serious objection to this way of understanding *in bello* proportionality is that it assumes that the value of some amount or degree of military advantage as measured on the scale is the same in all wars. This has to be the case if the value of a unit of military advantage is not to vary with the moral importance of the goals of the war. And the moral importance of the goals of the war cannot affect

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[31] AP I, *supra* note 18, art. 51(5)(b).

[32] Rome Statute of the International Criminal Court art. 8(2)(b)(iv), July 17, 1998, 2187 U.N.T.S. 90.

in bello proportionality without systematically favoring just combatants over unjust combatants. But if the measure of military advantage is not sensitive to the importance of the goals of the war, then harms to innocent people that are disproportionate when very little is at stake in the war must also be disproportionate when much is at stake.[33] Suppose, for example, that an act of war would have been disproportionate in the Falklands War if it would have provided a military advantage that would have increased the probability of victory by the British by one percent but would also have caused a certain amount of harm to innocent people. On the view of proportionality I have sketched, an act of war that would have increased the probability of victory by the Allies in the Second World War by one percent would also have been disproportionate if it would have caused the same amount of harm to innocent people. This, however, is clearly mistaken.

The decisive objection to this understanding of proportionality is that it is morally arbitrary—indeed, morally incoherent. Proportionality is an element of a *justification* for harming people. An act that harms innocent people is proportionate, and therefore justifiable, only if the harm it causes is *offset*. And harms can be offset only by good effects, such as the prevention of other harms. Yet military advantage is in itself not a good effect. In itself it has no value. Its value is only instrumental—that is, it is valuable only to the extent that what it is *advantageous for* is valuable. Only if the military advantage provided by an act of war increases the probability that combatants will achieve aims that are impartially good is the advantage valuable and capable of offsetting harms caused by that same act of war.

The understanding of proportionality that weighs bad effects against military advantage may thus be morally coherent in its application to an act of war by just combatants, provided that the act's military advantage is understood as a proxy for the contribution the act makes to the achievement of the just cause. But it makes no sense to suppose that when military advantage produces effects that are impartially bad, such as facilitating the achievement of aims that are unjust, it could nevertheless offset the infliction of harms, including injury and death, on innocent people. Bad effects cannot be offset and thereby justified by other bad effects.

Here is another way of making the same point. Recall that the justification for killing innocent civilians in war must be a lesser-evil justification. Wide proportionality is a constraint on such a justification. It specifies how much harm an act may cause as the lesser evil in relation to the harm it prevents. But an act that has the bad side effect of harming innocent civilians cannot be justified as the lesser evil on the ground that, by producing military advantage for unjust combatants, it also facilitates the achievement of other impartially bad effects. (Effects that are impartially good or bad contrast with those that are merely "relatively" good or bad. Military advantage for the Nazis is, for example, relatively good for the Nazis but impartially bad. Only effects that are impartially good or bad count in the assessment of proportionality.)

Another, though less serious, objection to weighing the harms to civilians caused by acts of war against military advantage only is that some acts of war,

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[33] *See* Thomas Hurka, *Proportionality in the Morality of War*, 33 PHIL. PUB. AFF. 34 (2005).

such as those classified under the heading of "non-kinetic targeting," are not military in nature. Some forms of cyberwarfare, for example, are harmful to civilians and must thus satisfy a wide proportionality requirement. They may, for example, be intended to cause economic disruption or to induce false beliefs about political matters among members of the civilian population. But in such instances they neither produce nor are intended to produce a military advantage because they are not directed at objects that "by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[34] It seems, therefore, that either the current legal principle of proportionality is defective in failing to apply in a range of cases to which it ought to apply or it implies that all instances of non-kinetic targeting that harm civilians but do not produce a military advantage are disproportionate because they have no effects that can offset the harms they cause to civilians.

The case for retaining the understanding of *in bello* proportionality currently found in international law and international criminal law depends on two claims: that it is the best of the possible understandings that are symmetrical between just and unjust combatants and that the adoption of an asymmetrical understanding would have dire consequences. Suppose that, as I and other revisionist just war theorists claim, *in bello* wide proportionality is, as a matter of morality, highly asymmetrical in its application, because acts of war by unjust combatants can only rarely have impartially good effects that are sufficient to offset both their impartially bad side effects *and* their impartially bad *intended* effects. Most acts of war by unjust combatants are therefore disproportionate in the wide sense and thus impermissible. It is, in short, not possible to fight in an unjust war without continually violating the morally correct principle of *in bello* wide proportionality, which demands that the harms that an act of war inflicts on innocent people be outweighed by its impartially good effects, such as the contribution it makes to the achievement of a just cause.[35]

Acknowledgement of these claims by the law would, it is often claimed, have bad effects for at least two reasons. First, by repudiating the symmetrical principle that weighs harms to innocent civilians against military advantage only, the law would deprive unjust combatants of a standard of proportionality that they believe these combatants can satisfy and would thereby forfeit one important way of motivating these combatants to exercise restraint in the conduct of war. Second, it would bring the law under pressure to acknowledge that fighting in a war with unjust aims is criminal, as one cannot fight in such a war without violating the *in bello* principle of wide proportionality—violations of which, I have claimed, can never be morally permissible. But if mere participation in an unjust war were criminalized, the law would be committed, at least in principle, to punishing unjust combatants simply for attacking just

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[34] AP I, *supra* note 18, art. 52(2).

[35] It is also not possible, according to revisionist theorists, to fight in an unjust war without continually violating the morally correct *jus in bello* principles of discrimination and necessity, though I will not attempt to explain this here.

combatants, at least whenever such attacks would harm civilians as a side effect and thus violate the wide proportionality constraint.

Let us consider these two claims in turn. The first assumes that the current legal understanding of proportionality actually has a restraining effect on unjust combatants. It might be supposed to have this effect in either or both of two ways. First, combatants might believe that it would be morally wrong to seek military advantage in ways that would cause excessive harm to civilians as a side effect. They might then be morally motivated to avoid acting in this way. Second, they might be deterred from violating the principle of proportionality by the threat of legal punishment.

I suspect that the current symmetrical principle of proportionality does sometimes motivate unjust combatants to exercise restraint for moral reasons. An unjust combatant might well believe, for example, that killing 100 enemy civilians as a side effect would be disproportionate in relation to the military advantage to be gained from the destruction of a single tank, and he might be motivated by that belief to refrain from destroying the tank. His mistake would be to suppose that there is some degree of military advantage for his side that *could* offset and justify the killing of 100 civilians. (He would also be mistaken to suppose that the destruction of the tank would be proportionate if the only side effect would be the infliction of a slight bruise on a civilian.)

The relevant question is therefore empirical—namely, what the effect on such a combatant's attitudes and motivation would be if the law were to impose the morally coherent requirement that the harms an act of war causes to civilians be proportionate in relation to the act's impartially good effects, including, of course, its contribution to the achievement of a just cause. One possibility is that, like many or most unjust combatants, he would believe that he was in fact a just combatant and would thus, if he were morally motivated, attempt to weigh the harms his act would cause against the imagined impartial good effects he might expect it would have.[36] In that case, the law would be inducing restraint, perhaps more effectively than it could by urging him to weigh the harms against expected military advantage—for the latter would, after all, require him to be thinking incoherently.

The other possibility is that he correctly believes himself to be an unjust combatant. In that case, he should understand the morally correct principle of *in bello* proportionality to imply that his destroying the tank, or indeed virtually any other military target whose destruction would unavoidably cause harm to civilians, would be disproportionate to a higher degree, and in a more fundamental way, than he might imagine it to be if he were weighing the harm to civilians against military advantage. If we continue to assume that he is morally motivated, he will then be more strongly motivated to refrain from acting than he would be if he accepted the current legal standard of *in bello* proportionality.

Consider next the issue of enforcement. This is to a considerable degree independent of the content of the proportionality principle. The current legal principle could be made reasonably precise and then be enforced on the basis of

[36] He might imagine that it would have good effects that it would not have or that what are in fact bad effects would instead be good. This will be addressed later in this section.

the isomorphic scales I sketched earlier that would measure harm and military advantage. And the morally correct principle could be enforced as well. Up to the present, however, there have been no serious prosecutions in either international law or international criminal law for violations of the proportionality principles stated in Additional Protocol I[37] and the Rome Statute.[38] At present, therefore, there is no credible threat to punish combatants, just or unjust, for violations of *in bello* proportionality. It is thus unlikely that the current morally incoherent principle has any significant effect in restraining unjust combatants by means of deterrence.

It would of course be desirable to have a legal principle of *in bello* proportionality that could be enforced in a way that would motivate combatants, including unjust combatants, to exercise restraint in the conduct of war. But revisionist just war theorists must concede that, whatever its precise terms might be, the morally correct principle of *in bello* wide proportionality, which weighs the harms an act of war would cause to innocent people against the act's impartially good effects, is singularly ill suited to impartial legal enforcement against both just and unjust combatants. The problem is not enforcement against just combatants. It is rather that any attempt to enforce the correct principle against unjust combatants would be likely to have very bad consequences overall. This is because virtually the only acts of war by unjust combatants that could satisfy this proportionality requirement are those that would prevent just combatants from causing wrongful harms while pursuing their just aims by impermissible means. Other acts of war by unjust combatants—particularly those intended as means to the achievement of unjust goals—are, as I noted, highly unlikely to have impartially good effects that are sufficient to outweigh their intended and unintended impartially bad effects. Most acts of war by unjust combatants will therefore be in violation of the correct principle of wide proportionality. Because of this, effective enforcement would require trying and punishing most of the combatants who fight for unjust aims in unjust wars.

Punishing acts of war by unjust combatants that harm innocent people as a side effect but have few or no offsetting good effects would in practice be tantamount to punishing unjust combatants simply for fighting in an unjust war. This would be objectionable for a variety of reasons. It would, for example, require the law to distinguish between just and unjust wars, or between wars with impartially good aims and wars with impartially bad aims. Because no area of law can ever simply restate the principles of morality that govern the area of life covered by that law, the relevant moral distinctions are unlikely to coincide with the distinction between legal and illegal wars. This is because the correct moral principles of *jus ad bellum*, if we could discover them, are likely to be both complex and subtle, whereas law must be comparatively simple to be able induce us, with our many cognitive, moral, and motivational infirmities, to act in morally acceptable ways. And to be able to punish soldiers without injustice, the law would also have to provide some public guidance about which wars were unjust, both before they were initiated and as they progressed, as their aims and moral status would be susceptible to change.

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[37] *See supra* note 31.
[38] *See supra* note 32.

It is certainly possible and desirable that, particularly through the creation of new international institutions, the law of war can be brought into much closer congruence with morality. But in the near term it is unrealistic, for the reasons just stated, to suppose that the law could appropriately punish combatants on the basis of its judgments about which wars are just and which are unjust.

But suppose for the sake of argument that the law could overcome the obstacles to identifying which wars are unjust and communicating this information to soldiers. Many other problems would remain. If, at the end of a war, one state were judged to have fought unjustly, it would certainly be unwilling to submit all or most of the members of its military who had fought in the war to trial by a court, even an international court. Perhaps a further war would have to be fought to compel it to do so. But suppose that it would somehow be possible to put a large number of ordinary soldiers who had fought in an unjust war on trial. Even if all of them had engaged in acts of war that killed or injured innocent people, most of them would be to some degree excused for having done so as a result of duress, nonculpable ignorance, and other mitigating considerations. If these considerations were taken into account, few of these erstwhile unjust combatants would deserve more than a very mild form of punishment, the prospect of which would do little to deter them or others from obeying an order to fight in an unjust war.

It would, moreover, be prohibitively time-consuming and costly for a court to examine the claimed excuses of a very large number of soldiers. There are at least three alternatives. One would be to assume for convenience that all the former unjust combatants had substantial excuses. That, however, would decisively undermine the deterrent effect of the threatened punishment. A second option would be to have full trials though only for some small proportion of the former unjust combatants, perhaps selected by lottery. But if the proportion tried were relatively small, which it would have to be to avoid overburdening the courts, the deterrent effect would again be lost. The third option would be to hold all the unjust combatants strictly liable by declining to take their claimed excuses into account. This, however, would not only be profoundly unjust but could also have a significant bad effect. While threatening all unjust combatants with relatively harsh punishment would help to deter combatants from participating in unjust wars, in cases in which the deterrent effect was insufficient to prevent an unjust war from being fought, the threat of severe *post bellum* punishment could then deter unjust combatants from surrendering when they would otherwise do so. They might prefer to continue to fight in the hope that victory would shield them from punishment than to surrender and face the prospect of severe punishment. If so, their unjust war would be unnecessarily prolonged, thereby increasing the harms that they would inflict on innocent people.

A further possibility might be to make violations of *in bello* proportionality illegal but not criminal—that is, not punishable. Although that would involve abandoning the aim of deterring violations, it would bring the authority of the law to bear in strengthening the moral motivation that combatants might have to avoid causing disproportionate harm to innocent people. This, however, would abandon too much. Somehow the law ought to be able to punish genuine violations of wide proportionality by just combatants—for example, the killing of hundreds of children as a foreseen side effect of destroying a single enemy tank.

It would, however, be absurd if the law could punish, and thereby deter, violations of *in bello* proportionality only by just combatants, allowing unjust combatants to go unpunished and undeterred. There is therefore reason to explore other possible ways of understanding *in bello* proportionality—ways that might not be fully correct morally but that would not be altogether incoherent and would enable the law to deter both just and unjust combatants from conducting certain military operations that would cause extensive harm to innocent people as a side effect. One might try, in particular, to identify a different way from that found in current law of understanding *in bello* wide proportionality that is symmetrical between just and unjust combatants, in the sense of being satisfiable by each at roughly equal cost in overall military effectiveness.

In previous work, I have developed and discussed two such proposals. I will briefly rehearse those discussions here to indicate why neither proposal is acceptable.

What we seek is a principle of *in bello* wide proportionality that weighs the harms that acts of war would cause to innocent people against good effects that can be expected to be produced in roughly equal measure by acts of war by just and unjust combatants alike. Only a principle of this sort is well suited to being effectively enforced as a means of motivating both just and unjust combatants to exercise restraint in the conduct of war.

One suggestion is that the good effects of an act of war that can weigh against harms to innocent people be restricted to preventions of harm that are the immediate causal consequences of the act.[39] Suppose, for example, that a missile launcher is located next to a civilian home (perhaps intentionally, to exploit any scruples that enemy combatants might have about killing the inhabitants as a side effect of destroying the launcher). Suppose further that unless it is destroyed, the launcher will be used to kill a certain number of enemy combatants and noncombatants. But if the combatants who would be the targets of the missile destroy the missile launcher in self-defense, they will kill the civilians in the adjacent home. According to this first suggested understanding of *in bello* proportionality, if the prevention of the killings of the combatants and noncombatants by the missile launcher is sufficient to outweigh the killing of the innocent civilians in the home, the destruction of the launcher would be proportionate. If the saving of the immediate potential victims of the launcher is insufficient to outweigh the killing of the inhabitants, the attack would be disproportionate. These claims concern the weighing of harms caused against harms averted and are neutral between just and unjust combatants—that is, they make no reference to whether the combatants who might destroy the launcher are just combatants or unjust combatants. Whether the destruction of the launcher would contribute to the achievement of a just cause is irrelevant to whether destroying it would be proportionate.

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[39] This is a slightly different and, I think, better version of a view I previously sketched and then criticized. *See* Jeff McMahan, *War Crimes and Immoral Action in War*, *in* THE CONSTITUTION OF CRIMINAL LAW 151, 181-82 (R.A. Duff, Lindsay Farmer, S.E. Marshall, Massimo Renzo & Victor Tadros eds., 2013).

Although this proposal may seem promising, there are, I believe, at least two decisive objections to it. First, many acts of war by just combatants have three features: they make it more likely that the just cause will ultimately be achieved, they cause harm to innocent people as a side effect, and they have no immediate good effects, such as the prevention of harm. It is clear, I think, that acts of this sort can be permissible; therefore they can be proportionate. But they cannot be proportionate according to this first suggested understanding of *in bello* wide proportionality because they have no immediate good effects that can offset the harms they immediately inflict on innocent people.[40]

The second, equally decisive objection is that this understanding's apparent neutrality between just and unjust combatants is an illusion. Consider again the case in which, if combatants destroy a missile launcher, they will prevent themselves and some nearby civilians from being killed but will also, as a side effect, kill the civilians in the house that is adjacent to the launcher. According to the proposed understanding of proportionality, the prevention of harms to the combatants is an immediate causal consequence of the act of war and thus weighs against and can offset the harms to the innocent people in their home. As a matter of morality, however, this is true only if the prevention of harm to the combatants is an impartially good effect. But if the combatants are unjust combatants, preventing them from being harmed by just combatants is not an impartially good effect; it is an impartially bad effect, as it enables the unjust combatants to continue both to pursue the unjust aims of their war and to threaten the lives of just combatants and of civilians on the just side. The saving of the unjust combatants' lives is of course a relative good for the unjust combatants themselves, but effects that are relatively good but impartially bad cannot offset other impartially bad effects of an act of war in the assessment of proportionality.

The other way of understanding the *in bello* proportionality requirement so that it could be satisfied by just and unjust combatants alike stipulates that the harms that an act of war would cause to innocent people be weighed against whatever impartially good effects the combatants might *most reasonably believe* the act will have.[41] Early in the Iraq War, for example, American soldiers might reasonably have believed that their acts of war would have the impartially good effect of preventing the Ba'athist regime from being able to use weapons of mass destruction against regional enemies or from supplying those weapons to terrorists for use against the United States. They might then have weighed the harms their acts would cause to innocent civilians against likely prevention of harms to innocent people that might have been caused by Iraq's weapons of mass destruction. They could then reasonably have judged their action to be proportionate even though there were in fact no weapons of mass destruction.

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[40] For elaboration, see *id.*

[41] An alternative version weighs the bad effects against whatever good effects the combatants actually believe the act would have. This is less plausible because it allows that an act can be proportionate because of the agent's unreasonable beliefs. It is also less serviceable because it makes proportionality vary from combatant to combatant, as they may have different beliefs. I will therefore not consider it here.

This way of understanding proportionality seems to apply equally to just and unjust combatants. In the example, the possible implication of the view that acts of war by American forces were proportionate does not depend on the claim that the American war in Iraq was just, either in its early phases or overall. It depends only on what it could have been reasonable to believe about the effects of the American action, which is compatible with the war's actually being unjust.

One objection to this proposal is that it makes proportionality depend on what it might be reasonable for combatants to believe in the circumstances rather than on the facts. But in practice this is unavoidable whenever anyone attempts to determine whether an act will be—or, indeed, was—proportionate. This is presumably why Additional Protocol I explicitly requires the weighing of bad effects that an act of war is "expected" to cause against the act's "anticipated" good effects.[42]

While this second proposal has some plausibility when applied to cases, such as that of the American war in Iraq, in which combatants may have reasonable, though false, *empirical* beliefs about the impartial good effects of their acts of war, it has no plausibility when applied to acts of war that could be thought to have impartially good effects only on the basis of mistaken *moral* beliefs. Suppose, for example, that a group of people were to go to war with the sole aim of exterminating another race of people whom they believe ought not to exist—not because they believe the existence of this race is harmful in some way but just because they believe the members of the race are unworthy of existence. There is no way that such a belief could be reasonable and, more importantly, no way that the supposed impartial goodness of exterminating some number of these people could be measured for the sake of comparison. Thus, if some act of war would both kill a certain number of the members of the race but also harm some innocent people of another race as a side effect, it is unintelligible to suppose that the latter harms could be weighed against or offset by the supposed good of the killings.

My argument in this section leaves the law in a quandary. The proportionality principle as stated in Additional Protocol I and the Rome Statute provides only the illusion of guidance to unjust combatants, as the effects it weighs against the harms their acts of war cause to innocent people are incapable of offsetting and thereby justifying those harms, except in rare instances in which the military advantage gained consists in preventing just combatants from causing wrongful harms by acting impermissibly (assuming that simply preventing wrongdoing by just combatants actually comes within the scope of the notion of "military advantage"). There is, in my view, no sense in which acts of war by unjust combatants can be proportionate when the only aims they advance are unjust and they also cause harm to innocent people as a side effect.

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[42] *See supra* note 31. It is curious, and perhaps unwarranted, that the drafters of the Rome Statute decided to insist on weighing the bad effects that an act of war "will have" against its "anticipated" good effects. There are other differences between the statements in the two documents but I will ignore them here and treat the two statements as if they were the same. On the differences between the protections afforded to civilians in international humanitarian law and in international criminal law, see *Adil Haque, Protecting and Respecting Civilians: Correcting the Substantive Defects of the Rome Statute*, 14 NEW CRIM. L. REV. 519 (2011). For the main discussion of proportionality, see *id.* at 541-48.

It may be that legal theorists have failed to notice the moral incoherence of the current legal understanding of the requirement of proportionality because the courts have never really been called upon to enforce it against violations by ordinary soldiers. If the courts were to begin to enforce this requirement against allegations of violations by unjust combatants, it would become very difficult for them to conceal the moral arbitrariness of weighing harms inflicted on innocent civilians against military advantage.

Eventually the law may have to concede that unjust combatants cannot fight in ways that are proportionate and thus, insofar as proportionality is a condition of moral permissibility, cannot fight permissibly when their acts harm innocent civilians as a side effect. We would then have to choose between acknowledging that the law of armed conflict permits the widespread violation of the correct moral principles of *jus in bello* and making participation in unjust wars illegal. I suspect that the latter is the better of these two options. In declaring that those who fight and kill as a means of achieving unjust aims act illegally, the law would not be committed to declaring as well that their action is also criminal, or punishable. One might hope that declaring most of the acts of war by unjust combatants illegal without threatening to punish them for those acts would be at least as effective in moderating their behavior as what the law does at present, which is to declare some of their acts disproportionate, at least by implication, without credibly threatening to punish them for those acts.

VI. Proportionality in Acts of War by Just Combatants

As I noted at the beginning of this chapter, proportionality is a constraint on a justification for causing harm. It should therefore not be surprising that most acts of war by unjust combatants cannot satisfy the morally correct *in bello* proportionality requirement, for there is simply no moral justification for these acts that might be constrained by a proportionality requirement. One might say of these acts either that the harms they inflict on innocent people as side effects are disproportionate because they are not offset and outweighed by other effects that are impartially good, or one might say that in these cases the issue of proportionality simply does not arise, as the acts are already impermissible because they lack even a presumptive moral justification.

There are, however, clearly proportionality constraints that apply to acts of war by just combatants, when those acts support the achievement of just aims. In these cases, the morally correct understanding of *in bello* wide proportionality and the current legal understanding may be closely aligned in their judgments, assuming that military advantage from an act of war by just combatants is a contribution to, or increases the probability of, the achievement of a just cause. There is, however, potential for divergence insofar as the morally correct principle allows that impartially good effects produced by an act of war that are not elements of the achievement of a just cause and are unrelated to military advantage may nevertheless weigh against and offset at least some of the bad effects of that act of war. But we can ignore this here and simply assume, in this section, that the correct moral principle and the current legal principles coincide. It should become evident that this is an innocuous assumption for the purposes of this section.

One concern that is frequently expressed in assessments of the proportionality of acts of war by just combatants is that the bad and good effects are often very different in kind and thus difficult to compare. How, for example, does one weigh the deaths of hundreds of innocent people against some increase in the probability of preserving certain political freedoms for a much greater number of different people? There are no simple answers to questions of this sort. The relevant comparisons are highly imprecise and the questions may have no determinate answers. This is not to say, of course, that the protection or promotion of values that are impossible to measure or compare with precision cannot count in the assessment of proportionality. Many though not all such values do count, and many, though fewer, are capable of offsetting and thereby justifying the killing of innocent civilians as a side effect. And some can provide the basis of a just cause for war.[43] But there are also cases in which the impartially good effects of an act of war consist in the prevention of the same types of bad effect that the act would inflict on innocent people as a side effect. In these cases, the good and bad effects may be reasonably precisely comparable. These cases, therefore, are particularly well suited to explaining how the *in bello* proportionality requirement applies in practice to acts of war by just combatants.

This phenomenon is, I believe, well-illustrated by most of the military operations conducted by Israeli forces in the invasions of Gaza in 2008-2009 and 2014. In both those wars, Israel's main aim was to prevent rockets and terrorist fighters from Gaza from killing ordinary Israeli citizens. I will assume that this aim was a just cause for war in each instance.[44] Certainly the prevention of the killing of innocent people is an impartially good effect. But acts of war by Israeli combatants that were intended to destroy missile launchers and tunnels from Gaza into Israel killed many ordinary Palestinian citizens of Gaza as a side effect.[45] These good and bad effects—preventing killings of ordinary Israelis and killing ordinary Palestinians—are readily comparable.

Before I explain the considerations that I believe are relevant to determining whether acts of war by Israeli combatants in Gaza were proportionate, it is worth digressing briefly to note a mistake about proportionality that was often made in discussions of both Gaza wars. The Israeli invasions were sometimes condemned as disproportionate on the ground that the number of Palestinian civilians who were killed greatly exceeded the number of Israeli civilians who had previously been killed by rockets fired from Gaza. But the number of Israeli civilians that had been killed in the past was irrelevant to whether the killings of Palestinian civilians in the Gaza wars were proportionate, except insofar as the previous killings furnished evidence of the attackers' intentions for the future and their military capabilities.

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[43] On which good and bad effects may count, and which do not, see Hurka, *Proportionality in the Morality of War*, *supra* note 33, at 39-50; McMahan, *Proportionate Defense*, *supra* note 15, at 148-54.

[44] I will also put aside doubts about whether these wars satisfied the *ad bellum* requirement of necessity. For a brief, parenthetical discussion, see Jeff McMahan, *Proportionality and Necessity in* Jus in Bello, *in* THE OXFORD HANDBOOK OF THE ETHICS OF WAR 418, 428 (Helen Frowe & Seth Lazar eds., 2017).

[45] I will set aside the possibility that some of the killings were intended.

One might think that the previous killings of Israelis were relevant to whether the later killings of Palestinians were proportionate if one thought that the justification for the killings of Palestinians was that they were *reprisals*. In law, a reprisal is a use of force intended to compel an adversary to halt or repair some breach of international law. It is an act of retaliatory harming intended to deter an adversary from engaging in further harmful action. It is meant to work by implicitly threatening further reprisals in response to further provocations. Proportionality in reprisals is thought to be a relation between the harm one has suffered and the harm one inflicts. Thus, in the International Criminal Tribunal for the Former Yugoslavia, the Trial Chamber offered an account of proportionality in reprisals when it ruled that "reprisals must not be excessive compared to the precedent unlawful act of warfare."[46]

I am assuming, however, that the Israeli attacks that killed Palestinian civilians were not reprisals. I am assuming that the harms to civilians were side effects rather than intended effects and, in particular, were not intended to convey implicit threats of further killings of civilians. If these assumptions are wrong and the killings of civilians were intended, at least in some cases, to deter Hamas militants from continuing to try to kill Israeli civilians, then the killings were wrong, and illegal, because they violated the requirement of discrimination.[47] On this alternative assumption, the killings of civilians were acts of terrorism, as are all reprisals that intentionally harm innocent people as a means of coercing or intimidating others.[48]

But on the assumption that the killings of Palestinian civilians were unintended consequences of military attacks intended to defend ordinary Israeli civilians, whether they were proportionate depends entirely on the comparison between the harms inflicted on the Palestinian civilians and the harms that the Israeli attacks prevented Hamas militants from inflicting on innocent Israelis in the future. In previous writings I have stated this point in more general terms by claiming that proportionality in defense is entirely *prospective*.[49]

The relevant question, therefore, is how many innocent Palestinians it could be permissible for Israeli combatants to kill as a side effect of preventing the wrongful killing by Hamas of a fixed number of innocent Israeli civilians,[50] The most illuminating way to think about this question, I believe, is to consider a range of common beliefs about the permissibility of the infliction of harms as a side effect of otherwise permissible acts of self- and other-defense. Suppose, for example, that an innocent victim (*V*) is about to be killed by a fully culpable

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[46] Prosecutor v. Kupresic, Case No. IT-95-16-T, Judgment, ¶ 535 (International Criminal Tribunal for the Former Yugoslavia, Jan. 14, 2000).

[47] *See* AP I, *supra* note 18, arts. 48, 51(2); *see also id.* art. 51(6).

[48] *See id.* art. 51(2).

[49] Discussions with Aidan Penn and Todd Karhu have convinced me that this is an overstatement and that harms that one has inflicted in the past can affect the amount of harm to which one is liable now for defensive purposes – that is, that past harms can be relevant to narrow proportionality. But, as the type of case in which past harms can affect liability is unlikely to arise in war, I will ignore this complication here.

[50] For further discussion of some of the claims in the remainder of this section, as well as further comments on the Gaza war of 2014, see McMahan, *Proportionality and Necessity in* Jus in Bello, *supra* note 44.

threatener (*T*). Although *V* is unable to defend herself, a third party (*3P*) is able to defend her at no cost to herself by killing *T*. Assume that killing *T* is both necessary and proportionate in the narrow sense. If these were all the facts, I believe that *3P* would have a duty to defend *V* by killing *T*. But suppose further that, in killing *T*, *3P* would unavoidably kill an innocent bystander (*B*) as a side effect and that the harm to *B* in being killed would be roughly the same as the harm to *V* in being killed. When this detail is added, I believe that it is clear that *3P* must allow *V* to be killed. This is because there is a moral asymmetry between killing innocent people and allowing innocent people to die or be killed. And *3P*'s choice is between killing an innocent person and allowing an innocent person to be killed.

Only if the harm caused to innocent people by *3P*'s intervention would be substantially less than the harm to innocent people that the intervention would prevent would the intervention be justifiable as the lesser evil, thereby overriding the constraint against killing the innocent, even as a side effect. Some philosophers have argued, however, that there is a possible justification for self-defense that does not apply to third-party defense of others. This is that each individual has, at least in certain contexts, an "agent-relative permission" to give some degree of priority to her own interests over the equivalent interests of others. Some philosophers have thought, for example, that an innocent person can have an agent-relative permission to kill a person who will otherwise kill her even though the threatener is in no way morally responsible for the threat and thus has not made herself liable to be killed.[51] The victim can, in other words, have an agent-relative permission to kill the nonresponsible threatener in self-defense even though there is neither a liability justification nor a lesser-evil justification for the defensive killing. Other philosophers have thought that there can be an agent-relative permission not only to kill a nonresponsible threatener in self-defense but also to kill an innocent person as an unavoidable side effect of action that is necessary to save one's own life. If this is right, it might be that, although *3P* is not permitted to kill *B* as a side effect of defending *V*'s life, *V* would be permitted to do so if she could.

My own view is that people are permitted to give some degree of priority to their own interests over the interests of others, though normally only when their doing so is not opposed by a moral constraint, such as the constraint against killing an innocent person. Thus, for example, I believe that a person is permitted to save her own life rather than save the lives of two strangers when she cannot do both, but that she is not permitted either to kill a nonresponsible threatener in self-defense or to kill an innocent person as a side effect of saving her own life—assuming that other things are equal.[52]

Even those who argue that there is an agent-relative permission to kill an innocent person either as a means or side effect of the defense of one's own life

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[51] Jonathan Quong, *Killing in Self-Defense*, 119 ETHICS 507 (2009); Jonathan Quong, *Agent-Relative Prerogatives to Do Harm*, 10 CRIM. L. & PHIL. 815 (2016).

[52] For arguments against the view that there can be an agent-relative permission to kill innocent people, see HELEN FROWE, DEFENSIVE KILLING 54-63 (2014). For arguments that it is generally impermissible to kill a nonresponsible threatener in self-defense, see Jeff McMahan, *Nonresponsible Killers*, 15 J. MORAL PHIL. 651 (2018).

recognize that there is a proportionality constraint on this form of justification. Some accept that, although it can be permissible, for example, to kill one innocent person as a side effect of saving one's own life, it is not permissible to kill two. Others accept that it can be permissible to kill two. Few believe that it can be permissible to kill three.

One important question for those who believe that there can be an agent-relative permission to kill an innocent person is whether that permission can be transferred by the agent to a third party. I believe that, if there were such a permission, it would be genuinely *agent*-relative and could not be transferred. Suppose, for example, that I have an agent-relative permission to kill an innocent bystander as a side effect of defending my own life. And suppose I also have a paid bodyguard who has a professional duty to defend my life. A situation arises in which an aggressor threatens my life but I am unable to defend myself. My bodyguard can defend me but will unavoidably kill an innocent bystander as a side effect if he does so. It is clear, however, that an ordinary passerby is not permitted to kill the bystander as a side effect of defending my life, even if I ask her to do so (that is, even if I try to transfer my agent-relative permission to her). If that is right, then I also cannot make it permissible for my bodyguard to kill the innocent bystander merely by paying him to do it.

There is another possible justification for killing an innocent bystander as a side effect of the defense of a single person. Perhaps surprisingly, this justification—if in fact there is such a justification—applies only to other-defense and not to self-defense. It derives from the fact that special relations between people can be the source of special duties. A parent's special relation to her child, for example, gives her special duties to that child. It may well be that the special relation gives the parent not only special duties but also special permissions that even the child himself does not have. Suppose, for example, that a young adult has no agent-relative permission to kill an innocent bystander as a side effect of defending his own life. The young adult's parent might nevertheless have a special permission (a "special relations permission"), grounded in the moral significance of the parental relation, to defend her child's life even if in doing so she will unavoidably kill an innocent bystander as a side effect.

In my view, the claim that it can be permissible to kill an innocent bystander as a side effect of saving the life of someone to whom one is importantly specially related is more plausible than the claim that there is an agent-relative permission to kill an innocent person as side effect of saving one's own life. This is simply because special relations are *morally* significant in ways that simple self-interest is not. Hence, if it were true that there are both agent-relative permissions and special relations permissions, I think that the amount of harm it could be permissible to inflict on innocent bystanders as a side effect of defending the life of someone to whom one is importantly specially related would be greater than the amount that it could be permissible to inflict as a side effect of defending one's own life.

In endeavoring to understand, in cases such as the Israeli invasions of Gaza, how much harm it can be proportionate to inflict on innocent people as a side effect of preventing terrorists or unjust combatants from unjustifiably harming or killing other innocent people, we must first achieve an understanding of the matters of moral theory I have just mentioned. We must determine, among other things:

1. whether there really is a moral asymmetry between killing innocent people and allowing innocent people to die that establishes a presumption or constraint against killing one innocent bystander as a side effect of saving a different innocent person;
2. if there is such an asymmetry, how strong it is;
3. whether people have an agent-relative permission to give some degree of priority to their own lives and interests over those of others;
4. if there is such a permission, how strong it is, and in particular how many innocent people it can make it permissible to kill as a side effect of self-defense of one's life;
5. whether such a permission can be transferred to a third party, such as combatants who have a duty to defend their fellow citizens or others, or both;
6. whether there can be a special relations permission to kill an innocent person as a side effect of defending the life of someone to whom one is importantly specially related;
7. if there can be such a permission, how many innocent people it can make it permissible to kill as a side effect of saving people to whom one is specially related;
8. also if there can be such a permission, whether the relations between just combatants and the innocent people they have a duty to defend are sufficiently important to make it permissible for a combatant to kill an innocent person as a side effect of saving the life of someone he has a duty to defend; and
9. if so, how many innocent people it can be permissible for him to kill as a side effect of saving a single person he has a duty to defend.

Although I have indicated what my tentative views about some of these matters are, I will not defend those views here. But simply showing what the relevant considerations are enables us to understand the work in moral theory that must be done before we can reach a sound understanding of how the action of just combatants in war is morally constrained by wide proportionality. It also helps us to understand what the range of potentially defensible views is. We can again illustrate this with the case of Israel's invasions of Gaza.

Consider first the most restrictive range of potentially defensible assumptions about the relevant issues. Suppose, that is, that

1. there is a strong moral asymmetry between killing innocent people and allowing innocent people to die or be killed;
2. there is no agent-relative permission to kill an innocent or nonresponsible person in self-defense; and
3. there is no special relations permission to kill an innocent or nonresponsible person in defense of someone to whom one is specially related.

On these assumptions, it was not proportionate for Israeli combatants to kill even one innocent Palestinian civilian as a side effect of preventing the killing of one innocent Israeli civilian. Indeed, depending on how strong the asymmetry is

between killing an innocent person and allowing an innocent person to be killed, it might have been proportionate for Israeli combatants to kill one innocent Palestinian as a side effect only if they would thereby have prevented the killing of some larger number of Israeli civilians—for example, four, five, or even more. It is perhaps revealing that, in discussions of Trolley cases,[53] now familiar well beyond academic philosophy, it is usually assumed to be permissible to kill one innocent person as a side effect of saving other innocent people only if the number of people saved is five or more.

Next consider the most permissive range of potentially defensible assumptions. These are that

1. there is either no moral asymmetry between killing innocent people and allowing innocent people to be killed or only a weak asymmetry of that sort;
2. people have a strong agent-relative permission to give priority to their own interests and lives over those of other innocent people;
3. this agent-relative permission is transferrable to third parties;
4. people have strong special relations permissions to give priority to the interests or lives of those to whom they are importantly specially related over the interests and lives of other innocent people;
5. the ways in which just combatants are specially related to those whom they have a duty to defend—such as co-citizenship, contractual relations, and so on—are sufficiently important to ground strong special relations permissions to harm or kill innocent people as a side effect of fulfilling their duties of defense; and
6. agent-relative permissions and special relations permissions are additive—that is, each applies separately so that the number of innocent people one has a special relations permission to kill is simply added to the number one has an agent-relative permission to kill.

On these assumptions, an innocent Israeli citizen's agent-relative permission might make it proportionate for her to kill as many as three innocent Palestinians as a side effect of defending her own life. Because her agent-relative permission transfers to Israeli combatants whose duty it is to defend her, they too are permitted to kill as many as three Palestinian civilians as a side effect of defending her. These combatants are also specially related to her in a way that permits them to give her priority over Palestinian civilians for that reason as well. The combatants might, for example, have a special relations permission to kill two or three Palestinian civilians as a side effect of preventing her from being killed. Assuming that these two sources of special permissions are additive, it can be proportionate for Israeli combatants to kill five or six innocent Palestinian civilians as a side effect of defending the life of a single innocent Israeli civilian.

These different sets of assumptions, which constitute the range of reasonable views about the relevant considerations, yield the range of possibly defensible views about harms that it can be proportionate in the wide sense for just combatants to inflict on innocent civilians as a side effect in war. On the most

[53] *See supra* p. 13.

restrictive assumptions, it can be proportionate for just combatants to kill one innocent civilian as a side effect only if their action saves at least five innocent civilians on their own side. On the most permissive assumptions, it can be proportionate for just combatants to kill as many as five or six innocent civilians on the opposing side as a side effect of saving only one innocent civilian on their own side.

Which view within the range is correct depends on which of the different views about the relevant issues of moral theory are correct. As always, arcane matters of moral theory turn out to be essential to understanding the morality of war.

VII. Conclusion

In the previous section, I have sought to provide constructive guidance for both just war theorists and theorists of the law of armed conflict in the practical application of the *in bello* principle of wide proportionality to the conduct of just combatants.

My aim in section V, however, was critical: to show that in most actual cases, this same principle either condemns as disproportionate, or disclaims as eligible for evaluation as proportionate or disproportionate, virtually all acts of war by unjust combatants. This verdict will be unaffected by whatever we determine to be true about the issues in moral theory discussed in section VI. The challenge posed in section V should be profoundly worrying for legal theorists. I have been unable to find a reassuring response to it. Perhaps I have overlooked some obvious solution—or some unobvious solution. I hope, in any case, that theorists of the law of armed conflict will take the challenge seriously.