Routledge Research in Applied Ethics

THE ETHICS OF WAR AND THE FORCE OF LAW

A MODERN JUST WAR THEORY

Uwe Steinhoff

I commend Steinhoff's approach of engaging all the disparate literatures and proposing a practical approach to just war. That is an uncommon but welcome path to have taken, and Steinhoff is one of the few conversant enough to pull this off.

— *Joseph E. Capizzi, The Catholic University of America*

Steinhoff's book is not only analytically strong but also displays a thorough knowledge of the historical and legal dimensions of the Just War tradition and, importantly, utilizes this knowledge in the development of his own distinctive account. The result is a much-needed integration of philosophical analysis and legal scholarship.

— *Seumas Miller, Charles Sturt University, TU Delft and Oxford University*

The Ethics of War and the Force of Law

This book provides a thorough critical overview of the current debate on the ethics of war, as well as a modern just war theory that can give practical action-guidance by recognizing and explaining the moral force of widely accepted law.

Traditionalist, Walzerian, and "revisionist" approaches have dominated contemporary debates about the classical *jus ad bellum* and *jus in bello* requirements in just war theory. In this book, Uwe Steinhoff corrects widely spread misinterpretations of these competing views and spells out the implications for the ethics of war. His approach is unique in that it complements the usual analysis in terms of self-defense with an emphasis on the importance of other justifications that are often lumped together under the heading of "lesser evil." It also draws on criminal law and legal scholarship, which has been largely ignored by just war theorists. Ultimately, Steinhoff rejects arguments in favor of "moral fundamentalism" — the view that the laws and customs of war must simply follow an immutable morality. In contrast, he argues that widely accepted laws and conventions of war are partly *constitutive* of the *moral* rules that apply in a conflict.

The Ethics of War and the Force of Law will be of interest to scholars and advanced students working in just war theory, applied ethics, political philosophy, political theory, philosophy of law, and criminal and military law.

Uwe Steinhoff is Professor in the Department of Politics and Public Administration at the University of Hong Kong. He is the author of *On the Ethics of War and Terrorism* (2007), *The Philosophy of Jürgen Habermas* (2009), *On the Ethics of Torture* (2013), and *Self-Defense, Necessity, and Punishment* (Routledge, 2019), and the editor of *Do All Persons Have Equal Moral Worth?* (2015).

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A Modern Just War Theory

Uwe Steinhoff

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Preface

In the fifteen years since the original German publication of a book published in English as *On the Ethics of War and Terrorism*, I have continued my research on the ethics of the use of force and, more generally, on justifications for setting back interests that are normally protected by rights. The present volume benefits from this additional research – which resulted in books *On the Ethics of Torture* and on *Self-Defense, Necessity, and Punishment* – but also continues central motifs already present in *On the Ethics of War and Terrorism*. Among these motifs are prominently individualist liberalism, the rejection of the legitimate authority criterion as well as of the doctrine of double effect, the insistence on right intention as a separate and important criterion, the critique of "revisionism," and an emphasis on going beyond the narrow focus on self-defense to give a much larger role to emergency justifications. These motifs are developed further in the present volume, more comprehensively and in more detail, and they are buttressed with additional arguments. Noteworthy, however, are two new motifs, namely the rejection of "objective" or "fact-relative" justification and the use of a principle of reciprocity to show that the valid moral norms for the use of force can legitimately differ from one society to another and also from peace to war. Both of these motifs help to further undermine "revisionist" just war theory – and to ensure the practical relevance of just war theory for the real world.

Acknowledgments

Chapter 2 is a slightly revised version of "What is War—And Can a Lone Individual Wage One?" *International Journal of Applied Philosophy* 23(1) (2009), pp. 133–150. Section 3.1 is a slightly revised version of "Doing Away with 'Legitimate Authority'" by Uwe Steinhoff, *Journal of Military Ethics* 18(4) (2020), pp. 314–332, reprinted by permission of Informa UK Limited, trading as Taylor & Francis Group, www.tandfonline.com. The original article is available at http://www.tandfonline.com/10.1080/15027570.2020.1723843. Section 3.2.1 is a revised and expanded version of "Just Cause and the Continuous Application of *Jus Ad Bellum*," in Larry May (ed.), *The Cambridge Handbook of the Just* War (Cambridge: Cambridge University Press, 2018), pp. 80–97. Section 3.2.2 is a slightly revised version of "The indispensable mental element of justification and the failure of purely objectivist (mostly 'revisionist') just war theories," *Zeitschrift für Ethik und Moralphilosophie* 3(1) (2020), pp. 51–67. Section 3.2.3 draws on paragraphs of "Just Cause and 'Right Intention'" by Uwe Steinhoff, *Journal of Military Ethics* 13(1) (2014), pp. 32–48, reprinted by permission of Informa UK Limited, trading as Taylor & Francis Group, www.tandfonline.com. The original article is available at http://www.tandfonline.com/10.1080/15027570.2014.908647. Section 4.1.2 is a slightly revised version of "Rodin on Self-Defense and the 'Myth' of National Self-Defense: A Refutation", *Philosophia* 41 (2013), pp. 1017–1036. Section 4.1.5 is a revised version of "When May Soldiers Participate in War?" *International Theory* 8(2) (2016), pp. 262–296. Sections 4.1.6 and 4.2.1.7 draw on some paragraphs in "Rights, Liability, and the Moral Equality of Combatants", *The Journal of Ethics* 16(4) (2012), pp. 339–366. Section 4.1.7 draws on material in "The Secret to the Success of the Doctrine of Double Effect (and Related Principles): Biased Framing, Inadequate Methodology, and Clever Distractions," *Journal of Ethics* 22 (3–4) (2018), pp. 235–263. Section 4.2.2 draws on some paragraphs in "Benbaji on Killing in War and 'the War Convention'" by Uwe Steinhoff, *The Philosophical Quarterly* 60(240), © 2010 The Author, Blackwell Publishing.

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1 Introduction and Overview

This book aims both to give the reader a thorough critical overview of the current debate in just war theory[1] and to offer a modern just war theory that can give practical action-guidance.[2]

It does the latter in particular by emphasizing the moral force of law. It will be argued that, and explained why, widely accepted laws and conventions of war are partly *constitutive* of the *moral* rules that apply in a conflict. This means that we are not enslaved to a "deep" and "immutable" morality of war but have the moral power – precisely *through* the customs and laws of war – to at least *partially* devise and thus also *improve* the morality of war. This is good news, since it helps to provide not only morally more accurate, but also practically clearer and more effective action-guidance for conduct in war.

The book does the former, i.e., provide a thorough critical overview of the current debate, by engaging just war theories that are happy to see themselves as continuing, and perhaps elaborating on and refining, a venerable tradition, as well as just war theories that prefer to describe themselves as "revisionist."[3] Communication between both schools is often somewhat limited. In fact, the very claim to be "revisionist" originally stemmed from a misunderstanding of traditional just war theory. In particular, traditional just war theory was interpreted as endorsing the "moral equality of combatants," a thesis which holds that combatants on both the justified and the unjustified side in a war have an equal liberty-right to kill each other. Yet the just war tradition did not endorse such a doctrine. While "revisionists" have meanwhile realized this to a certain extent (but keep clinging to the term "revisionism" nonetheless), they have still failed to realize that their "reductive individualism" is no innovation either. While they assume and some of them explicitly claim – without textual evidence – that traditional just war theory was "collectivist," it actually was, as we will see below, "reductively individualist" *avant la lettre*. That is, it applied the same justifications it used for the use of force in the domestic peacetime context to the context of war as well.

Moreover, the "revisionist" school not only fails to properly interpret and engage the tradition, it also fails to properly address and engage

non-traditional objections raised from outside their own circles – and there is more to modern just war theory than just "revisionism" and traditionalism. Yet "revisionist" descriptions of the current state of the debate present their readers with a rather dichotomic and thus misleading picture. In fact, while "revisionism" *claims* to revise the tradition by applying the ordinary morality of the peacetime use of force to the realm of war, it misinterprets both the tradition and ordinary morality. It is therefore part of this book's purpose to correct certain prevailing misconceptions that have been created by "revisionist" circles.

Conversely, several authors interpreting, defending, and elaborating the tradition have done a better job in engaging "revisionists" than vice versa – but nonetheless not to the extent necessary, and oftentimes relying on assumptions that are dubious themselves. Thus, while I disagree with many of the arguments and claims put forward by "revisionists" (some of which are shared by traditionalists), they are nevertheless important and deserve a detailed and sustained critical discussion. While I have offered some such discussion already in previous work,[4] the present work will focus on those arguments that are particularly relevant to the ethics of war. Ultimately, neither traditional just war theory nor "revisionism" can provide viable foundations for the ethics of war. Not all of the reasons for this are shared between the two theories, but one shared reason is what I reject as "moral fundamentalism" – the view that the laws and customs of war must simply follow an immutable morality, instead of widely accepted laws and customs having moral force and thus providing morally binding action-guidance themselves.

The book will proceed in the following way. In Section 2, I first define what war is.[5] Practically all modern definitions of war rule out the possibility that individuals can wage war. They conceive of war as a certain kind of conflict between groups. In fact, many definitions even restrict the term "war" to sustained armed conflicts between states. Instead of taking any such definition as a point of departure, the section starts from scratch. I first explain what an explication of the concept of "war" should achieve. I then introduce the fundamental, and frequently overlooked, distinction between war as a historical event and war as an action. It is war as an action – which, unlike events, can be right or wrong – that I explicate. Testing our linguistic intuitions with different examples of conflict, I isolate several criteria that a war proper has to fulfill and try to demonstrate that not only collectives but individuals, too, can wage war. In conclusion, I examine alternative definitions of war and show that mine fares rather well in comparison. It should be noted, however, that normatively nothing hinges on whether a reader accepts my definition or not. Still, a book on just war theory owes readers an explication of the concept of war, rather than a mere stipulative definition.

In Section 3, I deal with the usual criteria of *jus ad bellum*, the justification for entering or continuing a war (as opposed to *jus in bello*, the rules of engagement *in* war).

In Section 3.1, I will reject the idea that *legitimate authority* is a necessary condition for the justifiability of a war. I will first demonstrate that traditional just war theory did allow private, indeed even individual war. I will then show, focusing on James Turner Johnson and James G. Murphy, that arguments in support of legitimate authority, let alone in support of the "priority" of this criterion, fail. I will further argue that what often motivates the statist and conservative insistence on "legitimate authority" is the fear that doing away with this criterion will lead to chaos and anarchy. Yet proponents of legitimate authority fail to provide an argument capable of showing this fear to be rational, and I will explain why it is extremely unlikely that such an argument can ever be provided. Finally, I will consider the more restricted and cautious defenses of the importance of legitimate authority or "authorization" recently provided by Benbaji and Lazar, respectively, and show that they are to no avail either. Thus, there are no convincing reasons for accepting the "legitimate authority" criterion as a necessary condition for the justifiability of waging war. There are, however, convincing reasons to reject it as such a condition. Consequently, the criterion cannot be relied on to delegitimize individual war, private war, guerrilla war, or even terrorism.

Given their tight connection, I deal with *just cause* and *right intention* together (Section 3.2). First, in Section 3.2.1, I argue that the criterion of just cause is not independent of proportionality and other valid *jus ad bellum* criteria. One cannot know whether there is a just cause without knowing whether the other (valid) criteria (apart from "right intention") are satisfied. This also means that "just cause" cannot be understood as an aim, nor can it be understood as (necessarily arising from) a rights violation. Rather, just cause is a state of affairs. The advantage of this account is that it is applicable to all wars, even to wars where nobody will be killed or where the enemy has not committed a rights violation but can be justifiably warred against anyway. This account also avoids the inefficiency of having proportionality considerations come up at two different points: in a separate criterion of just cause and in the criterion of proportionality proper. Furthermore, given that many authors argue that retribution cannot be a just cause, I will demonstrate that if just causes are aims, then there is no reason to believe that retribution cannot (sometimes) qualify. I also show that it follows on my account that retributive effects have their role to play in the proportionality calculation (and thus in just cause). Finally, I address the question of whether *jus ad bellum* criteria should be continuously applied during the conflict and the debate about "backward-looking" and "forward-looking" accounts. I argue – with the tradition – for a continuous application of

the *jus ad bellum* principles and against accounts claiming that some separate *jus ex bello* or *jus terminatio* is needed.

In Section 3.2.2, I turn to the criterion of "right intention," the subjective element of the justification of a war. Traditional defenses of the right intention requirement argue that people have a right not to be killed with bad intentions (or on the basis of morally objectionable motivations, attitudes, or emotions, etc.); or they argue that even if people do not have such a right, it is nevertheless wrong to kill them if one does so with objectionable intentions or on the basis of bad motivations or emotions, etc. Thus, the right intention requirement is seen as a necessary *addition* to the other criteria. In contrast, my main argument runs considerably deeper. I argue that right intention is not a mere addition to the other criteria but actually a *constraint on their interpretation.* More precisely, my main argument is that without right intention, that is, without a subjective element in the justification to wage war, the only remaining option is a purely objectivist account of justification. (I reject *both* pure objectivism and pure subjectivism. My account is *mixed.*) Short of importing *ad hoc* assumptions into objectivist theory that are actually alien to it, however, objectivism can only come in the form of a strictly *fact-relative* account of justification (objectivist just war theorists actually tend to explicitly emphasize the importance of fact-relative justification).[6] But this poses a fatal problem: I will demonstrate that objectivist accounts of justification (or at least those that do not import *ad hoc* assumptions) lead to hyper-demanding just war criteria that cannot be intentionally followed and are therefore useless as action-guidance in the real world. Such purely objectivist criteria would also imply that real wars could never be objectively justified – unless by pure blind luck of cosmic proportions. Given that "revisionist" just war theory relies on an objectivist account of justification and on the credo that objective, fact-relative justification defeats liability to counter-attack,[7] which in turn serves as the foundation of the "revisionist" claim of the moral inequality of combatants,[8] the impossibility (putting miracles aside) for any real war to ever be objectively justified means that revisionist just war theory and its inequality thesis are inapplicable to, and thus irrelevant for, the real world.[9] In contrast, a just war theory incorporating the right intention requirement in the form of a knowledge requirement – and *only* such a theory – can and does fulfill its action-guiding function. I summarize some important practical conclusions from the discussion of just cause and right intention in Section 3.2.3.

Section 3.2.1 showed that *proportionality* assessments are an *integral* part of assessing whether there is a just cause for war. Accordingly, some aspects of proportionality were already examined in that section. Nevertheless, in Section 3.3, we will come back to proportionality once more. For the two traditionally listed just war conditions of *prospects of success* (Section 3.3.1) and *last resort* (Section 3.3.2) are *not*, as we will

see, independent or *necessary* criteria of *jus ad bellum*. Rather, they are two considerations that have to be *considered*, that have to be taken into account in the evaluation of proportionality – without being absolute *prerequisites* of proportionality.

More specifically, in Section 3.3.1 I argue that *success* in the context of just war theory can be interpreted in two ways: as winning the war or as achieving a certain political goal. The aim of winning and the aim of achieving a certain political goal, however, can come apart; and I will demonstrate, with suitable examples, that some wars can be justified even though they lack any prospect of success in either sense. I will then address a number of objections and show that they all fail. Thus, prospects of success is not a necessary condition for the justification of war.

In Section 3.3.2, I deal with the criterion of *last resort*. I argue that the last resort criterion cannot be valid since some means (for example, certain economic sanctions) are even more destructive than war. Under such circumstances, it is better to wage war (if this can be done proportionately) than to employ the alternative but more destructive course of action; and thus war need not be the last resort. Suzanne Uniacke argues, however, that this objection to last resort rests on a mistaken interpretation of this criterion. She interprets last resort as the same kind of necessity principle that one also finds in the self-defense justification and tries to strictly separate it from proportionality. Yet I argue that taking one's cue to the interpretation of the just war criterion of last resort from individual self-defense is misleading, since war cannot be justified under an appeal to self-defense alone. Thus, the last resort criterion of just war theory must not be equated with the necessity criterion of self-defense. Accordingly, it is Uniacke's defense of the indispensability of last resort that rests on a mistaken interpretation of this criterion.

Combining the results of the analysis, in Section 3.4 I draw the conclusion that agents satisfy *jus ad bellum* and are hence justified in their starting or continuing a war if they *know* (which neither requires certainty nor excludes doubts) that they *have a just cause* and that their resort to war *will indeed be proportionate*. I will also emphasize that such an account is, fortunately, more restrictive than merely saying that a war is or would be justified if its actual or foreseen results compare favorably to the actual or foreseen results of not having waged, or of not waging, a war at all.

In Section 4, I turn to *jus in bello*, which concerns legitimate conduct in war, that is, it lays down the moral rules of engagement. Two criteria are usually mentioned: the principle of discrimination (or distinction) and (*in bello*) proportionality. The function of the first criterion is to distinguish legitimate from illegitimate targets in war; the function of the second is to determine which courses of action are proportionate (both toward the targets and regarding so-called collateral damage, that

is, regarding innocent bystanders and their property or even regarding animals and the environment). There are two salient ways to answer the questions raised by the two criteria. One approach is to decide what is proportionate and which objects or persons constitute legitimate targets in war by simply relying on the answers given to these questions by ordinary peacetime morality and applying these very same answers to the case of war. Another approach is to attribute moral force to specific conventions governing conduct in war.

In Section 4.1, I will discuss the first approach, exemplified *par excellence* by "revisionist" just war theory. "Revisionists" emphatically claim that they come to revisionist conclusions about the ethics of war by applying the ordinary domestic or peacetime morality of the use of force to the realm of war. I shall argue that it is the other way around: while their conclusions about the ethics of war can only be called "revisionist" if one ignores or misinterprets the actual just war tradition, the "revisionists" are mistaken in claiming that they expand the *ordinary* morality of the use of force to the realm of war. On the contrary, their account(s) of the self-defense justification as well as their relative neglect of other justifications and the differences between them are more idiosyncratic than ordinary. I will first make some introductory remarks about the shortcomings of the "revisionist" take on ordinary peacetime morality and its implications for the ethics of war in general. I will then focus on five issues in particular.

In Section 4.1.1, I will critically examine McMahan's "*Responsibility Account.*" According to this account, "the criterion of liability to defensive killing is moral responsibility, through action that lacks objective justification, for a threat of unjust harm to others, where a harm is unjust if it is one to which the victim is not liable and to which she has not consented."[10] This approach to self-defense is, with slight variations, accepted by most revisionists. I shall argue that this account is faced with an absolutely fatal problem – namely implausibly draconian implications about liability to be killed – that McMahan acknowledged early on but never solved (nor did anybody else). Accordingly, this account is not so much part of the "ordinary morality of the use of force" (there is no jurisdiction that accepts this approach) but rather a non-starter.

In Section 4.1.2, I will address David Rodin's widely known attempt to demonstrate that national self-defense cannot be justified under an appeal to the domestic, individual self-defense justification. More precisely, he denies that defensive wars against unjust aggression can be justified if the unjust aggression limits itself, for example, to the annexation of territory, the theft of resources, or the restriction of political freedom, but would endanger the lives, bodily integrity or freedom from slavery of the citizens *only* if the unjustly attacked state (or someone else) actually *resisted* the aggression. In other words, Rodin argues that a state has to surrender to an unjust invading enemy credibly saying, for instance:

"Your territory, or your lives. But if you give us your territory, your lives will be spared (and you will not be mutilated or enslaved)." I will refute his argument in several steps. First, I draw attention to the fact that Rodin gives the impression that his account of self-defense closely follows domestic self-defense *law*. In fact, however, Rodin's comments on the necessity condition and its relation to an alleged "duty to retreat" misinterpret the law, and a correct interpretation of the law is not only compatible with, but *implies* a permission to resist the "bloodless invader." Second, I will turn to Rodin's remarks on proportionality. Here Rodin advances a free-standing moral argument, but again he also suggests that the moral reasoning he appeals to underlies self-defense law. If his argument at this point were correct, it could perhaps save his invocation of a duty to retreat. I will argue, however, that his argument is flawed. Rodin's remarks on the proportionality of self-defense against conditional threats focus on physical or material harm but implausibly ignore the severity of the violations of autonomy and of the social-legal or moral order that such conditional threats involve. Third, I will turn to a more recent chapter of Rodin's where he basically argues that ("often") defensive wars against "political aggression" are disproportionate because they risk the lives of those defended in an attempt to secure lesser interests. I will argue that this take on proportionality misses the point in an important respect, namely by confusing "wide" and "narrow proportionality," and makes unwarranted assumptions about the alleged irrationality or impermissibility of incurring or imposing lethal risks to safeguard less vital interests. Next, I will also show that while Rodin talks of a "myth of national self-defense" and of the necessity of moving beyond traditional just war theory and international law, it is actually his interpretation of just war theory and international law that is mythical. Finally, I will argue that Rodin's views on national self-defense on the one hand, and "war as law enforcement" on the other, are incoherent.

While Rodin is mistaken about the proportionality requirement of the self-defense justification, interpreting it as far more restrictive than it is, he is, as far as I can see, the only "revisionist" who rightly accepts the *imminence* requirement of the self-defense justification. He is wrong, though, in thinking that therefore intentional force against non-imminent threats cannot be justified. McMahan, conversely, is quite right in thinking that force against non-imminent threats can be justified – however, he is wrong in thinking that it can be justified by a self-defense justification. Both mistakes can be corrected by pointing to a *different* justification, namely the *defensive emergency justification (rechtfertigender Notstand)* to be found in German law.[11] In Section 4.1.3, I will first briefly describe the common understanding of the self-defense justification and then, in Section 4.1.4 and as a third issue, lay out the distinguishing characteristics of the emergency justification and explain

their implications for the ethics of war. In addition, I will also correct a typical "revisionist" misinterpretation of the *lesser evil justification*. While "revisionists" use this justification to justify *foreseen* harm to *innocent bystanders*, I will show that one of its indispensable uses in the context of war is the justification (under certain conditions) of the *intentional* destruction of targets that only *might* be sources of death and harm – whether they actually *are* such sources or not. This shows that "fact-relative justification" is as irrelevant for the lesser evil justification as it is for the self-defense justification.

A fourth issue calling for a more elaborate and detailed treatment – not least due to its centrality in the current debate – is of course the "moral (in)equality of combatants" and the claim that "justification defeats liability." I will first turn to this issue in Section 4.1.5. While I reject Walzer's sweeping equality thesis, there is also, as I will demonstrate, no reason to accept McMahan's equally sweeping inequality thesis – at least not, again, if one really relies on the *ordinary* morality of the use of force. In particular, I will show in detail how the interplay of, or clashes between, the self-defense justification and choice of evil justifications (which come in both *impartial* and *agent-relative* forms) can lead to *symmetry* between combatants.

In order to further undermine the allure of "revisionism," I will also, in Section 4.1.6.1, set the historical record straight and show that the thesis that soldiers on the justified side in a war are not morally equal to the soldiers on the unjustified side is actually the *traditional* view from Aquinas to Anscombe and beyond. Moreover, in Section 4.1.6.2, I demonstrate that McMahan's particular formulation of the inequality claim turns out to be a mere tautology with no substantive implications for actual conflicts. The reason for this are McMahan's not particularly helpful definitions, which have also led other "revisionists" astray. Of course, the claims he wants to make can be expressed with the help of a more adequate formulation, but that only turns a tautology into a falsehood, as already shown in Section 4.1.5. This result will be further corroborated by briefly retracing, in Section 4.1.6.3, the revealing course the debate on the "justification defeats liability" doctrine has taken. This doctrine, which is central to the "revisionist" argument for the inequality thesis, was initially introduced without argument. Only later was it defended against different objections. Meanwhile, however, with the barrage of objections not abating, it has devolved into a dogma – many revisionists prefer (and I will provide evidence for this later) to not even *mention* critics and their objections anymore, giving their readers the impression that "justification defeats liability" is an unchallenged truth. However, it is neither unchallenged nor a truth.

Another doctrine, and a fifth issue on which I will focus closer attention, namely in Section 4.1.7, is the so-called "doctrine of double effect," which prominently figures in attempts to morally distinguish

"conventional war" from "terrorism." While such a distinction might well be possible, it has to rely on something other than the doctrine of double effect. For starters, nearly all "revisionists" (and, unfortunately, quite a number of other just war theorists) accept this doctrine (or some related doctrine, like "the means principle") uncritically and thus without ever providing any argument for it. Nevertheless, at least *some* revisionists (and other authors) have tried to provide argumentative support for this doctrine or related ones. However, I will show that the way defenders of the doctrine frame the issue is biased and that the methodology they use is inadequate. In addition, the constant claim that the doctrine reflects "ordinary intuitions" regarding the moral difference between intentional harming and foreseen harming is made without any evidence to support it. We will see that once one pays attention to the actual evidence and uses neutrally formulated examples and an adequate methodology, the doctrine of double effect, the means principle, and related doctrines turn out to be baseless.

While the first part of the discussion of *jus in bello* just outlined is dedicated to correcting certain misperceptions about the ordinary peacetime morality of the use of force that also negatively affect thinking about the ethics of war, Section 4.2 will change gear by correcting a deeper misunderstanding. To wit, while the first part accepted, for the sake of argument, the idea that the same moral rules that apply to the use of force in peacetime also apply to the use of force in war, the second part rejects this assumption. This rejection does not amount to claiming that there is a special "war justification" *sui generis* (and hence this rejection is compatible with *one* kind of "reductive individualism," see Section 4.2.1.2); rather, the claim is that the moral *scopes and limits* of the justifications discussed in the first part are different in different societies and different contexts – war being one context among others. I explain this with the *moral* force of widely accepted laws and conventions, which sets my account apart from what I call *moral fundamentalism* in just war theory. This is the view that morality dictates what the laws of war have to be (even where the laws have to deviate from an alleged "deep" morality for pragmatic reasons), while, conversely, widely accepted positive law or widely accepted conventions do *not* influence what morality is, let alone partly *constitute* the morality of the use of force. I will proceed by first criticizing two very different but nevertheless paradigmatic examples of moral fundamentalism, namely the accounts of Jeff McMahan and Adil Ahmad Haque (Sections 4.2.1.1 and 4.2.1.3, respectively). None of these positions, I will argue, paint an accurate picture of the relation between war and morality. McMahan's account is simply incoherent, namely by claiming that in certain cases of conflict between law and morality, one "should" instead follow the law. This does not make sense, and arguments intended to show otherwise fail. Haque's account, due its objectivism, shares this problem, but suffers from others as well.

He proposes a "service view" of the law of war, according to which "the law of war should aim to help combatants better conform to their moral obligations."[12] I argue that the mechanisms through which the law fulfills this function according to Haque do not work. Moreover, far from deriving the law from morality, Haque presupposes at crucial junctures of his argument the moral validity of legal distinctions, which makes his argument circular. Finally, his attempt at providing a service-based argument for civilian immunity fails.

I will then lay out an alternative approach. To wit, I shall explain how moral mechanisms based on a principle of *reciprocity* cause widely accepted laws and conventions to be *partly constitutive* of the *moral* rules that apply in a conflict (Section 4.2.1.4). I will apply this to the variable moral scopes and limits of necessity and proportionality in war (Section 4.3.1.5), to the moral equality of combatants (Section 4.2.1.6), and to the principle of distinction (Section 4.2.1.7). This moral force of widely accepted laws and conventions means that we are not (as "revisionists" think) morally condemned, as it were, to slavishly follow a "deep" and "immutable" morality of war, but rather have the freedom and moral power to at least *partially* devise the morality of war – namely precisely *through* the customs and laws of war. This also means that we can use the laws of war to make the morality of war more *determinate* and, due to the authority of law, *more accepted and effective*, which are significant advantages in terms of action-guidance and practicality.

Finally, in Section 4.2.2, I explain how the account presented here differs from a similar-sounding account recently offered by Yitzhak Benbaji and Daniel Statman. While moral fundamentalism in just war theory must certainly be rejected, I will show that Benbaji's and Statman's state-centric and supposedly "contractarian" account cannot offer a viable alternative. The reciprocity-based and individualist account defended here, in contrast, can.

Notes

1 Wars in which innocent bystanders are killed ("collateral damage") – and thus virtually all wars – violate or infringe the rights of those innocent bystanders; and while that might be *justified* as a lesser evil, it is not *just*. Thus, the term "just war theory" might be misleading; it should rather be "justified war theory." Yet the former term is used for reasons of tradition, and I will use it here too. See on this issue (just vs. justified) also the exchange between Neu (2012) and McMahan (2012c).

2 This book will not deal with *jus post bellum*, justice after war, though. I do not deem this to be part of just war theory proper – which discusses when and how wars can permissibly be waged, not what happens *after*. I do not thereby mean to imply that this is not a worthy field of investigation – but it simply falls outside the scope of this study.

3 Since I find this self-description misleading, I will use the term in scare-quotes throughout (unless referring to something that really is revisionist).

4 Steinhoff (2020).
5 Of course, a reader of a book on the ethics of war might not only be interested in a definition of war, but also in the metaethical stance of the book's author. Since I have explained my metaethical position in a previous book in detail, I will not go into this here again. See Steinhoff (2020), Section 1.1. Suffice it to say that the arguments presented and the conclusions drawn in the present book in no way depend on a particular metaethical position.
6 Objectivism about justification is simply the view that a justification contains no mental element (like knowledge or right intention).
7 See McMahan (2009a), p. 43.
8 Ibid., esp. pp. 38–51.
9 This is not to say that the thesis cannot be reformulated with the help of a mixed account, but it should be noted that it would not inspire confidence if philosophers who first insist that *only* objective justification defeats liability suddenly change their mind in order to protect their preferred conclusions.
10 McMahan (2005a), p. 394.
11 Some Anglo-Saxon legal scholars also see the merits of this justification. See Fletcher and Ohlin (2008), pp. 96–102.
12 Haque (2017), p. 15.

2 What Is War – and Can a Lone Individual Wage One?

2.1 Defining War – What Is It Good For?

Although there are many different and often irreconcilable scholarly definitions of "war," people seem to be quite able to understand each other when they use the term; that is, different people apply the term to pretty much the same phenomena. Why, then, do we need a definition of "war" at all? We do so because the ordinary, everyday way of classifying things is not necessarily the best one, and because an explicit definition that sets out the essential criteria which a defined entity has to fulfill is much easier to work with and generates more insights than a mere intuition about what should be called "war," even if this intuition is widely shared and more or less consistent.

Consequently, a philosophical definition of war is intended to be not only more than a mere stipulation but also more than a mere direct reflection of ordinary usage. It is intended to *explicate* the concept of war, referring to, but not slavishly following, our everyday understanding of "war." Rudolf Carnap sets out four criteria for the adequate explication of a concept.[1] First, the resulting definition or explication has to be *similar* to the *explanandum*, that is, to that which is to be explicated, in this case, to the more or less vague idea of war we already have. If it were not, it would be an explication, not of war, but of something else or even of nothing. Second, the definition has to be *precise*, or at least significantly more precise than the original vague idea. In that context, it might also be necessary to distinguish between the different senses a word has. Third, the explication has to be *fertile*. For Carnap, who is primarily concerned with the natural sciences, fertility means that the explication or definition helps us to formulate as many laws as possible. This criterion overrides the criterion of similarity in the event of conflict. For example, the zoological term "fish," which denotes only cold-blooded, gill-breathing animals living in water, deviates considerably from the pre-scientific meaning of the word, which refers to all animals permanently living in water, including whales and dolphins. This deviation is justified by the fact that the scientific concept allows the zoologist to formulate a much greater number of true laws than she could if she used a

pre-scientific definition of "fish." If one looks at this from the other end, one can see that the criterion of fertility also makes sense in the context of explications that have little to do with scientific laws. The scientific concept "fish" allows us to formulate more scientific laws, but that this is the case shows that being cold-blooded and gill-breathing is something *essential*, that is, something that makes a particularly important difference and has very significant consequences.[2] Such important differences and significant consequences, however, do not necessarily have to be manifested in scientific laws. Therefore, a definition which cannot, because of the very nature of the concept explicated, be particularly helpful in formulating laws must still meet the requirement of fertility: it has to point out something essential. Finally, the definition has to be *simple*.

These criteria help to distinguish between more and less adequate definitions and explications, but they cannot by themselves unequivocally determine an explication. There are trade-offs between the different criteria, and the criteria themselves provide no clear rule as to which trade-offs are to be preferred. This is hardly surprising, since an explication of a concept is – as the criteria make very clear – not a purely descriptive but a normative task. An explication of a concept is not content with merely describing the ordinary usage of a term, but prescribes how the term *should* be used. Very often, of course, there is no reason to use a term in a different way from the ordinary one. A philosophical explication of our everyday concept "table" would not make much sense, since there is nothing to be explicated and nothing to be improved. This is not the case with terms like "fish" or, in particular, with terms that are laden with normative or evaluative implications or connotations. Consider the word "terrorism," whose ordinary usage – e.g., in the media or by politicians – is one of the best examples of a double standard. If non-state organizations deliberately kill innocents, it's called "terrorism" (unless those non-state organizations have the support of the media or the politicians in question), but if states do it (especially states these media or politicians sympathize with), it's something else. However, as long as there is no normatively relevant distinction between a state's deliberately killing the innocent and a subnational organization's doing exactly the same, it is completely unjustified to use the term "terrorism," which for so many has the ring of utter evil, only for the latter. The application to a certain violent campaign of the term "war" instead of "banditry," "violent criminality," or "terrorism," of course, also has significant normative and evaluative – and hence practical – consequences. Warriors or, to use the modern term, *combatants*, are usually viewed in a much more favorable light than mere criminals or so-called terrorists. Accordingly, they are also often treated better. Therefore, it is important to be on guard against any double standards that might be involved in the way terms like "war," "warrior," or "combatant" are used.

In what follows, then, I shall attempt to set out and justify a definition of "war" that simply and precisely provides criteria that are essential to the phenomenon of war, and to come to grips with most of our linguistic intuitions concerning the term, but without succumbing to those intuitions that sustain a certain double standard connected to its ordinary usage. Although there are, as mentioned above, many definitions of war to be found in the literature, in my view none of them satisfies these requirements.

2.2 War as Event and War as Action

The first distinction that has to be made is that between war as a historical event and war as an action. When historians talk of the Second World War, of the sides struggling with each other and of armies being reduced by cold and hunger, they are referring to a historical *event*. When Anglo-Saxon moral philosophers, politicians and just war theorists say that the Second World War was a just war, they talk about the *Allies' waging war* against Japan and Germany. When a Nazi says that the Second World War was a just war, he is talking about Japan's and particularly *Germany's waging war* against the Allies. Germany's waging war was an action (a very complex one); the Allies' waging war was also an action (a very complex one).

Why does just war theory treat war as an action? One might answer, quite reasonably, that whereas actions can be just or unjust, events cannot be – they simply "are." However, if a very bad man and a very good man are standing next to each other and only the latter is struck by lightning, some people might say that this is "not fair." Admittedly, such an assessment seems to involve a rather metaphysical and "cosmological" view of justice. However, if one refers not to events, like lightning strikes, but to states, it becomes more natural and seemingly less metaphysical to apply the just–unjust distinction. A distribution of goods, for example, is a state of affairs and can, it appears, be just or unjust. Yet even here an argument could perhaps be made that it is not the distribution as such that is just or unjust but the human beings' (or other actors') bringing it about or maintaining it. Be that as it may, a simpler and more straightforward answer to the question why just war theory is interested in war as action is that just war theory is precisely concerned with *action-guidance*. It aims to tell people *what to do*.

This distinction may seem too trivial to be made explicitly, but it is not trivial enough not to be ignored sometimes (or, in fact, very often). A. J. Coates, for example, claims that "the criterion of last resort applies to the initiation of hostilities rather than to the defensive reply or reaction."[3] This is, to put it mildly, a rather daring interpretation of just war theory. Nevertheless, Coates tries to support it with the following argument: it is only because of the unavoidable lapse of time between

the initial hostile act and the defensive response that last resort *seems* to apply.

> It is evident that psychologically at least the lapse of time can become very significant in such cases. It has the effect of turning a defensive act into an offensive, or even an aggressive, one in the minds of many.... What is progressively ignored is the fact that a state of war *already* exists. This psychological transformation can have a distorting effect on the moral judgement.[4]

Actually, it is Coates's confusing war as an action with war as an event or state that has a distorting effect on his interpretation of just war theory. That a state of war already exists, that a war as an event exists which the attacked party *P* is *involved in* precisely by virtue of being attacked, does not mean, of course, that *P* is already *waging* war and necessarily does so (without being able to help it) as long as the attacker continues attacking. Accordingly, the attacker's act of war does not automatically justify P's resort to war, let alone exempt him from the need for a justification. *Another* party's actions cannot exempt me from the need to have a justification for *my* actions. To give a war-related example: suppose the attacker, A, starts a war against B and, among other things, slaughters civilians (on B's side). Does that mean that B is automatically justified in slaughtering civilians (on A's side) because a state in which civilians are slaughtered *already* exists? Obviously not.

The confusion mentioned occurs not only in philosophical but also in political contexts. For example, those who after the 9/11 attacks claimed that the question whether the United States would be justified in going to war was already settled by the attack itself, since with it the United States already *was* at war, somewhat missed the point and confused the two senses of war. The fact that A wages war against B does not yet mean that B also wages war against A. There is no such thing as a Derridian "decision of the other in me."[5] We have to take our decisions ourselves. Accordingly, war is not the only, and not an automatically justified, answer to an act of war. It could also be answered by police action, pacifist strategies, or even not at all.

In the following, I attempt to give a definition of war as action, of the form "x wages war against y if and only if..."

2.3 Individual War

Although scholarly definitions of war differ to an astonishing degree, most of them agree on one point: war is a conflict between *groups*.[6] It does not seem to occur to most authors even for one moment that an individual as such, that is, not only as a participant in a collective effort but in his own right, can wage a war.[7] But why not? First of all, not only

states can wage war. War is as old as humanity – perhaps even older (think primate wars, for instance) – and has long existed in the form of tribal wars. The enormously brutal ones between different chiefdoms on Fiji in the nineteenth century are no less paradigmatic wars than the "trinitarian" wars von Clausewitz describes.[8] The wars between Amerindian tribes in North America were also real wars. Of course, this does not yet contradict the group thesis. But consider the following case. Tribe A fights a long war against B, in fact, a war of extermination. At a certain point, all members of tribe B have been killed by A, except for one great warrior W. Driven by a thirst for revenge (or a sense of justice), he continues the fight and again and again kills members of A, often in surprise attacks, by means of ambushes, traps, or perhaps even poison. Conversely, A's warriors again and again try to find and kill him, sometimes they succeed in wounding him, and sometimes they find some of his traps or camps and destroy them. This goes on until either W succeeds in killing all the warriors of tribe A or, more probably, this tribe succeeds in killing W. Is it not obvious that the single individual W is waging war against A?

Intuitively it is, at least for me. The activity that the two parties to this deadly conflict are engaged in really cries out for the term "war." Besides, if someone were to claim that the conflict ceased to be a war with the attrition of group B, one would like to know when exactly it ceased to be a war. Let us say tribe B was originally made up of 900 people. Did the fight cease being a war when there were only 500 left? Hardly. 300? 100? Well, 100 people are still a group. Three, yes, even two are still a group, although the smallest one possible. But then, when only W was left – suddenly it was no longer a war? Where is there a transformation of W's activity, let alone an *essential* one? True, one is the loneliest number, but to claim this to be sufficient for ending the war and transforming it into something else seems to be a particularly odd example of a kind of metaphysics of numbers.

One might object here that a forest too, if it loses more and more of its trees, for example due to deforestation (already the word is telling), will at some point stop being a forest. That point cannot be identified with precision; in fact, there may not really be such a *point*, but only a grey zone. However, that does not mean that there are no clear points in the process where the group of trees is still a forest and clear points where it is not. So why should this involve any, as I put it, "metaphysics of numbers"?

The answer is that it does not. But my example of the tribes A and B is different from the example of the forest. It shows, I think, that on reflection many of us do not have too much difficulty to say of the last three, even of the last two warriors of tribe B, that they are still engaged in a *war* against A. We would not, however, say that a group of three or two trees is still a forest. In other words, in the forest case, there is a *gradual*

"de-forestation" of the forest with no clear, precise point where it suddenly ceases to be a forest. In the case of the two tribes, on the other hand, there seems to be no such gradual "de-warcation." Denying that the last remaining warrior W is still engaged in a war while conceding that the last two or three warriors were so engaged thus posits *a clear and precise point* where a radical change occurs. That position requires an explanation. An explanation, however, that explains the sudden transformation from war to something else by a simple reference to the fact that the numbers were reduced from two to one *is* an explanation that involves some obscure metaphysics of numbers.

Moreover, into what would the war be transformed? Some sort of criminality? That is ridiculous, for what law should be applicable here? W does not fall under the laws of A, and no higher law is in force. But do we need a law? What about morals? Could not W simply be a murderer in the moral sense? Well, he could. Warriors and combatants, too, can commit murder, even against members of the enemy party and while waging war. Then we are dealing with a war crime. However, W targets only the warriors of the other tribe, not women and children or old men. Given the history of the conflict, it is quite unclear why doing this should make him a murderer. His enemies, who waged a war of extermination, are murderers, not he. Neither is he a bandit: his aim is not to enrich himself. An insurgent, perhaps? But an insurgent against what? His enemies never had any authority over him anyway, so the concept of insurrection does not make much sense here. Besides, an insurgency can take the form of a war. So can a *vendetta*. The same holds good for raids; they can be part of a war. What would have to be shown, then, is that he is a *mere* raider. Given the history of the conflict, again, it is clear that he is not. There simply does not seem to be any promising substitute for X in the formula "He is a mere X, and not someone waging a war." Thus, by way of exclusion, the only remaining option is that he is a warrior and is waging war.

But even if this were so, couldn't it be claimed that W, although he is the *last* remaining warrior of his tribe, is not really a private warrior and is acting, not as a single individual as such, but, in fact, as the last representative of his tribe and therefore as part of a collective? But it is hard to understand how an individual can be part of a collective that does not exist anymore. Of course, it can with good reason be said that he is still a warrior of tribe B, but that does not mean he is part of a collective. As just mentioned, the collective does not exist anymore. (Certainly, one could claim that a collective exists as long as one of its members exists. But that sounds like claiming that an ant colony exists as long as one of its members is alive. That doesn't sound particularly plausible. Thus, if tribe B still exists, it does not exist as a collective but as *him*. He would have to *be* tribe B. But if a single individual can be a tribe, this would hardly speak against the possibility of individual warfare: it would speak for it.)

Moreover, an example can easily be given that accommodates the "representation objection" just considered. In the Western *Jeremiah Johnson*,[9] Robert Redford plays a trapper who marries an Indian woman who is later murdered by another Indian tribe. Out of his thirst for revenge he then acts against this tribe as our warrior W acted against tribe B, again and again killing members of the tribe who killed his wife (while this tribe again and again tries to kill him). This goes on for months, perhaps even years. For the reasons already adduced in the context of W's fight, the trapper's activity, too, can only be called "warfare." However, he does not represent some other tribe. He represents no collective at all. He acts on his own behalf. He is his own highest authority. His fight against the tribe that killed his wife is an example of a war waged by a single individual.

Could there also be a war between only two individuals? It seems to me that this is quite difficult for contingent, but not for conceptual reasons. The reason is that two individuals who want to kill each other are not likely to both survive a violent encounter between them, let alone two or three. But a war is intuitively more than one single combat between two individuals, more perhaps also than two or even three engagements between two individuals. (The situation here is more like that in the forest example; it is not possible to say precisely how many engagements are needed. It might also depend on the intensity of the engagements.) In other words, since two individuals who want to kill each other are not likely to both survive their first or second or even third violent encounter, there will simply not be enough violent encounters between them to constitute, taken together, a war. However, it might be possible to contrive weird hypothetical cases where two lone individuals are engaged in a war against each other. For the reasons already adduced, this cannot be ruled out on conceptual grounds.

2.4 Sovereignty

Single individuals can wage war.[10] However, not all violent struggles of individuals – or of groups – count as wars. We sometimes speak of gang warfare, but this is only a figure of speech and understood as such. Intuitively, we do not consider such "wars" to be real ones. Or transfer the story of Jeremiah Johnson from the lawless wilderness to the modern United States. His wife has been killed by some mobsters, and he then tries to kill as many members of the Mafia family as possible. This may be called a "war" in the same metaphorical way as a "gang war," but it is hardly a real war. It is rather a criminal vendetta. Why is that? Where is the difference?

Well, for one thing, the difference lies precisely in this shift from the wilderness to another context. In the original Jeremiah Johnson case or

in the case of tribe A and warrior W, *there is no third party C that has considerably greater power than x and y together and credibly threatens to punish the two struggling parties for their use of violence against each other and for their disrespect toward C as arbiter and monopolist of force.* In the case of the mobsters and of the gang "war" there is such a third party, and this *is* an essential difference.

However, it has to be emphasized that it is this shift to a context in which such a *third* party exists that is the essential one, and not the mere shift to a state context. The Red Army Faction (RAF), for example, did wage a war against the German state, and this state and its public perceived it as such. Indeed, one could even say that to a certain degree captured RAF members were treated like prisoners of war. When the RAF declared its own dissolution, and hence the end of the war, two German presidents reacted by pardoning several imprisoned RAF members, and it was no small part of German society that considered this to be the right thing to do.

On the other hand, it is obvious that not all parties that violently resist certain measures or actions of the state are waging war against it. When squatters try to drive the police from the house they have occupied, this hardly deserves to be called a war. The same holds for gangsters who violently resist arrest. So the RAF must be different. What is this difference? A first thought might be that the RAF tried to destroy the German state, but that does not help. State B, which militarily defends itself against an aggressive war waged by state A, wages war against A, even if it is not aiming to destroy it. To aim at the destruction of an enemy, therefore, is obviously not a necessary condition for waging war.

However, the Red Army Faction in its fight against the German state and state B in its fight against A have something in common. *Both are in principle opposed to being ruled or dominated by their adversary.* The squatters or the mobsters (normally) are not so opposed. They will obey most of the laws of their state and perhaps in certain cases even call the police to help them. Of course, the member of the RAF (if he is not yet identified by the state as such) may do exactly the same. To oppose a state in principle is not to oppose it in every single case. But the member of the RAF fights against the state. The squatters and even the mobsters do not. Resisting a police force that tries to arrest you is something very different from fighting the state. On the other hand, fighting a state does not in every case mean trying to destroy it. Thus, unlike the mobsters, the squatters, and Jeremiah Johnson, who pursues his vendetta in the modern USA, both state B and the RAF fight (or fought) against a state, and since there is no third party C which has the power and the will to punish the struggling parties for their use of violence against each other and for their disrespect toward C as arbiter and monopolist of force, they both *wage a war.*[11]

2.5 Violent Struggle

The most obvious condition for the existence of a war is, it seems, the existence of violent struggle (this has sometimes been contested; I return to it in a moment). But what kind of violent struggle?

Very often war is equated with armed conflict. However, conflicts do not have to be *armed* in order to be wars. Consider our two tribes A and B, clashing again and again in battle, trying to annihilate each other, using spears. They are waging war. It is still a war, though, and quite obviously so, if they all use their bare hands, and *literally* their arms, to kill each other. Whether people try to kill each other with their bare hands or with weapons is hardly an essential difference, particularly when it comes to defining war.

Yet consider two tribes C and D, who are after each other's horses. They also clash again and again, and when they do, they start – wrestling. Whoever is thrown to the ground by his adversary moves to the side of the "battlefield"; he is "out." After the last man of D is overcome, D admits defeat and gives C a number of horses proportionate to the gravity of the defeat. It would be quite exaggerated to call these clashes real battles in a real war. The whole undertaking is rather some kind of ritual or sports event to avoid real war.

Does war, then, involve lethal violence? Well, normally wars do indeed involve lethal violence, but often police work does too. However, there is a big difference between policing and waging war. Police officers, at least in Western democracies, are not allowed to simply shoot suspects. Moreover, German police law and the police law of most other Western democracies prohibit shooting a suspect or even a convicted murderer on the loose without first warning him in order to give him a chance to surrender. In contrast, it is considered a completely legitimate act of war to shoot an enemy soldier who walks harmlessly along his trench without warning him first. In war, the enemy is marked for destruction. Of course, *sometimes* he is given a warning and a chance to surrender, but this usually happens only if the other side is so clearly superior that it has little to fear from him and can expect him to give up immediately. *Jus in bello*, too, does not demand more. The police officer, on the other hand, may not take a group of escaped murderers by surprise and open fire on them only because they outnumber him and would either kill him or escape again if he warned them. The priority of the police officer is to arrest suspects and leave the rest to the judge, while the priority of the soldier or warrior is to try to kill or at least wound or incapacitate the enemy. Of course, this is just a means; his end, presumably, is to contribute to winning the war. However, the point is precisely that certain practices are partly defined by the means used. In other words, if the soldier stops using the means of killing or at least wounding or incapacitating the enemy – apart from those situations where he faces practically

no risk to his own life if he desists from using those means – he is no longer waging war.

What about a more futuristic situation, where one of the struggling parties has weapons at its disposal that just stun the enemy or dematerialize his weapons without harm to those wielding them? Would that still be a war? That depends. If the soldiers would desist from using lethal or physically destructive means against the enemy even when they could *not* do so without incurring a significant risk to their own lives, then it is not war anymore. Whether such a situation that is in practice not without risk does actually occur or not is irrelevant: the important factor is the rules of engagement the soldiers accept as guidelines for the struggle, their dispositions to act. If on the other hand the soldiers *would* use lethal or physically destructive means against the enemy *if* a situation occurred where they could not desist from doing so without incurring a significant risk to their own lives that, however, is not high enough to justify the use of those means with the more restrictive constraints that govern self- or other-defense or necessity in the domestic peacetime context, then it *is* war (provided the other criteria for being a war are met).

It is extremely important to stress this difference between policing and soldiering. For example, the bombing campaigns that certain colonial powers undertook against insurgents were often called "police bombing." There is, of course, nothing self-contradictory in this notion. If a police helicopter hovers somewhere in the wilderness over an escaped mass murderer and the crew orders him to lay down his anti-aircraft gun immediately unless he wants them to drop a bomb on him and he does not obey, then dropping a bomb on him might well be called police bombing – not because it is the police who drop the bomb, but because they have given him a chance to surrender and meet the judge instead of death. This, however, was not quite the way the so-called police bombing of the colonial powers proceeded, as is clear from, among other things, the large numbers of women and children killed. Nor was it quite the way the Allied bombing of Yugoslavia in 1999 proceeded, although some states insisted on calling it a "police action." The difference between policing and soldiering is a difference in *methods*, not in actors or intentions. A military action isn't transformed into a police action only because it is intended to stop a crime or directed against a villain or has the higher blessing of the United Nations (UN).[12] Moreover, the distinction is extremely important, not only in order to avoid propagandistic euphemisms but also because it explains why an actor who is violently struggling against a party that wages war against him is not himself necessarily waging war against that party. The Red Army Faction waged a war against the German state, but the German state didn't wage a war against the Red Army Faction. The German state used police methods, the Red Army Faction did not.

What has been said so far in this section suggests, then, that *a violent struggle of* x *against* y *can be a war only if the default method in this struggle is to try to kill or at least to wound or incapacitate* y *or* y's *agents* (apart from those cases, perhaps, in which *x* could overpower y or his agents more or less non-violently without thereby running a significant risk to his own life and limb).

But what exactly does "violent struggle" mean? For one thing, it is more than scratching. If two persons meet on a street and one scratches the other hard with his finger in the stomach, then we would hardly call this a struggle, even if the victim scratches back. Moreover, it seems that it would still not be a struggle if one person dealt the other a single blow with the fist in the stomach and the other responded in kind, but neither of them was willing to risk a further escalation. This would be only a short exchange of punches. An aggressive or defensive action has to be sufficiently intense and sustained to be a struggle. It is, of course, not possible to quantify exactly how intense it must be.[13] What is possible, however, is to transfer analogically our intuitions concerning what constitutes a struggle in the case of two persons to the case of bigger entities. For example, the Israeli air attack on an Iraqi nuclear plant in 1981 resembles much more a single blow with the fist than a gunfight or a knifing. It was certainly an aggressive act, but it was not war. The same holds for border skirmishes. Invading another country and marching to its capital, on the other hand, is war. Thus, since not every act of violence is a struggle, the description of war as precisely a form of *struggle*, although it is a far cry from a mathematical quantification, seems to be a fair and practical enough hint as to how intense violence has to be in a concrete case in order to qualify as war (on the supposition, of course, that the other conditions are met).

Here a point already mentioned above has to be remembered, though. In dealing with the question whether there could be a war between only two individuals, I pointed out that a war is more than a single combat between two individuals and more than two or even three engagements between two individuals. A war is rather a sufficiently sustained series or a large enough sum of such engagements – which squares rather well with Clausewitz's assertion that "countless duels go to make up war"[14] (although, of course, they do not literally have to be "countless"). Thus, to amount to a war, a struggle has to involve numerous[15] hostilities between individuals (in the sense of "battles" between them or in the sense of sustained aggressions of one against the other). This does not really qualify the analogical transfer of our intuitions concerning what constitutes a struggle in the case of two persons to the case of bigger entities. For to say that bigger entities are involved in a violent struggle normally is, among other things, to say that there are numerous fights between individuals on behalf of the bigger entity. But saying that two individuals are engaged in a violent struggle does not imply that there

are numerous fights between them. Therefore, in order to cover the case of a war between only two individuals, it is necessary to make this condition explicit.

A further point is important. You can only *struggle* against someone who offers resistance. Do military campaigns that can be described as follows then count as war?

> The pilot of a fighter-bomber or the crew of a warship from which Tomahawk missiles are launched is outside the range of enemy fire. Here war sheds all the features of the classical duel situation and, to put it cynically, approximates certain forms of pest control.[16]
>
> The expression "surgical strike," which is often used in these contexts, describes the constellation very aptly: every form of symmetry is eliminated here; one party is stretched out on the operating table, while the other one handles it with the means and instruments it deems suitable.[17]

Yes, such campaigns can be acts of war. The reason is that resistance, as pacifists correctly point out, does not necessarily have to take the form of violence or force.[18] This is in quite a vivid way illustrated in a famous scene in the film *Fight Club*. A mobster who owns the building the protagonist and his men use as a clubhouse wants to throw them out. When the protagonist refuses, the mobster starts to give him a terrible beating, trying, as Clausewitz would put it, "through physical force to compel the other to do his will."[19] But instead of fighting back, the hero takes the punches and gets as close to the mobster as possible, soiling him all over with his blood, repeating again and again that he will not move out. Finally, exhausted and disgusted, the mobster gives up and leaves the hero and his comrades alone. This clearly *was* a struggle, a struggle the mobster lost. The hero put up a resistance with a determination the mobster could not overcome. He could not compel him to do his will. Accordingly, when Yugoslavia for a long time "took a beating" instead of giving in to the demands of the Allies, it offered them resistance – and hence the Allies were engaged in a struggle.

On the other hand, the civilians so often killed, mutilated, or raped by warlords and their troops often do not offer any significant resistance. They are just "handled," like objects. Their situation is analogous to that of an old and frail victim of a group of young muggers who knock him unconscious, kick him, and strip him of his clothes and valuables: such victims are not struggled against, they are simply used. But killing and mutilating and raping civilians who are too terrorized to offer, or simply incapable of offering, any resistance *can* be an act of war. (Something's being an act of war, of course, does not necessarily prevent it from being criminal.) It can be a (terrorist) act of war if it is intended to impose one's will on the state whose civilians are attacked or on some

third party that might take an interest in these civilians and therefore give in to certain demands in order to end the atrocious acts. In this case, the acts *are* a struggle, though not against the civilians but against the state or the third party.[20] War is waged against the third party; the civilians, however, are only massacred.

Yet the killing, mutilating, and raping of civilians by warlords and their troops mostly does not qualify as struggle. One might be tempted to remark here that it would hardly be morally better if it did. That might well be true. Nevertheless, even if being a warrior shouldn't count for much, it may, perhaps, still count for something. In fighting, in struggling, in waging war, one can at least prove that one is precisely a fighter, someone who does not easily give up in the face of resistance and obstacles but tries to overcome them. And this is a positive character trait that we can appreciate or admire even in evil persons. (Shakespeare's Macbeth and Milton's Satan may be the most obvious literary examples.) Those warlords and troops who kill, mutilate, and rape without this being a part of a struggle, however, thereby prove nothing of that sort.

A final point has to be noted. At the beginning of this section (2.5), I remarked that it is sometimes contested that the existence of war presupposes the existence of violent struggle. Thomas Hobbes famously claimed:

> WAR consisteth not in battle only, or the act of fighting, but in a tract of time wherein the will to contend by battle is sufficiently known. And therefore, the notion of *time* is to be considered in the nature of war, as it is in the nature of weather. For as the nature of foul weather lieth not in a shower or two of rain, but in an inclination thereto of many days together, so the nature of war consisteth not in actual fighting, but in the known disposition thereto during all the time there is no assurance to the contrary.[21]

This line of reasoning blurs several reasonable distinctions. First of all, a will is not the same as a mere disposition. In fact, to claim that someone is "disposed" to fight does not have much content if it is not explained under which conditions this disposition will become manifest. Most of us, after all, will, even in times of peace, constantly be disposed to fight under *some* conditions. Does that mean that there are no times of peace? Second, if the nature of foul weather lies in an "inclination" to rain, why should then the nature of good weather not lie in an "inclination" to sunshine? This, however, seems to make it somewhat difficult to distinguish good weather from foul. Besides, the "inclination" or disposition is not enough. Foul weather may not require that it rain all the time, but it does require that it should rain quite often or at least too often – that is, the "inclination" to rain has to become manifest. If it does not, we

will have sunshine all the time, and that means good weather. The same holds for war and peace. The will, incidentally, is also not sufficient. If two nations *want* to fight each other and prepare to do so, but then, for whatever reasons, change their minds, we would say that the war simply didn't start. The will to wage war and actually waging war are different things. What is correct, though, is that a war does not require an uninterrupted series of battles. But this is quite trivial. No fight or violent struggle requires an uninterrupted series of violent acts. If two boxers in their ring are not punching each other for ten seconds but only circle each other, waiting for a good opportunity, this obviously does not mean that they have stopped boxing or fighting for ten seconds. If two gunslingers shoot at each other and stop doing so for a moment because they have to reload their guns, this does not mean that the fighting has stopped. Rather, reloading is part of the fighting. In short, for war to exist, it is not necessary that there be an uninterrupted series of violent acts (battles, for example), but it is definitely necessary that there is more than a mere will, inclination or disposition to commit violent acts.

Thus, we have finally arrived at the following definition of war:

> *X* wages war against *y* if and only if
>
> 1 *x* is engaged in a violent struggle against *y* that involves numerous hostilities between individuals;
> 2 both *x* and *y* are in principle opposed to being ruled or dominated by their adversary, and there is no third party *z* which has considerably greater power than *x* and *y* together and credibly threatens to punish the two struggling parties for their use of violence against each other and for their disrespect toward *z* as arbiter and monopolist of force;
> 3 *x*'s default method in his struggle against *y* is to try to kill or at least to wound and incapacitate *y* or *y*'s agents (apart from those cases, perhaps, in which he could overpower y or his agents more or less non-violently without thereby significantly risking his own life and limb).

2.6 A Comparison with Some Other Definitions

How does this definition fare in comparison to some others? Let us have a look.

Quincy Wright states that in the broadest sense

> war is a *violent contact* of *distinct* but *similar* entities. In this sense a collision of stars, a fight between a lion and a tiger, a battle between two primitive tribes, and hostilities between two modern nations would all be war.[22]

This definition, of course, is far too broad. It is also completely counter-intuitive. And indeterminate. For example, why is a collision between two stars a war according to this definition? Because it is a violent contact between distinct but similar entities? But how do you know that it is a *violent* contact? For example, we sometimes talk smilingly about "violent sex." When we smile, we normally do not mean to refer to rape. Rather, we mean very passionate, "steamy" sex. But then why not compare the collision of two stars with steamy sex? Why not even come up with a "broad definition" of steamy sex that would include the collision of stars? The answer is because it has no analytical value whatsoever. At best, the collision of stars could be called war in a *metaphorical* sense. Yet even as a metaphor, it would seem to be quite inapt.

The definition has also other obvious problems. For one thing – and we can leave it at that – according to this definition a little boy's slapping his disobedient dog would be an "act of war" (in the "broad sense"). That, however, is silly (in a narrow sense).

Fortunately, Wright also comes up with a narrower definition. Here,

> war is... a state of law and a form of conflict involving a high degree of legal equality, of hostility, and of violence in the relations of organized human groups; or, more simply, the legal condition which equally permits two or more hostile groups to carry on a conflict by armed force.[23]

According to this definition, the USA in 2003 did not start a war against Iraq, because *it was not legally permitted to do so while Iraq was permitted to fight back* – that is, because there was no high degree of legal equality. The same holds for the US invasion of Panama, or for the war between the UK and Argentina or that between Iraq and Kuwait or Iraq and Iran. This is a *reductio ad absurdum* of Wright's definition. So is the fact that according to this definition a legalized, monitored (by state officials) duel between two hostile groups of people at dusk would be war.

Hugo Grotius, following Cicero, defines war as "the state of contending parties, considered as such"[24] (the context makes clear that he means contention *by force*). According to this definition, two fighting roosters or two contending boxers in the ring are engaged in war. However, they simply are not. Such a broad definition of war as that of Grotius, although it might be slightly narrower than Wright's broad definition, blurs the relevant distinctions and is of no analytical value.

The simplest definitions are often the most popular. Ronald J. Glossop conceives of war as a "violent conflict between organized groups."[25] Yet, again, this definition is too broad. It cannot distinguish between real wars and the so-called gang wars. It cannot even distinguish between war and a clash of two organized groups of gladiators in the

Roman Coliseum (or of fist-fighting and wrestling children on a school playground). Whatever these conflicts are, to call them wars is to stretch the concept far beyond its limits.

Fritz B. Simon, in a highly interesting and illuminating book on war, provides a less illuminating definition of war. It, too, is too broad. He states:

> ... war is a characteristic pattern of communication, that is, a social system in which the participating parties [are prepared to[26]] risk their existence.[27]

It is curious that although the title of Simon's book is *Tödliche Konflikte* ("Deadly Conflicts"), in his definition of war there is no reference to conflicts at all. According to the definition, a group of people who, for non-competitive reasons and without being engaged in any conflict with each other or others, decide to swim naked and perhaps bleeding next to a great white shark are engaged in war. That is absurd.

Even if one expanded the definition so as to speak of "risking one's life in a *conflict*," it would still be wrong. Two people who play Russian Roulette with the understanding that the winner takes something that is contested between them are doubtlessly risking their lives and engaged in a conflict. But to call it a war seems intuitively completely inappropriate. The same holds true for a situation where two people engage in a dangerous free climbing race. The one who arrives first at the top will get the contested prize. This is a conflict, and they are risking their lives. But it does not merit the designation "war." It is not the right kind of conflict and not the right kind of risking one's life.

Moreover, risking one's life or the willingness to do so is not only not a sufficient condition for a situation's or an action's being war, it is not necessary either. (In fact, Simon adduces the case of a man killing his wife in the heat of passion as a case of a "marriage war."[28] However, the case does not involve any risk on the man's part of his own life. Nor is it clear that the wife was prepared to risk her own death.) The Allied bombers bombing Yugoslavia were engaged in a war; yet they were actually not taking any risks (beyond and above the normal everyday risk of life itself – driving on a highway was much riskier). Maybe they still were *prepared* to take a risk, and their leadership kept them from doing so. However, let us for the sake of argument assume they were not prepared to take a risk. Would the bombing campaign against Yugoslavia not then be a war anymore? It seems to be quite obvious that the answer can only be: "It still would."

In *The Gestalts of War,* Sue Mansfield offers the following definition:

> In this book the term "war" refers to organized, premeditated, socially approved action involving groups of men in relatively complex

> operations of aggression and defense, and pursued in a rational fashion in order to accomplish certain goals.[29]

This seems to be a rather prejudiced definition. Only men wage war, in fact, *per definitionem*, only they *can* wage war. That bias, however, makes the definition wrong. In addition, it is unclear why war should by definition be "organized" and "premeditated." Whether a war is or is not organized or premeditated should better be left to empirical investigation instead of prejudging it by mere stipulation. Particularly curious is the idea that wars have to be "socially approved." Some argue that the Vietnam War at some point lost social approval. Let us assume that this is correct. Would it at that moment have stopped being the Vietnam War and become the Vietnam whatever? Again, the answer is quite clear.

Let me close this list of definitions with the most famous of them all. Carl von Clausewitz claims:

> War is nothing but a duel on a larger scale. Countless duels go to make up war, but a picture of it as a whole can be formed by imagining a pair of wrestlers. Each tries through physical force to compel the other to do his will; his *immediate* aim is to *throw* his opponent in order to make him incapable of further resistance.
>
> *War is thus an act of force to compel our enemy to do our will.*[30]

Yet, despite its fame, this definition shares a severe problem with Wright's second definition: according to this definition, a legalized and officially monitored duel between two hostile groups of people would also be war. But it is not.

There are of course many other definitions of war. I know of none that works better than all those reviewed here, and quite a few work worse. My definition is probably not perfect. But I do think that in comparison to other definitions, the one offered here has a lot to recommend it. In particular, it embraces a consistent liberal outlook and rejects double standards of the sort posited thus: "If an individual does it, it's mere criminality or worse; if a collective does it, it's a completely different matter."

Of course, in principle, it would be possible to deny that there can be individual war while conceding that the moral status of a self-authorized individual fighter could be the same – for better or worse – as that of a "real" war fighter. There is (without further and contestable premises) no *logical* connection between, for example, reserving the term war to conflicts between states and denigrating warriors without a state as terrorists. However, as already indicated, it is quite naive to assume that explicit clarifications can outweigh the connotative force of a term like "war" and the *suggested* implication of denying the status of a warrior to an individual. Therefore, the definition offered here is preferable – at

least to those who prefer a consequent liberalism to collectivism. Not all do.

This concludes my analysis of the concept of war. Having a clear definition and seeing how it compares to others is certainly of philosophical and political interest. However, again, the definition provided here does not, at least not by itself, come with any *normative* implications. Thus, it in no way prejudges the following normative discussion. It is this discussion to which we now turn.

Notes

1 Carnap (1950), pp. 3–8 (§§ 2–3).
2 Thus, I use the word "essential" in an ordinary and not in any specifically philosophical sense here.
3 Coates (1997), p. 195.
4 Ibid.
5 Derrida (2000), p. 468. For a criticism of Derrida's view on decisions, see Steinhoff (2006), pp. 23–25.
6 See for example Clausewitz (1976), p. 75; Glossop (2001), p. 10; Mansfield (1982), p. 2; Miller (1991), esp. pp. 20–21; Moseley (2002), pp. 14 and 20; Wright (1971), pp. 8 and 13. Clausewitz, of course, does not speak of "groups" but only of "a duel on a larger scale." However, it is safe to assume that the "larger scale" refers to the involvement of groups and not of two giants. Also, some other authors do not explicitly speak of groups or collectives but of *organized* violence, conflict, struggle, etc., but this, too, obviously refers to the organization of the actions of a group. Incidentally, Clausewitz's often-quoted "definition" of war (1976, p. 87) as a "continuation of political activity by other means" is no definition at all and wasn't intended by him as such. Blackmailing a politician with compromising photos into casting a certain vote in parliament is also a continuation of politics by other means, but it is not war.
7 A notable modern exception is Simon (2001), esp. pp. 3–20. The probably most famous exceptions are Grotius and Hobbes. Recently Schneider (2017) has also endorsed the view that individuals can be belligerents.
8 Simon (2001) uses the chiefdom wars in Fiji as the starting point of his analysis.
9 Warner Brothers 1972.
10 In Section 3.1, I will argue that they can also do so legitimately (whether you *call* it "war" or not). See also Steinhoff (2007), pp. 7–21.
11 Does this imply that we are not dealing with war if a big group within a state defends itself with tanks and helicopters only against a tax increase – which the other side tries to impose with tanks and helicopters – that is, without being in principle opposed to the state's rule? In principle, yes, but in case such a conflict drags on, it is likely to turn into a contestation of state power as such and thus into war.
12 Here I am using, of course, a modern concept of policing. Not everything that has been called "police work" in past centuries actually *was* police work in the light of this concept. Analogously, not everything that has been called "fish" in past centuries actually was fish.
13 Although, as I have said above, a conceptual explication aims at greater precision, there is also the other objective of being sufficiently similar to the ordinary linguistic expression that is to be explicated. For example, there is,

so to say, a certain essential vagueness to the term "forest." To simply stipulate that a forest must have more than 200 trees does not so much explicate the concept as distort it. In other words, the explication of a concept does not necessarily demand getting rid of *every* vagueness of the *explicandum*; indeed, it might be mandatory to preserve some of its vagueness to satisfy the similarity condition.

14 Clausewitz (1976), p. 75.

15 How numerous "numerous" is, is difficult to say. The remarks made in note 13 apply here too.

16 Münkler (2005), p. 132; translation slightly modified, see Münkler (2003), p. 234.

17 Ibid., pp. 220–221, my translation. Compare Münkler (2005), pp. 124–125.

18 David Rodin emphasizes that war is a form of contention and goes on to argue that war involves the opposed use of force. See Rodin, "What is War," http://ccw.politics.ox.ac.uk/What_is_War_HT_2004.asp, accessed on 3 April 2004. I agree with the first point, but disagree with the second. Not every contention must take the form of an opposed use of *force*.

19 Clausewitz (1976), p. 75.

20 The Allied bombing of German cities and civilians in the Second World War is such a case where the killing and mutilating of civilians constituted an act of war. Again, this doesn't mean that it wasn't a crime.

21 Hobbes (2001), p. 76 (Ch. XIII [8]). Moseley (2002), p. 20, also thinks that "sometimes wars involve no battles or clashes of arms." However, he gives no example of this.

22 Wright (1971), p. 8.

23 Ibid., p. 13.

24 Grotius (1990), p. 18.

25 Glossop (2001), p. 10.

26 On the next page Simon repeats the definition in a slightly different manner, which makes it clear that mere objective risk is not sufficient. A preparedness to take the risk is required.

27 Simon (2001), p. 13, my translation. See also p. 14. Simon follows here van Creveld (1991), p. 159: "In fact, war does not begin when some people kill others; instead, it starts at the point where they themselves risk being killed in return." However, van Creveld also says that war is "by definition ... a social activity resting upon some kind of organization." Ibid., p. 157. Christopher Coker, without providing an explicit definition of war, goes in a similar direction as Simon, but probably even further. While the former speaks of risk, the latter speaks of sacrifice. "It is sacrifice which makes war qualitatively different from every other act of violence." Coker (2004), p. 6. That, however, is simply wrong. Violent acts involving sacrifices, including those of one's life, also occur outside of the context of war.

28 Simon (2001), pp. 132–133.

29 Mansfield (1982), p. 1.

30 Clausewitz (1976), p. 75.

3 *Jus ad Bellum*
Justifying the Use of War

The *ad bellum* criteria of just war theory are to state individually necessary and jointly sufficient conditions for the justifiability of resorting to or continuing a war. (The *in bello* criteria concern a different level of agency, not the – normally, but not necessarily – collective act of war as a whole.) *Six criteria* are usually given for the *justification of entering a war* (or for continuing a war), namely:

1 *Legitimate authority.* A legitimate authority (king, president, parliament, or perhaps even a guerrilla leader and the like) decides on the entrance into war.
2 *Just cause.* One has a just cause for entering the war. Depending on interpretation, a "just cause" can be an aim (for example, the aim to defend oneself against an aggressor), a wrong suffered (for example, an unjust attack), or a set of circumstances, for example, one under which a proportionate war would be possible or is actual. If it is possible, the (collective) agent in question has a just cause to wage *a* particular possible war; if it is actual, then the actual war the agent is actually waging does have a just cause. This distinction allows for the possibility that an agent, for example a collective, has *a* just cause to wage a sufficiently restrained war, while the unrestrained war the agent is actually waging has no just cause.
3 *Right intention.* On most interpretations, this means that one pursues the war *in order* to further a just aim or cause. On another interpretation, the war need not be fought *for* a particular cause or aim. Indeed, it need not be fought with any particular *intention* at all, but rather with a certain *state of mind.* On a version of the latter interpretation, the so-called "right intention" requirement takes the form of a *knowledge* requirement, which demands that the agent *know* (which does not require certainty) that the other (objective, mind-independent) requirements for the justification of the war are satisfied.
4 *Proportionality.* The war fulfills the condition of *proportionality*, i.e., it is a proportionate means, which is not merely to say that it creates *less* evil than it averts, but that the evil it averts and the

good it achieves *outweigh* – in light of the given options – the evils it creates.

5 *Prospects of success.* The war also fulfills the condition of having *prospects of success.* Depending on interpretation, this refers to prospects of victory or to the prospects of at least achieving some lesser goals short of victory.

6 *Ultima ratio.* The war is the *last resort* (ultima ratio), that is, there are no other promising alternatives available.

Practically all of these criteria are contested in the current debate. Which of them survive scrutiny, and in what form, will be examined in this first part of the book. We will see that some have to be discarded altogether or at least as independent criteria – which is nothing to deplore but rather helps to streamline and simplify the overall theory. However, before we can do so, we first need to interpret and analyze the proposed criteria one by one.

3.1 Legitimate Authority

I just stated that the *ad bellum* criteria of just war theory are to state individually necessary and jointly sufficient conditions for the justifiability of resorting to or continuing a war. This means that if even *one* of the conditions is *not* satisfied, the war is unjustified; if they are *all* satisfied, the war is justified. This is no different from the conditions of the justifiability of self-defense, which on most accounts include imminent attack, necessity, proportionality, and a knowledge or "right intention" requirement: these conditions are also taken to be individually necessary and jointly sufficient. However, the self-defense justification does not include "legitimate authority." This, however, seems to be one of the traditional just war criteria. But why? Is it, indeed, a *valid* criterion? One way of asking this question is to ask: Can individuals as individuals, that is, without authorization by some allegedly higher authority, justifiably wage war? If the answer to this question is "yes," then legitimate authority is not a valid part of just war theory since it is not necessary for the justification of war.

Moreover, even if the answer is "no," this would still not establish that "legitimate authority" has a place in just war theory. Theories are supposed to be as simple as possible instead of complicating things unnecessarily. Thus, between two true theories, the simpler one is to be preferred. This is the reason why the self-defense justification does not contain, for instance, a "don't kill an aggressor if you can as effectively and safely defend yourself by knocking him out" clause. While this clause is *correct*, so that there cannot be justified lethal self-defense against an aggressor if non-lethal force would have been as easily available and as safe and effective, the clause is nevertheless *superfluous*, since it is of

course already implied by the necessity requirement. Obviously, however, a theory should not contain redundant elements.

In this section, I argue that the correct answer to the above-mentioned question is indeed "no": legitimate authority is not a necessary condition for the justifiability of war. Moreover, I will also argue that even if there were *some* wars which would be unjustified if they were not in some sense "authorized" by a "legitimate authority," "legitimate authority" would nevertheless be *redundant* even in those cases since all the necessary work is already done by other just war criteria. Thus, the legitimate authority criterion is otiose.

Unfortunately, some might find this conclusion "sensationalist" and be tempted to resist it even if it is based on sound argument, especially if they think that they have "the tradition" on their side or have been previously exposed to enthusiastic endorsements of the legitimate authority criterion. Accordingly, in order to prepare the ground for my later arguments against legitimate authority, I will first set the historical record straight and show that traditional just war theory did allow private, indeed even individual war. Traditional just war theory is much less conservative and much more individualist than it is usually made out to be. I then address and refute a particularly enthusiastic way of endorsing the legitimate authority criterion, namely to claim that legitimate authority is not only indispensable, but in fact has "priority" over other criteria. Having debunked these assertions about the tradition and the supreme importance of legitimate authority (and already having introduced some examples that undermine the legitimate authority criterion), I will then confront head-on the main (and virtually the only) reason that has been adduced for the claim that legitimate authority is necessary, namely the claim that doing away with this criterion would have very bad consequences and might lead to chaos and anarchy. I will demonstrate that proponents of legitimate authority fail to provide an argument capable of proving this fear of bad consequences and anarchy to be rational; and I will explain why it is extremely unlikely that such an argument could ever be provided. I will then briefly consider and refute a non-consequentialist argument for legitimate authority. I will also consider some more recent suggestions as to why legitimate authority is necessary or at least important for at least some wars and show that they are misguided. The legitimate authority criterion should be abandoned. Consequently, the criterion cannot be relied on to delegitimize individual war, private war, guerrilla war, or even terrorism.

3.1.1 Traditional Just War Theory and Legitimate Authority

There seem to be certain widespread confusions and misunderstandings concerning the place and contours of the criterion of legitimate authority in traditional – and present-day – just war theory. One recent critic

of just war theory, for instance, claims – without backing up this claim with any reference to, let alone quotes from, either traditional or present-day just war theory – that "looked at any way you will, the basic conditions for a war's legitimacy within the just war theory framework is what is perhaps best described as *de facto* authority: already established and internationally recognized power."[1] Another author – again without providing any textual evidence – concurs: "The canonical view in just war theory ... is that sovereign states have proper legitimate authority to wage war, and no one else."[2] And still another author boldly claims, in the *Stanford Encyclopedia of Philosophy* of all places, that "traditionalists might as readily be called legalists" since their "views on the morality of war are substantially led by international law, especially the law of armed conflict. ... States (and only states) are permitted to go to war ..."[3] The encyclopedist does not tell us who these traditionalists are, nor provide us with any textual evidence, nor explain where international law makes such statements. I, for one, am not aware of *any* present-day just war theorist who thinks that only states may wage war. Both present-day just war theory and the just war tradition are significantly more "colorful" than the statements just quoted suggest.

In this section, I shall focus on the tradition. A first thing to note is that it certainly does not share the pro-state bias found in the international *laws* of armed conflict (not least because there were no states for most of the many centuries of just war theory's existence).[4] To wit, many traditional writers first distinguish between *defensive* and *offensive* wars (where an offensive war is not necessarily unjustified)[5] and then make clear:

> Any private person may start a defensive war since natural law permits one *to repel force by force*. Therefore such a war can be waged without any authorization for the defense of life, limb, yes even things.[6]

However, the same author, Melchor Cano, states that while a private person does have the right to defend herself (and, indeed, others), she does not have "the authority to punish suffered injustices or by threat of force demand the return of things that have been lost [that is, taken], if there is a temporal interval [between taking and demanding the return]."[7] The authority to do this, that is, to engage in offensive war, belongs to commonwealths or communities (*res publica*).

In principle, that is: some early modern just war theorists acknowledge that there are exceptions. While Thomas Aquinas, in the Middle Ages, had simply claimed that "it is not the business of a private individual to declare war, because he can pursue his right ... before the judgment of his superior,"[8] some early modern theorists could not help but wonder

what happens if the private individual cannot *realistically* pursue his right before the judgment of his superior – for example, because the superior is unwilling or unable to provide justice. Francisco Suárez was of the opinion that then "the private individual shall patiently endure his loss."[9] Others, however, found that rather harsh and unreasonable, for instance Francisco de Vitoria:

> [A]lso, necessity can confer this license and authority [to wage war]. For if within one and the same realm one city should take up arms against another, or one of the dukes against another duke, and the king should neglect or should lack courage to exact redress for the wrongs that have been done, the aggrieved city or duke may not only resort to self-defense, but may also commence war and take measures against the enemy and even kill the wrongdoers, there being no other adequate means of self-defense. For the enemy would not cease from outrage, if the victims thereof were content merely with self-defense. On this principle a private person also may begin an attack on his foe, if there is no other way of safeguarding himself from wrong.[10]

Melchor Cano agrees with Vitoria, at least as far as aggrieved cities and leaders below the rank of a king or prince are concerned. Thus, not only "supreme" powers[11] but also powers that have a power above them (like cities have kingdoms or states, and dukes have kings above them) can resort to war, if the power above them is unwilling or unable to do its job, namely provide justice and security.[12] Then the aggrieved party can, as they say, take the law into its own hands.

Of course, that a non-supreme entity – that is, an entity that has some "authority" above it, like a city the state or the individual the local jurisdiction – may take the law into his or her own hands does not necessarily make the traditional just war criterion of legitimate authority superfluous. One might wonder, after all, whether there might be certain criteria that cities or even individuals have to fulfill for being a legitimate authority in their own right. (I think that in a sense there are, but these criteria are already dealt with by the subjective requirement – "right intention" – of a justified war, which makes an independent criterion of legitimate authority redundant.[13]) However, such an understanding of the criterion of legitimate authority radically contradicts at least conservative understandings of this criterion, that is, understandings that employ this criterion in order to delegitimate private or individual war – or, indeed, all non-state belligerents. Unfortunately for the conservative, however, this latter understanding is not widely shared by traditional just war theory, as we saw. Traditional just war theory is *not* conservative, and it is much more individualist than many make it out to be.

3.1.2 The Spurious "Priority" of Legitimate Authority

Much recent just war thinking not only fails to support a conservative understanding of the legitimate authority condition, but seems not to consider the criterion of "legitimate authority" as a necessary criterion for the justification of a war at all. More often than not, the irrelevance of legitimate authority is simply an implicit assumption, but on rare occasions, legitimate authority is also subjected to sustained criticism.[14]

There is, however, also a counter-movement: some authors think that legitimate authority is indeed the *most* important criterion and deserves "priority." In the following, I will argue that it does not, and that the arguments in support of the legitimate authority condition are anything but compelling.

To establish this, we have to engage the defenders of the criterion of legitimate authority. Prominent among them is James Turner Johnson, who is rather displeased with the fate that the criterion of legitimate authority has suffered since the times of Thomas Aquinas:

> Through most of the history of the just war tradition, writers on just war, when listing the requirements for just resort to armed force, followed the example of the summary provided by Thomas Aquinas: first the authority of a sovereign ruler; then just cause, ..., and then right intention...[15]

Johnson complains that "[p]resent-day discussions of the idea of just war commonly give priority to the question of just cause in listings of the requirements for justified force."[16] Here Johnson does not merely want to make a historical observation about changed listings in books, but rather thinks "that something has been lost" in this shift: according to him, "legitimate authority" *deserves* to be the first criterion on the list.[17]

But why? He explains:

> According to the historical tradition ... the requirement of sovereign authority holds first priority, since the sovereign, as the one ultimately responsible for the common good of the political community, has the responsibility for dealing with wrongdoing in such a way (including the possible use of armed force) as to maintain the justice and peace of that community. On this conception, the use of armed force is just only if the one responsible for the good of the political community uses it to serve that good: this is the classic conception of *bellum iustum*.[18]

This, however, is not a satisfactory answer to the "why?" question, it only prompts its reiteration: even if one granted (which in modern times many will not) that the sovereign has the ultimate responsibility for the

common good of the political community as well as the responsibility for dealing with wrongdoing, why should this make this legitimate authority more important than or "prior" to just cause? (In fact, Johnson does not really explain what he *means* by "priority.") After all, without a just cause (which on Aquinas's account requires that "those who are attacked ... should be attacked because they deserve it on account of some fault"[19]) there would not *be* any wrongdoing the sovereign could justifiably answer to, and all his "legitimacy" would not be able to change this fact. Likewise, even if it were true that "the use of armed force is just only if the one responsible for the good of the political community uses it to serve that good," it would *also* be true (on Aquinas's account) that the use of armed force is just only if there is a just cause. Thus, *both* criteria are *equally necessary*. Moreover, neither of them is by itself *sufficient* – here too, legitimate authority has no advantage over just cause. In other words, far from legitimate authority being *prior* to just cause, just cause and legitimate authority are sitting in the same boat: in Aquinas's thought, *both* are necessary criteria for the justification of a war, and *neither* is sufficient. To say that legitimate authority has – philosophically or morally, not only on some list – "priority" is therefore an unwarranted stipulation.

Here, however, it has been suggested to me that what Johnson might have in mind is that "determining 'just cause' depends on the judgment of the sovereign authority; 'just cause' is not a free-floating valorization independent of such judgment."[20] Setting aside the issue of whether this is an accurate interpretation of Johnson, it seems to be an inadequate interpretation of Aquinas. As already noted, on Aquinas's account, just cause requires that "those who are attacked ... should be attacked because they deserve it on account of some fault," and no Christian thinker, certainly not Aquinas, would ever think that whether someone deserves to be attacked depends on the *judgment* of some authority (other than God). Authorities can be wrong; and therefore those who contradict them on such occasions and come to a different "determination" would have to be right. And sometimes they will *know* (they will have a justified true belief) that they are right.

Another author who claims that "good authority" or "competent authority," as he calls it, has "priority" is James G. Murphy.[21] He explains what he means exactly as follows: "[I]f competent authority is prior, only an agent qualifying as a competent authority can have just cause ..."[22] However, this account makes "competent authority" actually *redundant* as an *independent* just war criterion: if you cannot have just cause without having competent authority, then you will automatically have competent authority if you have just cause. In other words, on this account, just cause *comprises* competent authority, and therefore you can completely *delete* the latter from the list as an independent criterion.

Instead of being an independent criterion next to (let alone above) just cause, competent authority would now just be an important *sub*-criterion or *sub*condition of just cause: this is precisely what it means to say that you cannot have just cause without competent authority. Yet, interestingly – and revealingly – Murphy later on explains that a just cause for resort to war involves "a relation between three variables: first, an action or structured set of actions [*a*]; second, a value or group of values [*v*] threatened or attacked by those actions; and third, a set of possible responses [*r*] to those actions in order to vindicate the values in question. Thus, the ordered set [*a, v, r*] defines a just cause."[23] Thus, what his official account of just cause is lacking is *any reference to legitimate authority* – even though in the chapter on legitimate authority, which precedes the one on just cause, Murphy could not emphasize enough that there cannot be a just cause without legitimate authority. Apparently, there can be – even on his own official account of just cause.

Moreover, when one looks at Murphy's account of legitimate authority, one cannot help but wonder why he thinks that this criterion is indispensable for the justification of war. (And one also cannot help but wonder why he does not deem it necessary to explain this.)

> I suggest that the minimum required to qualify as a competent authority is (a) a substantial degree of support from or acquiescence by the population, (b) effective control of most of the country, and (c) a minimal commitment to the well-being of the population.[24]

These, however, are indeed mere suggestions, not arguments. Why, for instance, should "effective control of the country" play any role whatsoever? Suppose there is some ethnic minority, some tribe, threatened with extermination by the state on whose territory the tribe has lived so far. They certainly do not effectively control the country (if they did, they would not have the problem of being threatened with genocide). However, they have the hope that by resisting long enough, they might be able to survive until a new, more reasonable government is in place, or perhaps to simply survive by making the extermination plan too costly for their enemy. Thus, they engage in extended guerilla warfare, again and again attacking military installations that the enemy could use against them and seeking out and ambushing enemy troops. It seems that such a war can be justified. But if it is not, then the reason is certainly not that the tribe does not have effective control of the territory of the state that is intent on killing them.

Moreover, let us further assume that one warrior of the tribe seized power in the face of the threat. He is rightly convinced that the tribe can only survive if it fights, but he does not like most of the tribesmen and -women since they have treated him very badly in the past. So he is not committed to the well-being of the adult population (if they would

simply starve to death, he would not care), but to his own well-being and perhaps to that of the children (who are by far outnumbered by the adults). He also does not have the support of the population, but rather has to bully them into following him (they only "acquiesce" in the sense of not openly resisting him). Yet the fact remains that the tribe can only survive under his leadership and thanks to the guerrilla war initiated by him, and that he knows that.

Is the tribe's war against the genocidal enemy now unjustified? Intuitively it still does not seem so. Perhaps the warrior's bullying of the tribe is unjustified. But even that is not so clear: he might have a necessity justification for bullying the tribe – it is necessary in order to save not only most of the adult population, but also the children; and arguably the parents have a duty to protect their children, so the warrior forces them to do what is their duty anyway. But even if we assume that the bullying is unjustified, it certainly does not follow that the war is. If the warrior had stolen weapons from a neutral country and stealing them would have been unjustified, it would not follow that the war is therefore unjustified. As self-defense with a previously and unjustifiably stolen weapon can be justified, so can war. Or to put it differently: even if what the warrior does to the tribe – bullying them – is unjustified, what he is doing with them – fighting an enemy who would otherwise kill them all – can still be justified.

Maybe Murphy could reply that he never doubted the right of private persons to defend themselves, [25] and that the armed conflict described here is simply some kind of collective self-defense, not war. But this reply does not work. First, if self-defense is understood as force directed against ongoing or imminent attacks, then my example is definitely *not* one of pure self-defense: the tribe does not wait for an imminent or ongoing attack, but rather seeks out the enemy, attacking its installations, and ambushing them. This is not self-defense.[26] However, if one simply *calls* this self-defense, then certainly quite a lot of things one would normally call war would fall under this description too. In other words, there could then be self-defense in the form of war, and if for these wars one does not need legitimate authority, then legitimate authority is simply not a necessary just war criterion.

Moreover, Murphy explicitly rejects "the idea that, within the framework of a world of sovereign states, just cause could arise from any kind of general right to punish or restore" and therefore turns "to self-defense."[27] But if states too may only wage war in self-defense – what additional rights do actors with legitimate authority gain? It would seem legitimate authority makes no difference.

Of course, Murphy suggests that a "country's self-defense is essentially different from what is involved in an individual's self-defense" and states: "The two would overlap in a case where the aggressor country intended, as part of its war aims, to kill or enslave the population of

the country under attack."[28] However, this claim seems to assume that individuals (unlike states) are only allowed to defend themselves against attempted murder or enslavement. But this assumption would be simply wrong: self-defense can be directed against all kind of rights violations (for instance, against the violation of property, including against trespassing.)[29] As Francisco Suárez, another early modern theologian and just war theorist, put it: "[C]ivil laws ... are justified in conscience when they provide that if any one tries to dispossess me of my property, it is permissible for me to repel force with force."[30]

In addition, Murphy not only unjustifiably limits the scope of individual self-defense, he also unjustifiably limits an individual's use of force *to* self-defense: "[S]elf-defense or defense of weaker family members is the only possible 'just cause' for the individual."[31] This is wrong as a statement about the "Christian tradition,"[32] wrong as a statement about law, and wrong as a statement about morality. As regards Christianity, I don't think that by "Love thy neighbor as thyself" Jesus was only referring to weaker family members, and I fail to see what in Christianity should keep a private individual from defending a stranger from a murderer if she can. That one should turn one's own cheek does not mean that one should turn the cheeks of others, so that their aggressors can better hit them. In fact, Thomas Aquinas had already suggested "that those with sufficient strength have an *obligation* to protect their fellows in need."[33] And Domingo de Soto, a theologian and just war theorist, later (in the 16th century) noted: "For a private person can defend an innocent [even] if this involves harming the attacker."[34] This assertion is not only true for the Christian tradition, but also for law and morality. Western jurisdictions (and most certainly morality) allow other-defense of *any* person under unjustified attack, family member or not. I need not idly stand by when a stranger is about to be killed by a murderer and I could stop the murderer only by force. Finally, Western jurisdictions allow private individuals to engage in "citizen arrests" and sometimes even in other kinds of non-defensive crime prevention, and they provide so-called necessity or choice of evil justifications for the use of force, where this use of force need not (unlike self-defense) be directed against an imminent or ongoing attack.[35]

Thus, if Murphy were right that the only just cause of states is self-defense, then, given that he is definitely not right in thinking that the only just cause of individuals is self-defense, individuals, even without "legitimate authority," would have a significant advantage over states. In any case, Murphy has failed to demonstrate that legitimate authority is a necessary just war criterion and that individuals cannot have a justification to wage war. (Of course, if one defines war such that it cannot be waged by individuals, then they cannot wage it justifiably because they cannot wage war at all[36] – but that would be a definitional constraint, not a normative one, and would not exclude the possibility that single

individuals could justifiably use non-defensive force for political reasons, for instance).

Finally, let me point out that Murphy's anti-revolutionary and statist bias cannot even be supported by his very own criterion of legitimacy. To wit, he claims:

> Private individuals and rebel groups cannot as such constitute competent authority. Meeting it depends on the insurrection's leaders being representative of the people, and depends on the nature of that representativeness being open to including some moral permission or moral right to lead an insurrection. I suspect that meeting the challenge has rarely been achieved, partly due to the difficulty of identifying precisely who has the right to lead that insurrection as representative of the people.[37]

Murphy nowhere explains what it means that "the nature of that representativeness" is "open to including some moral permission or moral right to lead an insurrection." Moreover, one would assume that if insurgents need a right to lead an insurrection, then governments also need a right to engage in wars or in counter-insurgencies. It is unclear why the latter should be more easily available than the former. Likewise, two of the three criteria that according to Murphy are "required to qualify as a competent authority" can clearly be satisfied by rebel movements (and are sometimes not satisfied by states), namely "a substantial degree of support from or acquiescence by the population" and "a minimal commitment to the well-being of the population."[38] The final criterion, "effective control of most of the country," can certainly be satisfied at some point by sufficiently successful rebel movements and is not satisfied by failed states. In any case, *none* of the three criteria is necessary for a war to be justified anyway. Murphy has certainly not shown otherwise.

Elsewhere, too, Murphy is somewhat short on argument. In reference to my work, he considers the possibility that every person could count as a legitimate authority. That is not really quite what I had said; rather, I argued for a *rejection* of the traditional criterion of legitimate authority.[39] But of course, for practical purposes, it does not make much of a difference whether one declares that individuals do not need legitimate authority to wage war or whether one declares that they could have it anyway. Be that as it may, Murphy asserts that my position is "permissive (and correspondingly implausible)." Why? Because:

> The costs of that Hobbesian position are too high, both in yielding excessively large scope for individual resort to violence and in undermining the roles of the law and the state as well as the very idea of the rule of law. ... It also rejects the intuitively plausible norm of *nemo iudex in sua causa*.[40]

In reply, it should be noted that I had appealed to Locke rather than Hobbes, and Locke has of course anticipated the alarmist argument, much flaunted by statists, that allowing single individuals to (even violently) resist "the Commands ... of a Prince ... will unhinge and overturn all Polities, and instead of Government and Order, leave nothing but Anarchy and Confusion." Locke has a good response to this:

> To this I answer: That Force is to be opposed to nothing, but to unjust and unlawful Force; whoever makes any opposition in any other Case, draws on himself a just Condemnation both from God and Man; and so no such Danger or Confusion will follow, as is often suggested.[41]

I had quoted this response of Locke in the text Murphy is referring to; and I had also pointed toward the double standards of statists like Murphy who avail themselves of the dictum that nobody is to be a judge in his own cause but have of course absolutely no difficulty in allowing the *state* to be a judge in its own cause (for example, by allowing the state itself to decide when to attack other states or by allowing the state itself to arrest, judge, and imprison – and perhaps even execute – citizens who commit crimes against the state, like high treason). Murphy conveniently chooses to ignore both Locke's reply and the criticism that a position like his involves a double standard.

3.1.3 The Consequentialist Argument for Legitimate Authority: The Specter of Chaos and Anarchy

Of course, many will not be quite convinced by Locke's reply and think that there is much to the statist concern. But is there really? Let us have a further and closer look at the statist concern and the motivation behind the insistence on legitimate authority. How plausible is it?

Michael L. Gross, who actually has considerable sympathies for guerrilla movements, nevertheless rejects the idea that any small group of people or even individuals could have legitimate authority. Following Nahed Artoul Zehr, he states that "unchecked violence in the hands of organizations like Al-Qaeda may ensue in the wake of decentralized authority."[42] (Again one cannot help but note a certain blind spot regarding states here: one could also assume, for instance, that unchecked violence in the hands of organizations like "sovereign nation-states" may ensue in the wake of according them, as Gross unfortunately does, "legitimate authority as a matter of course."[43] Indeed, the most murderous organizations in human history have been states, not sub-national organizations.) John Williams shares Zehr's and Gross's assessment, stating that "the radical decentralization of legitimate authority to individuals brings with it grave dangers."[44]

A first question to ask about such statements is, however, what they actually mean. What is the *argument* here? One might reply that this is obvious – but it really isn't. To wit, are these statements saying something like this: "If every individual is in principle (that is, as long as he or she abides by the other just war criteria) morally permitted to wage a war of his or her own, then this would have very bad consequences"? If this is indeed what is meant, then it is rather confused since moral obligations and moral permissions are (in contrast to even mistaken *beliefs* about moral obligations or permissions) *not causally effective*. Since moral obligations and moral permissions are not causally effective, they do not have *any* empirical consequences. Mass murder is morally prohibited, that is, morally impermissible, and always has been. Yet that did not and does not keep mass murder from happening. And if God can make things moral and immoral, and suddenly decided (without telling anybody): "Now mass murder (of certain people and peoples) is moral" (he did so in the past quite often, according to the Bible), then this would have no (non-normative) causal effect whatsoever. Sure, it would indeed make mass murder moral, but it would not thereby make it happen *more often*. There are no *empirical* consequences. In other words, to claim that the moral permission of individuals to wage wars of their own would make the world a more dangerous place is a very bad argument against the moral permission of individuals to wage wars of their own, for, contrary to the argument, that moral permission simply *leaves the world as it is* – it has no empirical consequences whatsoever.

Hence, we should be careful not to confuse the *effect* of a norm with its *justification* or *falsification*. For example, on some "universalization principles" of the justification or falsification of norms, a norm prohibiting certain acts is correct if everybody engaging in such acts would have very bad consequences (Kant's categorical imperative is sometimes interpreted in this way). Thus, such a universalization principle is supposed to work as a *principle of justification* (and, conversely, of falsification) of norms.

That *general disobedience* of a certain rule will have a certain empirical effect might, given a suitable principle of justification, show that the rule is correct; but that the rule is morally correct does not mean that it will have any good effect – after all, people might simply not abide by it. In other words, while abiding by a correct rule might have good effects, the rule itself and its correctness have no empirical effect whatsoever.

With this distinction in mind, let us return to the assessment of a claim like "the radical decentralization of legitimate authority to individuals brings with it grave dangers." If this claim is supposed to mean that if individuals indeed *are* morally legitimate authorities, then this brings with it grave dangers, the claim is simply wrong since, as I pointed out, moral "facts" are causally ineffective. They bring neither danger nor security. Empirically, they bring nothing. Therefore, a more charitable

interpretation of such a claim would be that it perhaps implicitly appeals to some justification principle and is supposed to mean something like, for instance: "If all people did what a rule permits them to do which declares that an individual may wage war on its own whenever the criteria of just cause, right intention, proportionality, last resort, and prospects of success are satisfied, then this would have terrible consequences; and since the universalization principle of the justification of moral norms is correct, it follows thereby that such a permissive rule is wrong."

The problem here, however, is twofold: why should we accept this justification principle, and second, what *evidence* is there for the proposition expressed in the "if-then"-clause?

To illustrate the problem, let us have a look at the principle mentioned. There are well-known objections against such generalization principles in ethics. As Allen Buchanan notes: "there are innumerable acts that are permissible even though it would be disastrous if everyone did them – for example ... closing one's eyes for one minute at a particular time of day."[45] The devastating force of this objection seems often to be underestimated. The rule-utilitarian Stephen Nathanson, for instance, thinks that Buchanan's objection fails because the "action he describes is morally innocent only because widespread instances of it are so unlikely to occur."[46] Actually, however, this practice is *very* widespread: virtually every person on the planet closes his or her eyes each day for much more than a minute (for example when they sleep or rest or meditate), and one would assume that closing them longer than a minute is even more dangerous. Moreover, whether an individual act of closing one's eyes for a minute or more at 2 PM is innocent or not does not depend on how many other people there are who also close their eyes at 2 PM, but rather on the *circumstances* in which one closes one's eyes. For instance, my individual act of closing my eyes at 2 PM every afternoon to meditate for a minute in my office is still innocent – regardless of whether there are millions of people who irresponsibly do exactly the same while driving fast on a highway.

Yet Nathanson claims that "there are many cases in which actions that appear to be innocent are judged wrong because the general practice is harmful" and adduces as an example the disposal of "sewage and other waste in water."[47] Yet as a matter of fact, a tourist's urinating in the Pacific Ocean is *not* judged harmful (because it really isn't) – the fact that everyone (including chemical companies) disposing of their waste into water would be harmful does not change our judgment of the tourist's action at all, nor should it. But let us face a more difficult task and assume that Nathanson is speaking of *toxic* waste (although his actual statement is much more general). Does Nathanson really want to say that disposing of toxic waste in water is *always* impermissible?

Suppose a pilot and her crew are on their way to transport a few barrels of toxic waste to the proper facility to dispose of it. Suddenly, over

a lake, they have technical difficulties, one motor is on fire. The pilot realizes that she has only two options: she can crash with the barrels into the nearby city, where the barrels will leak and the combination with the fire will lead to a terrible disaster, likely resulting in hundreds of dead civilians. Or she can throw the barrels overboard, into the lake, where they will kill a lot of fish, but eventually the toxins will dissolve and pose no further risks. Moreover, without the weight of the barrels, the pilot and her crew will be able to reach the landing strip. It seems very clear that the pilot has both a legal and moral necessity or choice of evils justification here to break a law or a rough-and-ready moral rule against disposing of toxic waste in water.[48] To deny the pilot and her crew this justification seems to amount simply to irrational and, for that matter, immoral and inhumane rule-fetishism (and the same line of reasoning is, of course, applicable to certain "emergency" situations where the waging of a private war seems to be the only reasonable option).

Thus, while this universalization principle might be able, under certain empirical circumstances, to rule out private war, there simply is no good reason to accept this principle as the final arbiter in moral questions: the principle is wrong.

Even if it were correct, however, one would still need to show that the empirical facts that the argument against private war presupposes really obtain. To illustrate this, suppose, for example, that somebody claimed that individuals cannot justifiably engage in self-defense unless they are specifically authorized by a legitimate authority, the only legitimate authority being the Pope. And he supports this assertion by relying on the universalization principle (which for the moment we just grant for the sake of argument) *and* the claim that if everyone who faces an unjustified attack would engage in necessary and proportionate self-defense without papal authorization, then this would have devastating consequences. Yet this latter claim strains credulity: the consequences of all people using necessary and proportionate means to resist unjustified attack is that the plans of aggressors will more often get thwarted and the rights of innocents more often protected than in a scenario where they only acted after (not always forthcoming) papal authorization. Yet the protection of the innocent against aggressors is a good effect, not a bad one. This is also true, however, if the protection of the innocent happens by means of war – even by means of individual war.

At this point, one might adduce what I would call the "bad example" argument: otherwise properly behaving non-state actors might nevertheless induce less commendable non-state actors to engage in violence too, and this has to be taken into account in the proportionality considerations. However, it again stresses credulity to claim that this danger is so grave that it will *always* tip the proportionality scales against non-state violence. At the very least, there is absolutely no *evidence* to suggest that it does. Moreover, the bad example argument would *also* be applicable

to state violence.[49] To employ it in one case and to ignore it in another is simply biased.

The conclusions to be drawn from these deliberations are these: First, the claim that "radical decentralization of legitimate authority to individuals brings with it grave dangers" is simply wrong – indeed a category mistake – if it is supposed to mean that a certain kind of moral fact – the existence of a moral permission for individuals to engage in private war – has any causal, empirical consequences, bad or good. If, however, the claim implicitly relies on a conjunction of a justification principle with some kind of empirical description of what would happen if people would act in certain ways, then authors arguing against the "radical decentralization of legitimate authority" would have to answer at least three questions: a) *which* justification principle are they using, b) *why* should we accept it, and c) *what evidence* do they have for the empirical claim which, in conjunction with the justification principle, is supposed to imply the moral impermissibility of the "radical decentralization of legitimate authority." Without answers to these questions, the case for "legitimate authority" is not only unconvincing – it is not even clear what the case is supposed to consist in. I have so far, however, not come across a defender of legitimate authority actually providing a clear and remotely convincing answer to any of these questions, let alone to all three of them.

3.1.4 Other Arguments for Legitimate Authority or "Authorization"?

In Section 3.1, I said that there is no legitimate authority condition for the self-defense justification. One might object, however, that it would seem that in most Western jurisdictions private citizens may only act in self-defense if the state, for example in the form of a police officer, is not present to defend them at least as effectively as they could defend themselves. Yet first, this requirement might itself again only be based on the irrational fear of chaos; and second, it would not establish the existence of a legitimate authority condition. The leading German commentaries on criminal law, for example, explicitly discuss this issue under the heading of *necessity*: if the police officer can effectively defend the citizen, then the citizen, under the circumstances, allegedly cannot satisfy the necessity requirement of justified self-defense.[50] Likewise, if the attacked citizen knows that a third party, *even another private citizen*, is present who will effectively defend him using *milder* means than the attacked citizen himself would have to employ, then, again, the first private citizen has to leave the defense to the third party. "Authority" seems to have nothing to do with it: necessity is doing all the work here – if the private citizen has "authority" or "moral standing" to defend himself whenever the other conditions of justified self-defense

are fulfilled, "authority" plays no independent role; in fact, it is unclear what "authority" is then supposed to mean. At best, it might mean that the person is then justified. But of course, we already knew that someone is justified in doing x if he is justified in doing x.

But *is* necessity doing all the work here? There seems to be a slight difference: the attacked person only has to leave the defense to the other private citizen if he knows that she can defend him at least as effectively as he could defend himself *and* could and would use *milder* means to do so (maybe she is capable of simply knocking the attacker out, while the attacked person would have to rely on his knife or gun instead). However, if the impression I reported above is correct, namely that in most Western jurisdictions private citizens may only act in self-defense if there is no police officer present to defend them at least as effectively as they could defend themselves, then in those cases where a police officer *is* present, the citizen would *also* have to leave the defense to him if the latter's means would be as effective and *as* mild as the private citizen's. (Incidentally, if they would be as effective but *less* mild, the police officer would be legally required to leave the defense to the private citizen.) And this, one might argue, would afford "authority" an independent role in at least those rare cases where everything is equal between the private citizen and an officer.

However, to evaluate the said impression, one must consider cases in which *really* all else is equal between the private citizen and the police officer. Consider this case: A police officer and a private citizen, standing shoulder to shoulder, are attacked by ten culpable ax murderers closing in. In front of the two, there is a hip-high steel box with a button on it, left behind by some scientist. Both the police officer and the citizen know that if they press the button, an electric impulse will stun the attackers and incapacitate them until they can be picked up by backup. What *difference* is it supposed to make whether the button is pressed by the officer or the private citizen? To be sure, positive law could just posit such a difference (it could also posit that the private citizen has to press the button), but what *moral* difference could possibly support this legal posit? Perhaps one might speculate that the attackers themselves would somehow prefer to be stopped by the officer instead of by the private citizen. Yet if that is the case, then things are not equal anymore. To wit, while the frustration of a person's preferences does not yet constitute bodily or financial harm, it constitutes what has been dubbed intangible harm.[51] But then the private citizen's defense becomes *more* harmful than the police officer's and hence *unnecessary*. Again authority plays no independent role. Similar things can of course easily be demonstrated in the context of the lesser evil justification and the proportionality of harms inflicted on third parties. What difference should it make whether the stunning of an innocent bystander occurs through the police officer's or through the private citizen's pressing the button?

Thus, it is difficult, to say the least, to demonstrate that the self-defense justification needs an additional legitimate authority criterion beyond necessity and proportionality. For the same reasons, it will be equally difficult to demonstrate – and, of course, no such demonstration has ever been offered – that just war theory needs an additional legitimate authority criterion beyond proportionality and last resort.

Moreover, the "right intention" requirement also stands in the way of the non-redundancy of legitimate authority. In a recent discussion of the legitimate authority criterion, Yitzhak Benbaji concedes that legitimate authority is not necessary for all wars. Instead, he claims that wars that "partly or fully meet the factual condition (and wars that ought to meet it) are subject to the [legitimate authority] Requirement."[52] The "factual condition" is the condition that the war be waged by one group (the "Actor") "in the name" of a "Political Society," for the benefit of a "Beneficiary," and with the resources (that is, at the expense of) a fourth collective, the "Bearer" (there can be overlap, of course).[53] In fact, however, in the end he also concedes that not even all of *these* wars are really subject to the legitimate authority requirement,[54] at least not if this is supposed to mean that without fulfilling it they would be unjustified. However, he does seem to think that a subset of these wars is subject to the requirement. Why? Because if the beneficiaries and the bearers do not "veto" the war, then this makes the war "more likely" to have a just cause, to be necessary, and to be proportionate.[55] (Note that while traditionally "legitimate authority" refers to decision-makers within "Political Society," here "legitimate authority" is obviously understood in a much wider sense.)

However, even if this were true, it would not establish the non-redundancy of legitimate authority. To wit, imagine people had "self-defense computers" around their wrists that are as reliable as diving computers. If the computer does not beep, it is likely that there is no attack in the first place. Thus, defensive measures that are "unauthorized" by the computer are likely to be unjustified. Yet if the defender knows this or should know it, then he cannot fulfill the knowledge requirement of justified self-defense while his computer is silent unless there is clear evidence that outweighs the evidentiary authority of the computer on this occasion.[56] The knowledge requirement, after all, requires that the defender has a justified (and thus reasonable) true belief that the objective conditions of the self-defense justification are fulfilled. The right intention requirement of just war theory should be interpreted in the same way.[57] But then there is no additional work to be done here by "legitimate authority."

As far as "Political Society Authority" (as opposed to the authority of the "Bearer" or the "Beneficiary") is concerned, Benbaji simply states that "individuals in whose name the war is fought ought to be included in the process by which the decision to go to this war is taken,"[58] but

he also admits that "a violation of Political Society Authority does not imply that the war is unjust"; instead, "a veto by Political Society merely makes it the case that ... the decision to fight it would be morally defective."[59] Yet the question I am tackling here is whether legitimate authority is a valid part of just war theory, a theory which deals with the *justification* of wars. After all, virtually all wars, *including justified ones*, are "morally defective," for example in that they mutilate or kill innocent bystanders and thereby violate their rights. Likewise, if Little Billy promises his mom never to use force against a priest, and he then, nevertheless, in proportionate and necessary self-defense knocks out a priest who is trying to rape him, then his self-defense might be "morally defective" in that it constitutes a breach of a promise, but it is certainly not unjustified. In the same vein, "Political Society Authority" simply isn't a valid part of just war theory even if going to war without such an authority should – on some, certainly not on all, occasions – breach some kind of social contract.[60]

Seth Lazar has recently commented on "Authorization and the Morality of War" but made clear that he does not want to directly engage the question of legitimate authority in just war theory.[61] In fact, he considers "authorization" as something that is simply part of the proportionality consideration and also as something that not all wars need in order to be justified. To wit, he states that his "arguments from authorization provide [only] one set of reasons among others that contribute to the proportionality calculation" and that "[a]n unauthorized public war can still be proportionate."[62] (And in "private wars [...] agents can be 'self-authorizing'" anyway.[63]) While this account of authorization is obviously extremely modest and qualified, it is worth explaining why it is not nearly modest and qualified enough. So let us have a closer look at this.

I have suggested elsewhere that on the basis of one's special responsibilities to one's children, spouses, lovers, or friends one may kill some people in certain circumstances even if they are not liable to be killed, that is, even if killing them would violate their rights.[64] Lazar has more recently argued for the same point;[65] however, he tries to connect it to "authorization" in a peculiar way. He claims (and I agree) that a mother may divert a trolley away from her own child even if then an innocent rail worker on the side-track gets killed. He first envisions a situation where two mothers, Karen and Toni, do this in two independent cases, saving their own children Ben and Ian, respectively. Then he alters the case. Let us call the alteration *Switched Parents*:

> [O]nly the other's parent can save each child. Karen and Toni can communicate, and reach an agreement. I think that each can permissibly divert the train onto the side-track, even though doing so proximately saves the other's child, not her own. By saving Ben,

> Toni saves her own child; likewise, by saving Ian, Karen saves Ben. Each mother is justified in switching the train, not only by the life she directly saves, but because, given her compact with the other, her doing so is the only way to save her own child.[66]

In other words, this "compact" allegedly makes it proportionate for each mother to proximately save a stranger at the cost of killing another stranger, something that normally would not be proportionate. Lazar's next step is to claim that this model can be applied to more complex scenarios: "In collective defence, we enter a reciprocal compact with the other defenders, to join our efforts to defend the people about whom we each care." And then, finally, comes the connection to "authorization": "Authorization matters, therefore, because it constitutes this agreement for mutual defence." And: "Authorization and agent-relative reasons [like those stemming from special responsibilities or 'associative duties'] matter for the ethics of war in virtue of this reciprocity-based justification, even if agent-relative reasons cannot be transferred in any other way."[67]

The problem with this argument is that authorization does *not* constitute the agreement for mutual defense. Not all agreements are authorizations in any normal sense of the word. Moreover, contrary to what Lazar implicitly assumes, authorization plays absolutely no role in *Switched Parents*. To wit, if Toni wants to see her own child dead (for whatever reasons) and explicitly tells Karen *not* to save Ian, then Toni obviously *has not* authorized Karen to save Ian. However, as long as it remains true that Toni *will* save Ben if Karen saves Ian (for whatever reasons, maybe a third party has made relevant threats), then it also remains true that Karen can save Ben only by saving Ian, and that is enough for Karen to be permitted in deflecting the trolley. She simply does not need Toni's authorization: authorization has nothing to do with it.

3.1.5 Conclusion

I argued in this section that traditional just war theory did allow private, indeed even individual war, and that arguments in support of a legitimate authority criterion, let alone in support of the "priority" of this criterion, fail. I further argued that what motivates the insistence on "legitimate authority" is the fear that doing away with this criterion will lead to chaos and anarchy. Yet I demonstrated that proponents of legitimate authority fail to provide an argument capable of proving this fear to be rational; and I explained that there is no reason to believe that such an argument can ever be provided. The fact of the matter is that wars need not necessarily be authorized by some higher authority (such as a king, president, or parliament) in order to be justified (*nor* do they become justified or even as much as endowed with a just cause only

because someone – be it a private individual or a "legitimate authority – says so). Accordingly, the criterion of legitimate authority cannot be relied on to delegitimate individual war, private war, guerrilla war, or even terrorism. I then considered some other defenses of authorization and demonstrated that the "authorization" these accounts defend is either not needed for justification or already provided by other just war criteria or, indeed, entirely fictitious.

3.2 Just Cause and "Right Intention"

There are considerable confusions surrounding the concept of "just cause" in the context of war. We will discuss this concept in Section 3.2.1. Confusions also beset the concept of "right intention," whose importance and function for just war theory is widely overlooked and whose form is often misunderstood. To wit, we will see in Section 3.2.2 that "right intention" is not simply an *additional* criterion, but rather, in its proper form, a criterion that is necessary to *constrain* the interpretation of other criteria in such a way as to keep just war theory applicable and thus practically relevant. Furthermore, since "right intention" is logically connected with just cause, these confusions surrounding the former notion also negatively affect a proper understanding of the latter. My discussions of the two concepts will therefore be connected, and I will draw the conclusions from both discussions in Section 3.2.2.

3.2.1 Just Cause, Retribution, and the Continuous Application of Jus ad Bellum

What one is ultimately interested in with regard to "just cause" is whether a *specific* war, actual or potential, is justified – for example, the concrete historical 2003 Iraqi war against the invading Coalition forces, or a war one is contemplating in response to some concrete aggression. I call this "the applied question." Answering this question requires knowing the empirical facts on the ground; and answering it with reference to any concrete historical or potential war is beyond the scope of the present chapter. However, an answer to the applied question regarding a specific war requires a prior answer to some more general questions, both descriptive and normative. It is these questions that are the subject of this chapter. The questions are: What *kind of thing* is a "just cause" for war (an aim, an injury or wrong suffered, or something different altogether)? I call this "the formal question." Then there is what I call "the general substantive question." Depending on the prior answer to the formal question, the general substantive question can be formulated as: "Which causes are just?" or as "Under what conditions is there a just cause?" A final question, which has recently elicited increased interest, is what I call "the question of timing": does the "just cause" criterion only

apply to the *initiation* of a war or also to the *continuation* of a war, that is, can a war that had a just cause at the beginning lose it at some point in its course (and vice versa)?

In the following I argue, regarding the formal question, that a just cause is a state of affairs. Moreover, the criterion of just cause is not independent of proportionality and other valid *jus ad bellum* criteria. One cannot know whether there is a just cause without knowing whether the other (valid) criteria (apart from "right intention") are satisfied. The advantage of this account is that it is applicable to all wars, even to wars where nobody will be killed or where the enemy has not committed a rights violation but can be justifiably warred against anyway. This account also avoids the inefficiency of having proportionality considerations come up at two different points: in a separate criterion of just cause and in the criterion of proportionality proper. As regards the general substantive question, I argue that all kinds of aims can, *in principle*, be legitimately pursued by means of war, even aims that might sound dubious at first, like vengeance or the search for glory. Thus, the pursuit of such aims does not make the war disproportionate or deprive it of just cause. As regards the question of timing, I argue that the criteria of *jus ad bellum* apply throughout the war, not only at the point of its initiation. While starting a war at t^1 might be justified, continuing it at time t^2 might be unjustified (and vice versa), and this insight does not require an addition to *jus ad bellum* but is already contained in it.

3.2.1.1 *The Formal Question: What Kind of Thing Is a "Just Cause" for War?*

There are different ways the term "just cause" is used in just war theory and political discourse. In one sense, a "just cause" refers to what causes the war, to what *gives occasion* to it. As the 16th-century just war theorist Francisco de Vitoria states: "There is a single and only just cause for commencing a war, namely, a wrong received."[68] In law, for example, a so-called "cause of action" is a fact or set of facts sufficient to justify a right to sue to obtain money, property, or the enforcement of a right against another party. Clearly, a rights violation, or the fact that it has occurred, would give one a cause of action to sue for compensation or for the enforcement of the right. It is conceivable, therefore, that a rights violation can also provide a cause of action in other contexts: a rights violation might give one a justification to seriously consider the use of force, including military force. Whether one may then *actually* use force, however, might still be dependent on further conditions, in particular on whether the use of force would be proportionate and necessary.

In another sense of "just cause," however, the term refers to a *goal or aim one is fighting for.* For instance, for Frances Kamm, the term refers to "a limited set of goals, called a just cause, that would justify starting

a war."[69] Thus, in the first sense "just cause" refers to a *rights violation* (or at least an immoral act); and in the second sense of the term, it refers to the *aim of defending against, rectifying, or punishing* the said rights violation.

Both uses of the term "just cause" are problematic. The problem with conceiving of just cause as an aim is that something can only be an aim if, in fact, somebody is aiming at it. However, if an innocent people is threatened with total annihilation by a genocidal aggressor, it seems to make perfect sense to say that the attacked people have a just cause to resort to a war of self-defense even if they are all pacifists, do *not* aim at defending themselves (nor does anybody else), and in fact do not resort to war but allow the enemy to slaughter them. To say that under these circumstances they do not *have* a just cause is just to confuse the criterion of just cause with the different one of right intention. In other words, there can *be* a just cause without anybody fighting *for* or *intending* to militarily achieve a certain just goal.[70]

In addition, Kamm's claim that a certain "limited set of goals" can "justify starting a war" is rather odd for a deontologist like Kamm: after all, a defining element of deontology is the view that the ends (by themselves) do *not* justify the means. This is, of course, also the position taken by traditional just war theory, which insists on the satisfaction of criteria like proportionality, last resort, etc.

This leads us back to the first rendering of "just cause": why should we not just conceive of just cause as a rights violation – or as the *fact* that a rights violation has occurred – and simultaneously accept that for the justification of a war more is needed than a mere rights violation?

There are two problems with this proposal. First, it seems implausible to say that *every* rights violation, even the mildest, is a just cause for *war*. If blogger A from state B insults innocent writer C from state D as "untalented little pig," we would hardly consider this a just cause for war (nor would B's refusal to punish A be such a cause) – otherwise "just cause" could hardly still exercise a restraining function on the pursuit of war and would be misplaced in just war theory (which does purport to restrain war). Second, it is not conceptually impossible to have legitimate wars *without* any prior rights violation: there could be consensual wars, for example, or wars where two parties fight over scarce resources that both of them need to survive. Instead of saying that both parties are unjustified, it is arguably also possible to say that both parties have a necessity justification (and one should at least not exclude this possibility by definitional fiat). It should also be noted that the rights violation is supposed to be one that has been committed by the party one is warring against. However, there could in principle be situations where a third party credibly threatens to commit some catastrophic crime unless A wages some restrained war against innocent B. In this case, again, there can be a necessity or lesser evil justification to engage in a war.[71]

Thus, both senses of "just cause" discussed so far have serious shortcomings. There are two alternative understandings of "just cause," however, that could avoid the shortcomings just mentioned (it remains to be seen whether they both avoid other shortcomings). The one defended here is to conceive of just cause as a criterion that is *not* independent of (all the) other just war criteria. On my account, proportionality is a subcriterion of just cause; furthermore, last resort and prospects of success are subcriteria of proportionality: whether a war is proportionate also depends on what other means are available and how likely they are to achieve the positive results the war is supposed to bring about. Thus, one can only determine whether there is a just cause by considering these other criteria.[72]

This account is not so different from traditional accounts. For example, the 16th and early 17th century just war theorist Francisco Suárez explains that "not every cause [is] sufficient to justify war, *but only those causes which are serious and commensurate with the losses that the war would occasion*. For it would be contrary to reason to inflict very grave harm because of a slight injustice."[73] Thus, in Suárez's account, the presence of a just cause for war is not independent of proportionality considerations; on the contrary, only by taking proportionality into account can one establish whether or not there is a just cause for war. Luis de Molina, around the same time, takes the same position, talking of "a just cause *in comparison to the damages that will be inflicted* by the war."[74] He further clarifies that "there is a just cause for war if we take possession of that which belongs to us or is owed to us, *provided that we cannot obtain it in any other way than by the means of war*,"[75] thus connecting just cause also with the criterion of last resort: if there are less harmful means to get what others owe you, there is no just cause for war in the first place.

The second alternative, in contrast, is to claim that a just cause for war is an aim of a certain, particularly weighty kind. That is, authors taking this route conceive of the criterion of just cause as some kind of list of acceptable aims that a war is to achieve, for example: defending the nation against an aggressor, stopping a genocide, toppling a tyrant, etc. (Some authors, alternatively, consider a just cause as a list of rights violations that a war is supposed to avert, for example: aggressive invasion, genocide, tyranny, etc. However, this approach cannot overcome the second problem mentioned above.) These authors regard just cause as independent of proportionality (and last resort and prospects of success). In other words, they think that only particularly important aims can be a just cause for war, and that there can be a just cause for war without the war being just or justified (even if the condition of right intention is satisfied): the war might still be disproportionate or not a last resort, for instance. Since war normally involves the killing of persons, these authors seem to think, a just cause must be an aim (or rights violation)

that can *in principle* justify killing people in order to achieve the aim or stop, mitigate, or punish the rights violation.

I reject this approach for three reasons. The first reason is that war does not *necessarily* involve the killing of people,[76] and thus such non-lethal wars can be justified even if the aims pursued in them cannot justify the killing of people. In other words, to demand that a just cause for war must be able to justify the killing of people does not do justice to wars that do *not* involve the killing of people. Such non-lethal wars simply need not be fought for aims that can justify killing people in order to have a just cause.

At this point, it might be objected that the idea of a war without fatalities is unrealistic. However, first, even if there would never be any non-lethal wars in the real world, this would still not undermine the conceptual point: even if there will never be a dinosaur on a ship, there is no *conceptual* impossibility for dinosaurs to be on ships. Moreover, for this reason, we actually *cannot* say with certainty that there will *never* be dinosaurs on ships: the animated scenes (the ones explaining how scientists were able to create dinosaurs) in the movie "Jurassic Park" have at least some connection with science, and who knows what the future will bring. On this note, second, thanks to science and technology, the debate on non-lethal warfare is *already* here – as are the prototypes of some of the weapons that could be used in such warfare, with further prototypes being developed at this very moment.[77] Since it is a good idea for the ethics of war not to lag a step behind technological developments, the very real possibility of non-lethal warfare cannot simply be ignored or dismissed: the military most certainly does *not* dismiss it.[78] Third, it is not just non-lethal weapons that can make wars non-lethal. It is also possible that weapons that would normally be lethal become *ineffective* due to the enemy's vast technological superiority. When I speak of a war here, I am of course referring to a war as a complex action, not as a historical event. The Second World War is a historical event, Britain's war against Germany a (collective) action, and Germany's war against Britain a different action.[79] Now, the NATO bombing of Yugoslavia (in particular Serbia) ("Operation Allied Force") must certainly count as a war (even if some politicians, in view of the lack of enthusiasm of their constituency, preferred to call it a "police action"). But so must the Serbian resistance against the NATO forces, a resistance that included the Serbian air force and air defense, and in which Serbian MIG-29s fought NATO jets. Yet according to the official NATO version, the Serbs did not inflict lethal casualties on NATO forces. Neither, it seems, did they inflict lethal collateral damage in their fight against NATO. But then this war against NATO could have been justified (and many Serbians think it was) even if *killing* in this war would *not* have been justified. All that needed to be justified was imposing a *risk* of lethal harm on the Allied forces, but obviously that can be justified more easily than the *actual* infliction

of lethal harm. For these three reasons, then, the idea of a war without fatalities is *not* unrealistic.[80]

The second reason not to conceive a just cause as an aim of a certain kind, in particular an aim that can *in principle* justify *killing* (or at least maiming) people, is that such a conception has the embarrassing consequence of making just causes shoot up like mushrooms and in the most unlikely places. The aim of avoiding the killing of innocent people through enemy force is certainly an aim that can in principle justify killing the killers in self- or other-defense. Yet in virtually all[81] modern wars, including those that allegedly have a just cause and are justified, innocent bystanders are "collaterally" killed even by the justified side. Thus, if the Noble Defender State invades the Evil Genocidal State to stop the latter's ongoing genocide of some ethnic group and in the process kills only *one* innocent bystander "collaterally," then *every* state, on the account criticized here, suddenly has a just cause of war against Noble Defender State, *even* Evil Genocidal State. This seems absurd.

To be sure, it should be noted that some authors, for example McMahan, distinguish between rights violations and rights infringements, where the former are *unjustified* and the latter *justified* transgressions against rights.[82] Thus, McMahan could claim that as long as the innocent bystander is killed in a justified military attack, there might have been a rights infringement, but not a rights violation.

A first problem with this account is that it is not clear why justified transgressions could not also give you a valid reason to fight back against them. Arguably, if you can save 100 innocent people only by killing one innocent person, you have a necessity justification for killing the one, but of course the one person need not allow you to slaughter him like a sheep. It seems he is allowed to fight back; he is not under a duty to sacrifice his life for strangers. But then one would think that *if* unjustified transgressions against the right to life give rise to a just cause for war, then justified transgressions can do so too, and for exactly the same reason: they are *transgressions* against the right to life, and the persons who suffer from them need not simply accept them.[83]

Moreover, even if we granted that justified "infringements" of rights cannot give rise to a just cause, this is of very limited practical relevance since there will also be virtually no war that contains *only* justified infringements. At least at times, disproportionate or unnecessary and hence unjustified force will be used, and hence the transgressions connected to such use of force will indeed be rights *violations*. Thus, the account still implies that if the Noble Defender State invades the Evil Genocidal State in a humanitarian intervention and in the process kills only *one* innocent bystander unjustifiably (perhaps since the force used was disproportionate or unnecessary in this case), then every state has a just cause of war against the Noble Defender State, even Evil Genocidal

State. In my view, this amounts to a *reductio ad absurdum* of the approach in question.

The third reason for rejecting this approach is that it is impossible to give a list of all aims that "could in principle" justify a war without in the end relying on some more general criteria. In other words, while one can indeed give some examples, in the end one has to say (or imply) things like: "Just causes are those aims the pursuit of which by means of war can in principle, that is, under conditions that are at least possible, satisfy the criteria of proportionality, last resort, etc." However, this has the consequence that we end up using the criterion of proportionality (and other criteria) twice: first in order to establish, for instance, whether there are *in principle* conditions under which measures involving the killing of people are proportionate and necessary means to retaliate against a foreign power's insulting one's own king, and subsequently in order to establish whether this is so *in the concrete case.* What, one might wonder, is the purpose of this procedure, given that it seems to be somewhat superfluous and uneconomical? After all, the result of the second application of the criteria is decisive, not the result of the first one; and the second application by no means presupposes the first one.

The above three objections, incidentally, do not just apply to the view that a just cause is an *aim of a certain, particularly weighty kind*, but also to the view that a just cause is a *rights violation of a certain, particularly severe kind.*[84] It is instructive, and also further confirms my assessment of the two approaches, that Jeff McMahan, who has provided the most elaborate defense of the importance of weight or severity in this context in the past,[85] has recently felt compelled to abandon this position precisely, it seems, in the light of the first and the third objections just mentioned.[86] (As already noted, however, both his old and his new account succumb to the second objection.) To wit, in the past McMahan claimed that "the just causes for war are limited to *the prevention or correction of wrongs that are serious enough to make the perpetrators liable to be killed or maimed.*"[87] Now, in contrast, McMahan claims that

> there is a just cause for war when those whom it is necessary to attack or kill as a means of achieving a war's aim or aims satisfy the agent-based conditions of liability to be attacked or killed, and thus will be actually and not merely potentially liable to be attacked or killed if the circumstance-based conditions of necessity [and] proportionality are satisfied as well.[88]

As formulated, this is difficult to understand. So let us explain. There are three noteworthy changes in comparison to McMahan's earlier account.

First, just cause is now no longer an *aim*. I am not entirely sure whether McMahan actually realizes this shift since he does not explicitly note it, although it would certainly have been noteworthy. In any case, I will set this issue aside. More important for present purposes is that he is, second, merely talking of *attacks* now, and attacks, of course, need neither kill nor maim – they could be comparatively mild. The third change is the introduction of the odd category of "potential liability."[89] What is that? We first have to know what liability is. McMahan explains that "part of what it means to say that a person is *liable* to attack is that he would not be *wronged* by being attacked."[90] (The other part, which need not concern us here, is that on his concept of liability people can only become liable to attack by *forfeiting* rights *through their own responsible action*.[91]) People are "*potentially* liable to be attacked" if they are "morally responsible to a sufficient degree for a threat of sufficiently serious harm to make them liable to be attacked or killed *if*, but only if, the circumstance-based conditions of liability are also satisfied."[92] The two "agent-based conditions of liability" are precisely "posing a threat of unjustified harm" and being "morally responsible for doing so";[93] the circumstance-based conditions are, as we already saw, necessity and proportionality. Given, however, that on McMahan's account necessity and proportionality are "internal to liability,"[94] which means that one cannot be liable to just *any* harm, but only *to proportionate and necessary harm*, his talk about "potential liability" is confused. To repeat, McMahan says that people are "*potentially* liable to be attacked" if they are "liable to be attacked or killed *if*, but only if, the circumstance-based conditions of liability are also satisfied," that is, if, but only if, the attack is necessary and proportionate. However, since people can, on his account, only be liable *to* necessary and proportionate attack (not to an unnecessary and disproportionate one), he is in effect saying that people are "potentially liable" to necessary and proportionate attack if and only if they are morally responsible to a sufficient degree for a threat of sufficiently serious harm to make them liable *to proportionate and necessary attack* if, but only if, *the attack is necessary and proportionate*. The italicized parts of this sentence show that this is a mere tautology: in other words, "potential liability" and liability are exactly the same thing on McMahan's account, although he has not noticed this. Given McMahan's own framework, one cannot be potentially liable without being liable, and vice versa – which is also confirmed by the fact that according to McMahan "the criterion of liability to attack in war is moral responsibility for an objectively unjustified threat of harm,"[95] that is, one is not only "potentially" liable but *liable* to proportionate and necessary force if one fulfills the "agent-based conditions of liability."

If, however, one insists on rejecting the tautological reading of McMahan's "potential liability" formula, then the only alternative that might suggest itself is that McMahan wants to say that people are "potentially

liable" to necessary and proportionate attack if and only if they are morally responsible to a sufficient degree for a threat of sufficiently serious harm to make them liable to proportionate and necessary attack if, but only if, *they are actually subjected* to a proportionate and necessary attack. This would mean that as long as they are not *actually* subjected to necessary and proportionate attack they are also not liable to proportionate attack. This, however, not only contradicts what McMahan says about "the criterion of liability," it is, in addition, also like saying that a sugar cube is only then solu*ble* (that is: *able* to be dissolved) in water if it is *actually* put into water. Such a stance shows a lack of understanding of what solubility or, in the case at hand, liability *means*. It simply makes no sense. For the reasons given, therefore, both McMahan's old and his new (or not so new) account of "just cause" must be rejected.[96]

A noteworthy additional reason to reject McMahan's new account in particular is its underlying motivation. McMahan claims that the appeal to "potential liability" "secures the independence of the requirement of just cause from the *ad bellum* necessity and proportionality conditions, so that there can be a just cause for war even if war would be unnecessary or disproportionate."[97] We already saw that this is incorrect since "potential liability" either *is* liability or else makes no sense. Even if it were correct, however, it is entirely unclear (McMahan certainly does not provide an explanation of this) why this alleged independence should be an advantage.

Some might argue that a separate criterion of just cause, incoherent or not, offers an additional protection against precipitate recourse to war. If one already knows that certain acts, lèse-majesté for example (as we want to assume), cannot even *in principle* justify killing people in order to avert, rectify, or punish such acts, then this is to be welcomed, after all. Such knowledge prevents people from "getting bad ideas" in the first place.

But if such acts cannot justify killing "in principle," they cannot justify it in the concrete case either. Conversely, however, there are things that are unable to justify killing a person in the concrete case at hand – but *can* do so "in principle." If on this basis one then assumes that one does have a just cause for war, this only invites "bad ideas" instead of avoiding them.

These remarks might be somewhat abstract, so let me offer an example from the sphere of personal self-defense (which is to be understood as including other-defense). In many jurisdictions (and morally as well, in my view), the danger of losing an arm at the hands of an unjustified attacker can justify killing the attacker. It justifies this, for example, if the arm cannot be saved from the attacker by any other means than killing him. The aim of defending one's arm against an unjustified attacker *could* thus be a just cause for self-defense. However, if in the concrete case, the arm can be saved as effectively and efficiently, that is, without

additional costs and risks for the defender, by merely knocking the attacker down, then killing the attacker would be excessive and hence unjustified in this case.

Thus, while according to accounts that make just cause independent of proportionality, there would be a just cause for killing in this case, on the account defended here there is *no* just cause for killing in this case. It would appear that the latter account is to be preferred if one would like to avoid misunderstandings that could have grave consequences. After all, the more or less subtle point that one has a just cause for war (or killing) but is nonetheless unjustified in resorting to war (or killing) will hardly be one that can be successfully communicated to all politicians, military brass, soldiers, and citizens.

With regard to just cause, we also need to make a distinction that, unfortunately, is never made in the literature – which often leads to considerable confusion. To wit, one has to distinguish the question *whether an agent* (for example, a private person or a state) has a just cause for war from the question *whether a particular war* (which can be actual or potential) has a just cause. Let us again use the self-defense example. If in a concrete case a potential defender can save her arm from an unjustified attack only by knocking down the attacker, then the potential defender has a just cause for using force against the attacker. If, however, *the* force or violence she actually uses far exceeds what is necessary under the circumstances – if, for example, she kills him although simply knocking him down would have been as easy, safe, and efficient – then there is *no* just cause for *this* use of force. This distinction relates to (but does not coincide with) Elizabeth Anscombe's correct (and almost completely ignored) observation that waging *a* war can be morally justified under certain circumstances while *the* war that is actually waged under said circumstances is impermissible. For instance, she was of the opinion that the British were justified in waging *a* war against the Nazis but that the war they *actually* waged was nevertheless unjustified as it was disproportionate, guided by illicit intentions, and violated the principle of discrimination between the guilty and the innocent.[98]

Thus, I propose the following characterizations regarding "just cause":

> An *agent* has a *just cause* for waging war (alternatively we could say: there *is* a just cause for waging *a* war) if there is an injustice, an emergency, or an agreement to wage war between the potential parties to the war,[99] such that under the given (for example geographic, strategic, military-technological) circumstances the military rectification or punishment of the injustice or the defense against it, the military response to the emergency, or the military realization of the agreement, is not necessarily disproportionate; that is, under the given circumstances *a* proportionate war is possible.

> A *particular war* has a *just cause* if there is an injustice, an emergency, or an agreement to wage war between the potential parties to the war, such that under the given circumstances the military rectification or punishment of the injustice or the defense against it *through this particular war*, the military response to the emergency or the military realization of the agreement *through this particular war*, is not disproportionate (or would not be disproportionate, in the case of a potential war.)[100]

It is thus possible for an agent (that is, a person, a state or some other collective) to have a just cause for war without the (kind of) war the agent is actually waging or contemplating having a just cause. Moreover, the account defended here has the attractive feature that it both continues a venerable tradition and need not be supplemented with *additional* theories (of "*jus ad vim*," for example[101]) that deal *separately* with non-lethal force and *separately* with force that answers to things other than rights violations. In short, it is both simpler and more comprehensive than alternative accounts – two features that make this theory more useful in its practical application.

We are now in a position to answer the question asked at the beginning of this section, namely: "What kind of thing is a just cause?" In the light of the previous discussion, the proposals that a just cause is an aim or some kind of injury or wrong or something that is necessarily connected to "liability" or "potential liability" must be rejected. Instead, as implied by the characterization of a just cause I have just given, a just cause is a set of circumstances or conditions. A just cause is a certain state of affairs.

3.2.1.2 *The General Substantive Question: "Which Causes Are Just?" or "Under What Conditions Is There a Just Cause?"*

As far as my own account of a just cause is concerned, I have already answered this latter question with the two indented characterizations offered above. Of course, this answer raises additional questions, in particular the question as to when, exactly, a war is or is not proportionate. A precise answer to this latter question, however, is beyond the scope of this section. Nevertheless, some general things can be said, which will also help to further clarify how the account of just cause defended here works in practice.

We can approach the issue by considering the distinctions that tend to be made by accounts that conceive of a just cause as an aim. The general aims regularly appearing in the literature are defense against ongoing or imminent attacks, prevention of some non-imminent future attacks or threatened evils, rectification (of some injustice, for example,

unjust seizure of property or territory), and punishment. Punishment is the most protean concept here since punishment can have different sub-aims, in particular special deterrence (the punished agent is deterred from further punishable acts), general deterrence (the punishment of the agent also deters other agents), and retribution (making the punished agent suffer is considered as good in itself or as something that is good insofar as it satisfies the unjustly harmed victims' desire for revenge[102]). Moreover, some authors claim that punishment can, via deterrence, be a means of defense.[103] Yet it should be noted that *defense*, properly speaking, can only be directed against ongoing or imminent attacks, not against future threats.[104] This is not a mere quibble about words; rather, the self-defense justification (applicable only to ongoing and imminent attacks) and the justifying emergency justification (applicable also to future threats) are governed by different justificatory requirements and thus yield different results.[105]

Be that as it may, it would appear that at least *some* defensive, preventive, rectificatory, and deterrent wars can be justified – and hence have a just cause – if the stakes are high enough. In fact, if the stakes are high enough, there is very little that cannot be justified.[106] On the other hand, however, one can make the stakes part of the characterization of certain wars and certain war aims, thus arriving at more specific aims. For instance, David Rodin claims that one cannot, for reasons of proportionality, justifiably pursue by means of war the aim of defending one's nation against what he calls a "bloodless invasion"[107] or "political aggression," namely against an aggression that "is primarily directed towards obtaining a political or material advantage for the attackers."[108] He comes to this assessment on the basis of his premise that lethal self-defense is only permissible against threats to "vital rights" (like the rights not to be killed or raped) but not, for example, in defense of mere property, territory, or the right to vote.[109] If he were right (and if one accepted Rodin's further implicit premise, which I do not, that wars will necessarily involve killing people), then these kinds of wars could not have a just cause provided a just cause is tied to proportionality (as it is in the account defended here). Yet Rodin's account is based on a gross misinterpretation of the proportionality requirement of self-defense. On more plausible interpretations of the proportionality requirement, wars of national self-defense against "political aggression" can be justified and have a just cause, which indeed is the traditional view of the matter. Since I will argue this point at length below,[110] I will not pursue it further in the present context.

Instead, it might be worthwhile considering the interesting question as to whether *purely retributive* wars can ever be justified and thus have a just cause. By a purely retributive war, I mean a punitive war that is known to have no defensive or preventive (and thus also no deterrent) effects. Rather, the only good it achieves, if this is a good, is to make wrongdoers suffer and their victims draw satisfaction from this fact.

A first thing to note is that arguments against retributive war often proceed with remarkable swiftness and an unabashed bias. David Luban's argument (which can stand as *pars pro toto* since it is quite representative) is a case in point. He states:

> [Retributive] punishment through warmaking is morally unacceptable for at least five reasons: (1) It places punishment in the hands of a biased judge, namely the aggrieved party, which (2) makes it more likely to be vengeance than retributive justice. (3) Vengeance does not follow the fundamental condition of just retribution, namely proportionality between punishment and offense. (4) Furthermore, punishment through warmaking punishes the wrong people and (5) it employs the wrong methods.[111]

The bias I mentioned is shown in Luban's completely overlooking the fact that as far as the first four points are concerned *exactly the same* can be said about Luban's preferred justification of war, namely defense. Self-defenders, both individuals and states, are also judges and executioners in their own cases – *they* have to judge whether they are under attack and what is necessary and proportionate in terms of self-defense, and *they* will act on their judgment (or ignore it and simply act as they please); and there is of course nothing that hinders a self-defender from also being vengeful and not merely defensive. (Luban's prejudice, incidentally, can also be seen in the fact that while he officially claims that placing "punishment in the hands of a biased judge, namely the aggrieved party" is a bad thing, he only a few pages later praises the Nuremberg Tribunal[112] – suddenly having no problem anymore with the fact that the four nations from which the judges were drawn were, indeed, aggrieved parties.[113]) Of course, not all defenders are *self*-defenders; one can also defend someone else. But then again, one can also *punish* someone for things he has done to someone else, not to oneself. Thus, there is simply no advantage of defense over punishment here.

The fact that a defender might be biased toward himself and yet be able to act permissibly shows that Luban severely overestimates the force of what he calls the biased judgment objection to the punishment theory of waging war.[114] While he claims that "the institution of punishment demands impartial judgement,"[115] it actually does not "demand" this any more than the "institution" of defense does. While it would perhaps be *desirable* or *ideal* if all attacked people were defended by impartial defenders, we are simply not living in the ideal world, and it would certainly be ludicrous to claim that an innocent attacked person has to allow himself to be harmed by a culpable attacker if no unbiased defender is available. On the contrary, in such cases a biased self-defender will do just fine and can act permissibly. Why should this be any different in the case of retribution? Luban does not explain this, not least since he does not consider the fact that his

objection applies (if it applies at all) no less to the case of defense than to the case of retribution.

Let me give an example. Suppose a woman has been brutally raped. Given the conditions of the society she is living in, there is no chance that the rapist will ever be punished (or even so much as ostracized). Yet the opportunity presents itself to her to incapacitate the rapist enough to then severely beat him up, which will, however, as the woman knows, not produce any deterrent effects. The woman indeed uses this opportunity and takes revenge, gaining enormous satisfaction and a feeling of empowerment from it (a feeling she had lost before). Of course, I have no doubt that a few liberal philosophy professors will deem the woman's act unjustified; however, I have also no doubt that the vast majority of people in Western countries and probably also around the globe will not. And indeed, why should it be unjustified? The rapist violated the woman's rights, and a rights violation triggers the violator's duty to compensate the victim for it. The woman – nobody else will – makes him partially compensate by exacting revenge. From a moral perspective, this certainly improves the situation and should therefore be justified. Some might argue, to be sure, that such revenge is not virtuous since it is motivated by anger or even hatred. Yet first of all, it would seem that hating rapists is more virtuous than loving them. Second, hatred is nothing but strong resentment, and resentment is not only a natural, but also a necessary part of any honest moral condemnation.[116] Moreover, the liberal virtue *par excellence* is respect for other people's rights. Yet as long as the women's punishment of the rapist is not excessive, she is quite capable of virtuously punishing him. In fact, Luban himself admits, in a rather strange way, that vengefulness can be justified. (Incidentally, this admission squarely contradicts his claim [3].) He says: "What makes vengefulness nonmoral is not that it can never be morally justified (in some cases it surely can), but rather that it surges up in us whether it is justified or not."[117] However, this is like saying: "What makes self-defense nonmoral is not that it can never be morally justified (in some cases it surely can), but rather that people tend to defend themselves against attacks whether they are justified in doing so or not." The obvious logical fact of the matter, however, is that morally justified self-defense and morally justified revenge are moral, while morally unjustified self-defense and morally unjustified revenge are not. Again there is no difference between self-defense and retribution or revenge here.

A few further remarks on Luban's claim (4) might also be useful. It is correct that in most wars innocent people will be harmed, even killed – but this is so whether the war is defensive or retributive. In all modern wars there is "collateral damage." However, Luban replies:

> if war is a mode of retribution, damage infliction is not collateral to the war's purpose in the way that it is collateral to the purpose of

> self-defense. In retribution, inflicting harm *is* the purpose. To partition the violence punitive war inflicts on the enemy state into the part that intentionally punishes the guilty (which part is that?) and the "collateral" part seems sophistical and artificial.[118]

It actually seems that Luban's own remarks here are sophistical. Not only "if war is a mode of retribution," but also if war is a mode of defense is the infliction of damage and harm not collateral – at least not of damage and harm to military targets such as soldiers. They are, indeed, harmed on purpose. But if the violence *defensive* war inflicts on the enemy state can be partitioned – as Luban seems to think it can – into the part that intentionally harms the proper targets of defensive violence (which part is that?[119]) and the "collateral" part that foreseeably or accidentally harms the innocent, then the parallel partitioning in the case of punitive war is no less possible. Thus, when Luban says "To call intentional violence that has harm as its goal collateral is disingenuous if not downright contradictory,"[120] my reply would simply be that it is disingenuous, if not downright contradictory, to call the collateral harm inflicted on the innocent in the course of targeting the guilty "intentional."

Let me now come to Luban's point (5) about the "wrong methods." This boils down to the claim that retributive war "uses modes of punishment that civilized societies have abandoned: mutilation, destruction of homes and property, brain damage, the slaughter of kinfolk" and, in most cases, "the death penalty."[121] If Luban means by "slaughter of kinfolk" genocidal practices, I fail to understand why he thinks that retributive war has to come in the form of the slaughter of kinfolk. If he merely means that a lot of innocent people who have kinship relations get killed in most wars – then that is also true of modern defensive wars. In any case, the invocation of "the slaughter of kinfolk" is simply tendentious, so let me put it aside. As regards the other bad things Luban mentions, it should be noted that "civilized societies" have evidently *not* abandoned them if many wars waged by what Luban probably considers to be civilized societies are at least *also* retributive. Yet as he himself realizes (as evidenced by his remarks on British vengefulness towards Germany during World War II and American vengefulness with regard to the invasion of Afghanistan),[122] *they are*. But perhaps Luban only means that "civilized societies" have abandoned such modes of punishment in the *domestic* context. However, in the domestic context, civilized societies also prohibit the peacetime use of the military against internal enemies (in fact, many Western constitutions expressly forbid such use), but Luban does not seem to take this as an indication that civilized societies should also abandon the wartime use of the military against external enemies. Thus, if wartime international defense practices need not follow the same restrictions as peacetime domestic defense practices, then wartime international retributive practices need not

follow the same restrictions as peacetime domestic punitive or retributive practices either.

Thus, I conclude that Luban's arguments against retributive war fail. In fact, they seem to be simply biased. The same bias is also discernible in Jeff McMahan's critique of retributive war. He has three objections against it. Let us focus first on the first two objections, namely that "the necessary information about what individuals have done and why ... is in general entirely unavailable" in war; and that "the harms inflicted by war could not possibly be calibrated to give each person no more and no less than what he or she deserves."[123] He himself realizes "that determination of liability and satisfaction of the proportionality constraint are also necessary conditions of just defense" but immediately informs the reader that "the standards of evidence are necessarily lower in the conditions in which people must engage in defense than they are for carrying out retribution."[124] Yet this is simply irrelevant. On his very own account, people are only liable to *proportionate* attack and such liability and its proportionality depend on *the facts*, not on the evidence or any alleged "standards of evidence."[125] Moreover, one would like to know which "standards of evidence," exactly, regarding proportionate defensive attack on the liable are applied if one drops bombs on an area teeming with soldiers and civilians one does not know (or even see) and whose exact activities one does not know either. Not surprisingly, therefore, McMahan's assumption that defensive wars can be waged in such a way that the intended harm at least is only inflicted on those who are liable to it and only to the degree they are liable to it has met with serious skepticism.[126] In fact, McMahan himself meanwhile *admits* "the general inability of just combatants to distinguish between liable and non-liable unjust combatants," but now suddenly declares that this is "a comparatively minor problem."[127] Unfortunately, his argument to this effect is entirely unconvincing, in fact circular,[128] and he fails to explain why the parallel problem cannot also be "comparatively minor" in the case of retributive war.

With his third objection, however, McMahan might finally have a point: "War in the contemporary world inevitably causes harm to the innocent, even if unintentionally, that is vastly disproportionate to the importance of inflicting on wrongdoers whatever harms they deserve."[129] In other words, even if it were, by itself, justifiable (as it might well be) for a mother to exact revenge on the 20 murderers of her children for purely retributive reasons and without this revenge having any other beneficial effects (like deterrence of would-be murderers), her lethal retribution would become *un*justifiable if it also foreseeably killed an innocent bystander.[130] Yet this does not justify the conclusion that McMahan draws, namely that "retribution ... is not an aim that can ever be legitimately pursued by means of war."[131] First, even in the contemporary world war does not *necessarily* kill or maim people, nor does it

necessarily kill or maim *innocent* people.[132] Second, war is not just a phenomenon of the contemporary world but also of the past and future. This also means that the focus on states detracts from the protean character of war.[133] Wars are not only fought by states, but have been fought by tribes long before states existed (and still are today) and are in fact also fought by chimpanzees[134] and all kinds of armed groups or perhaps even single individuals acting on their own.[135] Thus, consider the Glanton Gang immortalized in Cormac McCarthy's novel *Blood Meridian*. This group of scalp-hunters roamed Mexico, Texas, and Arizona in the mid-19th century and quite indiscriminately massacred Americans, Mexicans, and Native Americans.[136] Certainly none of the members of the Glanton Gang can count as innocent. If, therefore, a group of Indian warriors had dug up the hatchet, intercepted one of the raids of the gang and killed the whole group on the open battlefield, this could well have happened without inflicting harm on innocent people.[137] Moreover, there is no reason not to consider such a battle as part of a war. If the USA can wage war on "terrorist groups" (and they surely can), then a Native American tribe can do so too. Wars are not a prerogative of states. In short, it is simply mistaken that *all* wars inflict harm on the innocent, and therefore this claim cannot undermine the justifiability of purely retributive war.

Third, McMahan does not even refer to purely retributive war as defined by me. Recall that above I defined a purely retributive war as a punitive war that is known to have no defensive or preventive (and thus also no deterrent) effects. However, even if it were true that such wars cannot be justified, this would still not imply the truth of McMahan's claim that, to repeat, "retribution ... is not an *aim* that can ever be legitimately pursued by means of war,"[138] nor would it imply Luban's suggestion that retribution cannot be "a legitimate *reason* to make war."[139] Imagine, for instance, that culpable Anna is about to murder innocent Bela with a knife, and the only way for Christine to prevent this murder is to shoot Anna in the head – which indeed she does, thereby saving Bela. Yet Christine did not have the goal or aim to save Bela; in fact, she does not care about Bela one way or the other. Rather, she saw Anna's attack on Bela as a great opportunity for retribution: she wants to get back at Anna, who once unjustly harmed her. On the other hand, however, she would *not* have shot Anna if this would not have been a necessary and proportionate means of other-defense – as it was. Thus, she respected the restrictions of justified other-defense. Whatever we might want to say about Christine's *character* – her *act* was certainly justified.[140] To wit, deeming it unjustified for the mere fact that with her act of other-defense Christine aimed at retribution would suggest that Christine was under a moral obligation *to let Bela die* if it was psychologically impossible for her, Christine, to stop Anna with other than retributive aims under the circumstances. Yet that seems implausible. Morality should

not require potential defenders to let innocent people under attack get killed only because the potential defenders cannot bring themselves to act with other than retributive intentions. There is simply no plausible rationale for such a requirement. This, however, is no different in the case of war. Thus, justified war can in fact be retributive; its *aims* can be *purely* retributive *even* in the case where innocent bystanders get killed. Whether that is justified depends on proportionality and necessity considerations, not on whether the warriors aim at retribution or not.

In sum, all kinds of aims can be legitimately pursued by means of war, even aims that might sound dubious at first, like the search for glory. If Christine kills Bela in order to enjoy the glory of the intrepid defender, then her act is still justified. What matters is that Christine knew that Anna was about to kill Bela and that Christine's measures were a necessary and proportionate means to stop her from doing so. Her aims, in contrast, do not matter. This is a further reason why conceiving of a just cause as an aim either will hardly serve to restrict war or will only "serve" to incorrectly restrict it, prohibiting it where it should be allowed. The account defended here avoids such mistakes.

Finally, if retribution is actually a good in itself insofar as it makes guilty people suffer what they deserve and also good because the victims of the guilty draw satisfaction from retribution (and why should that not be a good?), then the fact that a war is also retributive counts *for* its proportionality, not against it. Accordingly, on my account, which tightly connects just cause to proportionality, retribution can contribute to a war having a just cause.

3.2.1.3 The Question of Timing: Does the "Just Cause" Criterion Only Apply to the Initiation of a War or Also to Its Continuation?

Some authors have recently argued that "moral considerations regarding whether and how to end a war are distinct from *jus ad bellum*."[141] All three authors mentioned in the footnote deem it necessary to complement *jus ad bellum* with what they call "*jus ex bello*," "*jus terminatio*," or the ethics of "war exit," respectively. And all three think that this complementation is a significant innovation.

It would indeed be an innovation, yet an entirely superfluous one. The three authors simply misunderstand *jus ad bellum*: it does not only refer to the *initiation* of war, as they suggest, but also to its *continuation*.[142] In fact, this should be glaringly obvious: after all, it is clearly also the case for the analogous examples of the self-defense justification and the necessity justification. I know of no jurisdiction that would, for instance, distinguish between the criteria governing the initiation of self-defense and those governing its termination. The reason for this is that, again, it is simply obvious that the criteria have to be applied "diachronically,"

as Schulzke would say. To wit, that you have at a time t^1 a self-defense justification to beat Paul does not mean that you also have a justification to continue beating him at t^2. For self-defense to be justified, there *has* to be an imminent or ongoing attack, and the defensive measures *have* to be necessary – it is not sufficient that *they once were* necessary and that *once there was* an attack. Every lawyer, every judge, and every citizen knows that: if you beat Paul because he tries to slit your throat, you will have a self-defense justification for beating him if this is necessary to stop him, but this does not provide you with a justification to continue beating him if he is already lying unconscious on the ground – it is not necessary anymore and there is not even an ongoing or imminent attack anymore. Realizing this and operationalizing this insight most certainly does not require an "ethics of defense exit" to complement self-defense statutes; rather, the existing law and morality of self-defense already cover this because it is universally understood that they must be applied diachronically. The same is true for the existing just war criteria in the case of war.

Yet Rodin claims that "in fact *jus terminatio* poses distinctive moral problems that cannot be resolved by simply applying *ad bellum* conditions continuously over the course of a conflict."[143] Why not? Because, says Rodin, of "new emergent costs, like the risk of defeat." He thinks that before you fight you only risk, let's say, the enemy seizing your territory or killing your people, but once you start to fight you also risk being *defeated* (in the sense of losing a fight – you cannot lose a fight if you haven't fought at all). And Rodin asks: "[H]ow did the defender acquire a permission to inflict additional harms [in trying to avoid defeat] over and above the initial [before one started fighting] proportionality assessment ..., simply by entering into a state of war? This looks entirely mysterious."[144] However, first, Rodin's argument rests on a wrong premise: he makes it appear as though in the *initial* proportionality consideration the risk of defeat must not be considered. But that is like saying that a doctor who considers operating on a patient must not consider the risk of *botching* the operation before she starts the operation but only once she has started it. Such a suggestion, however, is inane. Moreover, even if one granted Rodin that assumption, there would still be no mystery involved. To wit, if at time t^1 someone faces a threat against which the use of some force would be proportionate and at time t^2 he faces *more* threats or a bigger or more comprehensive one, then, all else being equal, the use of *more* force would be proportionate. That is not mysterious but logical. To give an example: You stand in front of your apartment with an apple in your hand and someone tries to steal the apple from you. It would, we can assume, be proportionate to push him away (but not to knock him down). Instead of pushing him away, you take a step back into your apartment. A person's dwelling, however, is afforded special protection by law and morality. If now the thief still comes after you

to get the apple, you would be permitted to use more force in defense against a more severe threat – the threat not only of losing the apple but now also of the violation of your apartment. While Rodin might find it "mysterious" why you are allowed to use more force "simply by entering" your apartment, nobody else will.

Rodin also adduces what he calls "a fanciful case"[145] to argue against doing proportionality assessments in war (and elsewhere, it seems) on a purely "forward-looking basis" (which considers harms or wrongs done during the war as sunk costs that need now not be further considered).[146] Note, however, that I am arguing here for applying *ad bellum* conditions continuously over the course of a conflict, but such *continuous* application is quite compatible with *also* looking backwards. Rodin seems to equate the continuity account with "forward-looking" accounts, but that is a mistake. The forward-looking account is only *one* version of the continuity account. However, since it is indeed a version of the continuity account, it is instructive to see why Rodin's argument against it fails.

Rodin considers a case where one dangles another person out of the window for the mere fun of it and without the person's consent, and then realizes that it is wrong but is unable to lift the person back into the room without help. Rodin claims that *both* continuing to dangle the person *and* stopping doing so (by letting go) is wrong. Accordingly, he thinks that both the continuation and the discontinuation of a war can be wrong. Thus, he sees a dilemma here.[147] But there simply is no dilemma, since continuing to dangle the person as part of an attempt to rescue her is *not* wrong.[148] Rodin claims, however, that this is "clearly false."[149] He states:

> [If] dangling for less than ten minutes and dangling for ten minutes or longer are separate offences, then I will clearly be morally and legally liable for the more serious offence, even though I only dangled you for five minutes prior to the epiphany. The continued dangling after the epiphany contributes to my culpability, despite the fact that I am morally required to do it.[150]

This is clearly false. Part of an offence, and element of the crime, is *mens rea*, the guilty mind, but once I dangle the person with the intent to *rescue* her, I have no guilty mind anymore. (Rodin claims that "[n]o one can benefit morally from his own wrongdoing, and removing or mitigating my culpability for harmful action that would otherwise be wrong would be a benefit to me."[151] Yet both law and morality, quite reasonably, do allow people to benefit from not having a guilty mind, and this is the only benefit that is accorded here.) Incidentally, if *mens rea* were *not* an element of the crime, then you would also be culpable and committing an offence if you had grabbed a person who fell out of the window by no fault of yours, trying to save her. But that, of course, is

absurd. In Rodin's case, I would, however, be *civilly* liable (I would have to pay adequate compensation) for the continued dangling, for this is a consequence of my initial wrongdoing and I am responsible for it. But that in no way implies that the rescue-dangling after my moral epiphany is *criminal* or *culpable*. Thus, the dilemma that Rodin unnecessarily wants to construe can easily be avoided by simply applying the appropriate moral and legal categories.

Moellendorf, like Rodin, also argues against the "forward-looking conception of proportionality"[152] and thus against one version of the continuity account. He considers an argument provided by McMahan in support of the forward-looking account. McMahan considers a case where a runaway trolley will kill five innocent people unless the trolley is diverted onto another track where it would kill only one innocent person.[153] Assuming that even killing two – but not three – innocent people as a side-effect of saving the five is proportionate, a bystander would be justified in diverting the trolley. Yet when the bystander pulls the switch, there is an unforeseen malfunction that fails to affect the trolley but accidentally kills two other innocent persons. The bystander quickly repairs the switch and thus can still divert the trolley. Is it still permissible for him to do so? It is if one regards the previous accidental killing of the two bystanders as "sunken costs" that need not be considered in the decision now; it is not, however, if the two previously killed persons enter into the new proportionality consideration, for then the saving of the five would have the total cost of killing three, and that would, *ex exemplo*, be disproportionate. McMahan thinks that it would be counter-intuitive to take the latter position and to declare that now the bystander has to let the five innocent people die instead of being permitted to divert the trolley to the track with only one innocent person. I agree with him.

Moellendorf does not. He thinks that the forward-looking account faces two problems, namely that it "seems inconsistent with the concept of proportionality, which requires that there is in principle some limit to the costs that can be imposed in the pursuit of the just cause" and that it "would evacuate proportionality of much of its important critical force, for it renders incomprehensible the claim that a war is disproportionate because of its cumulative costs."[154] Both claims are mistaken. First, there obviously is a clear limit set by the continuity account in the given example: *ex hypothesi* the proportionality requirement would make it disproportionate for the bystander to divert the trolley if he foresees that at least three people will then be killed. Of course, Moellendorf's point is that one could kill three people *again and again* if each time the (miraculously still unforeseen) malfunction occurs (killing two people) and one could still save the five by diverting the trolley to the one. Yet that does not in the least change the fact that *at each time* there *is* a clear proportionality constraint. Moreover, Moellendorf's second point is wrong too. There is a limit also to the cumulative costs. While it might

be proportionate to save the five at the cost of killing two people as a side-effect, saving the five at the cost of slowly torturing one person to death (or of having her, as a side-effect, transported into an automated torture machine that will do the same) might well be disproportionate. If so, then there is no limit on how many people can be "cumulatively" killed in the endless reiteration of the attempt to save the five, but there is a limit on how many people can be cumulatively tortured (namely none), and thus the continuous account also sets a proportionality limit for the cumulative case.

Moreover, if Moellendorf's account of proportionality were correct, it would also have to apply, for the same reasons, to proportionality in self-defense. Suppose it were proportionate to defend your wallet against a thief by knocking him down, but anything beyond this were disproportionate. You are walking through a tough neighborhood. A robber tries to take your wallet, and in pursuit of the "just cause" of keeping it you knock him down. After 100 meters more you come across another robber (or perhaps even the same one: he tries again) who tries to take your wallet. On Moellendorf's "budget" account you have to let him because you already exhausted what he calls your "proportionality budget"[155] with the first robber. In other words, you can no longer defend your wallet. This is entirely counter-intuitive if not downright absurd, however, and most certainly not an account of proportionality that any jurisdiction subscribes to.[156] Accordingly, there is also no reason to subscribe to such an account in the case of war.[157] To wit, if a genocidal enemy attempts to kill the entire population of one million people in a certain territory, then Moellendorf's account implies that there is some "proportionality budget" so that, for instance, "collaterally" killing 1,000 innocent civilians in the course of the whole defensive war against this genocide attempt would be proportionate while killing 1,001 would not. This further implies that after already having collaterally killed 970 innocent civilians without having averted the genocide, one would now have to let the genocide simply take its course if one could only avert it by "collaterally" killing 31 additional civilians. Again, this seems to be absurd (at least barring absolutist convictions).

Finally, it should perhaps be noted that the continuous application of *jus ad bellum* does not undermine the distinction between *jus ad bellum* and *jus in bello*. This distinction does not concern timing (nor does it concern any declarations of war or of peace), but the level of agency and decision-making. To wit, imagine a people can only save themselves from being malevolently slaughtered by an enemy group if they engage in organized collective self-defense. Their *jus ad bellum* question is: "May we, as a collective, wage war?" Assume they know that if they do, a few of their soldiers will violate *jus in bello* restrictions, for example, kill some wounded enemy soldiers who are already *hors de combat*. This fact and knowledge would not necessarily undermine the justifiability

of the war as a whole, as a *collective* action, since the war could still be justifiable as the lesser evil even if some *individual* acts of the soldiers are unjustifiable. To use an analogy: if a person can only save herself from being killed by a culpable aggressor if she asks someone for help of whom she knows that he will use slightly excessive force, then *she* is nevertheless justified in doing so (an attempted murderer being exposed to somewhat excessive force is a lesser evil than his succeeding in his murder attempt), even though *her helper* is not justified in using excessive force. She is justified since she has no alternative means than asking the helper and the helper's acts are not under her control. The helper, on the other hand, is *not* justified in using unnecessary force since his own acts obviously *are* under his control. In the same vein, a collective can be justified in resorting to war (and thus in enlisting its soldiers' help) even if it is known that some of the soldiers will, against the collective's wishes, use excessive force.

We can thus conclude that the objections against the continuous application of *jus ad bellum*, including just cause and proportionality, are spurious. The criteria of *jus ad bellum* apply throughout the war, not only at the point of its initiation. While starting a war at t^1 might be justified, continuing it at time t^2 might be unjustified (and vice versa), and this insight neither requires an addition to *jus ad bellum* (it is already contained in it) nor does it undermine the distinction between *jus ad bellum* and *jus in bello*.

3.2.2 *Right Intention? The Subjective Element of a Justified War*

I said at the beginning of Section 3.2 that just cause is logically connected with right intention. What is the connection? It is often said – in fact, it seems to be the standard view – that in order to satisfy right intention the war has to be fought *for* the just cause.[158] However, given the account of just cause presented here, a war *cannot* be fought *for* a just cause but at best *with* a just cause: a just cause is not an end to achieve, but a set of conditions that the war satisfies or the agent finds him- or herself in.[159] But if this is so, what then is the subjective element, if any, of a justified war?

Again a comparison with self-defense law might help. (In legal scholarship "self-defense" is regularly understood to include other-defense, and I will use the term in the same inclusive fashion.) This comparison is pertinent since, as noted, self-defense is, next to rectification and punishment, one of the traditional justifications of war. If anything, its importance has even increased in modern times: the defense justification has marginalized the other two justifications.[160] Moreover, the self-defense justification is not only used on the *jus ad bellum* level to justify the *collective* war effort (as *national* self-defense), but also on the *jus in*

bello level to justify soldiers' killing enemy soldiers (as *individual* self-defense).[161] And this *jus in bello* level is also relevant for right intention. While one finds the right intention condition often only listed under *jus ad bellum*,[162] traditionally it is also a *jus in bello* condition, applying not only to state leaders but to individual soldiers as well. The traditional Christian just war theorists were also addressing the question of whether, and under what circumstances, individuals may participate in war, and they made it clear that when they do participate in war, these individuals must have *a right intention*.[163]

Moreover, the comparison would still be relevant if self-defense played no role in justifying war and killing in war: it would be relevant as an illustration of how the justification of an act can comprise a subjective element without demanding that the act be committed *for the (objective) reasons* that justify it. To wit, the leading legal commentaries on the German self-defense statute agree that indeed there is the requirement of a subjective element, but while some scholars claim that for self-defense to be justified the defender must have the specific *intention* to defend him- or herself or others, that is, that he or she must use force (or other measures) *in order to* defend him- or herself or others, these leading legal commentaries explicitly reject this claim and instead affirm that it is sufficient if the defender *knows* that *the conditions of justified self-defense are fulfilled*.[164]

I subscribe to the latter view, which obviously fits well with the account of just cause presented here, given that I do not define a just cause as an *aim* (to pursue) but as a set of *circumstances* (to know). The view has noteworthy implications. It implies that a man who takes part in a war only because he enjoys killing people and in order to kill people but *knows* that the objective conditions of justified killing are satisfied (like proportionality and necessity), *also* satisfies the subjective element of justification, that is: his *action is justified*, period (whatever we might think about his *character*). The same applies to states and organizations: if a state engages in an intervention to stop a genocide *not* in order to stop the genocide but simply to enhance its power, but knows that in so doing it complies with the objective just war criteria, then this power's intervention is a justified war. Further motivations and intentions of the actor are simply irrelevant for the question whether the act is justified or not.

This, in some ways, might sound like a particularly lenient or permissive conception of right intention. However, in other ways, it certainly is not, particularly not if compared with the common view that the subjective element for a justified war merely demands "right intention" in the sense of fighting *for a morally good aim*, like stopping an unjust aggression. On this latter interpretation of "right intention" an agent *deliberately* and *intentionally* using *excessive* force could still satisfy right intention – namely as long as he keeps pursuing a just cause. "Right intention" understood in this way, however, sounds less like a

constraint on the justifiability of war than an invitation to fanaticism. I submit, therefore, that the account of right intention presented here is to be preferred.

However, this initial proposal needs to be supported with further argument. After all, views on the just war criterion of "right intention" differ widely. Some just war theorists seem not even to be interested in the criterion. This is especially so for "revisionist" just war theorists, who rarely ever mention the criterion, and on those rare occasions do so rather dismissively.[165] Recently, moreover, the criterion has come under frontal and sustained attack, with three authors behind the attack proposing to discard it entirely.[166]

Just war theorists writing more in a theological tradition, on the other hand, still deem the criterion highly relevant, and sometimes think that it should be interpreted expansively, that is, as also referring to motivations or even emotions, and not only to intention.[167] They follow traditional just war theory, for in the tradition the criterion often covers both. While Aquinas says that "rightful intention" means to "intend the advancement of good, or the avoidance of evil," he quotes in support of this view an influential statement by Augustine referring to other mental states and not just to intention: "The passion for inflicting harm, the cruel thirst for vengeance, an implacable and relentless spirit, the fever of revolt, the lust of power, and such like thinks, all these are rightly condemned in war."[168] Following Augustine and Aquinas, the later scholastics also seem to not clearly distinguish intention in the strict sense from "illicit" motivations and emotions. Thus, in traditional just war theory, the term "right intention" has already been used to refer to more than merely intention. This, I submit, entitles me to also use it in a wider sense, namely as referring to yet another mental element: *knowledge*.

I will explain why the criterion of right intention – which applies both to *jus ad bellum* and *jus in bello* – must not be discarded if understood as proposed here, namely as a knowledge requirement (Section 3.2.2.1). Conventional defenses of the right intention requirement argue that people have a right not to be killed with bad intentions (or on the basis of morally objectionable motivations, attitudes, or emotions, etc.); or they argue that even if people do not have such a right, it is nevertheless wrong to kill them if one does so with objectionable intentions or on the basis of bad motivations or emotions, etc. Thus, the right intention requirement is seen as a necessary *addition* to the other criteria. In contrast, my main argument runs considerably deeper. I argue that right intention is not a mere addition to the other criteria but actually a *constraint on their interpretation*. More precisely, my main argument is that without right intention, that is, without a subjective element in the justification to wage war, the only remaining option is a purely objectivist account of justification. (I reject *both* pure objectivism and pure subjectivism. My account is *mixed*.) Short of importing *ad hoc* assumptions

into objectivist theory that are actually alien to it, however, objectivism can only come in the form of a strictly *fact-relative* account of justification (objectivist just war theorists actually tend to explicitly emphasize the importance of fact-relative justification).[169] But this poses a fatal problem: I will demonstrate that objectivist accounts of justification (or at least those that do not import *ad hoc* assumptions) lead to hyper-demanding just war criteria that cannot be intentionally followed and are therefore useless as action-guidance in the real world. Such purely objectivist criteria would also imply that real wars could never be objectively justified – unless by pure blind luck of cosmic proportions. Given that "revisionist" just war theory relies on an objectivist account of justification and on the credo that objective, fact-relative justification defeats liability to counter-attack,[170] which in turn serves as the foundation of the "revisionist" claim of the moral inequality of combatants,[171] the impossibility (putting miracles aside) for any real war to ever be objectively justified means that revisionist just war theory and its inequality thesis are inapplicable to, and thus irrelevant for, the real world.[172] In contrast, a just war theory incorporating the right intention requirement in form of a knowledge requirement – and *only* such a theory – can and does fulfill its action-guiding function.

To further bolster this result, in Section 3.2.2.2, I will consider some objections to the argument I have just outlined and demonstrate that these objections fail. In fact, the curiousness of these objections is quite revealing in itself.

Finally, in Section 3.2.2.3, I emphasize that the "right intention" requirement is a *mere* knowledge requirement. A justified agent must know, that is, he or she must have a justified true belief, that all the other valid criteria of justification are fulfilled. As long as this is the case, the agent's intentions, motives, or emotions are irrelevant, however bloodthirsty or sadistic they might be.[173]

3.2.2.1 The Indispensability of "Right Intention" in the Form of a Knowledge Requirement

It is worthwhile to approach the issue of the right intention requirement in just war theory by comparing it to the parallel requirement in the ethics and law of self-defense. To wit, in Anglo-Saxon law there is the *Dadson* principle (so named after a court case), according to which "justified force requires belief in, or knowledge of, the presence of justificatory circumstances."[174] Anglo-Saxon law is not alone in requiring some subjective, i.e., mental, element for the justified use of force, including justified self-defense. It seems to be almost a consensus among Western jurisdictions that such a subjective element is required.[175] The test case in the legal literature for the question whether the self-defense justification should contain a subjective element is the case of the unknowingly

"justified" defender (I put "justified" in scare quotes because whether or not he or she is justified is precisely the contentious issue). Consider this example:

> *Jill and Earl*: Jill always wanted to murder Earl, whose nose she does not like. She sees him sitting in a restaurant, draws her gun, and shoots him dead. Unbeknownst to her, however, Earl, in turn, was just about to murder an innocent business rival who was also in the restaurant, and shooting Earl dead was the only way of preventing this.

The case of the unknowingly "justified" agent has been widely discussed in the legal literature, and while some authors – namely objectivists – would indeed deem Jill justified, the majority do not.[176] Yes, with her action Jill actually saved the innocent person from an unjust attack. But did she really act in justified other-defense? That seems bizarre. True, she might have satisfied all the *objective* justificatory criteria of self-defense (that is, those not referring to mental states): there was Earl's imminent attack, and shooting Earl was (as we assume for now) necessary and proportionate under the circumstances. Yet Jill did not know that her act would preempt an unjust attack. She shot Earl simply to murder him and without any awareness of said justifying circumstances. Her act thereby demonstrated a blatant disregard for law and morality that, it seems, neither law nor morality can accept. Thus, it seems that we are not dealing with an act of justified self- (or other-) defense here.

Some objectivists, however, try to avoid the intuitively unacceptable result of letting Jill off the hook, so to speak, by trying to "get" Jill via an account of attempt liability. While Jill, according to this approach, engaged in justified self-defense and did not commit murder, she could still be held liable for *attempted* murder.[177] Of course, the murder attempt – Jill's shooting Earl – is *justified* according to the objectivist, but Jill would still be *culpable*, and if culpability is sufficient for punishment, she could therefore be punished.[178]

Yet, first, talking about "culpable right action" as these objectivists do seems highly counter-intuitive or even, as objectivists sometimes admit, "oxymoronic."[179] Even more importantly, a second problem with this curious approach is that it is not clear what the objectivist means by "culpability." In particular, it is difficult to see how this could be *moral* culpability. Normally, we say that someone is culpable if she knowingly or at least negligently did something that is in fact impermissible (and does not have an excuse). The objectivist cannot say that (on his account Jill's act is not impermissible). So why is Jill culpable? Maybe the objectivist will say that she is culpable because she recklessly took the risk of killing an innocent person, or that she is culpable because she knowingly did something that she *thought* to be impermissible (this latter account of impermissibility will let many ideologically motivated killers off the

hook since they might think that they are even obliged to kill), or that she is culpable because she (mistakenly) thought that she did some act x and it is in fact the case (whether she thinks so or not) that doing x would be wrong. But *why* does that make her culpable on the objectivist account? After all, morality, on the objectivist account, does *not* require her not to be reckless in this way or not to do something she deems to be impermissible: if it did, then her act of shooting Earl would be *im*permissible (since it contravenes a requirement of morality), which, however, is precisely what the objectivist denies. To put it differently: if morality *required* people not to act culpably, then Jill's act would be impermissible. If however, as the objectivist claims, morality does *not* require people not to act culpably – on what basis can the objectivist claim that Jill is "morally culpable"? What does this even mean then? The objectivist does not really explain this.[180]

I think that this line of reasoning is correct. Admittedly, however, it relies heavily on our intuitions regarding this case. One attempt to do better has been undertaken by Russell L. Christopher. He argues that a purely objectivist account of self-defense leads to *logical contradictions*.[181] Yet while Christopher's arguments are ingenious (and have no equivalent in the just war literature), they are open to severe doubts.[182] Therefore, I prefer not to rely on his arguments. My own argument, instead, is that a purely objectivist account leads to a hyper-demanding – and thus entirely impractical, that is, useless – account of the necessity condition of self-defense.

Why is that? Well, there is no discernible reason why an objectivist account of justification should, in the context of self- and other-defense, understand "necessary" in any other way than as referring to *literally* and *objectively* the *mildest means necessary* to defend oneself or another from an attack. After all, the objectivist wants to talk about "fact-relative justification," where these facts are not supposed to refer to what people know or can know or reasonably assume. But then it is mysterious how, in real life, any actual instance of lethal self-defense could *ever* be necessary – and thus it is mysterious how it could ever be justified.

The reason for this is that it is a simple fact of physics that if Jill had fired a shot at a certain time t while holding her weapon in a certain position p, the bullet of her gun would have struck the bullet coming out of Earl's gun in midair and deflected it in such a way as to save the life of Earl's innocent rival. Of course, there is no way that Jill can know which time and position that is, but since we are talking about objective justification, this is irrelevant. Likewise, it is a fact of physics and physiology that if Jill had fired a shot at a certain time t' while holding her weapon in a certain position p' the bullet of her gun would have struck Earl's skull in such a way as to knock him unconscious. She also, less fancily, could have simply shot Earl's gun out of his hands.[183] While objectivists can accept the "ought implies can" doctrine, they – unlike

their opponents – cannot understand the "can" epistemically (as in: "She couldn't know) but at best physically and physiologically. But in this sense of "can" Jill could, objectively speaking, do all the things I have just described, and thus it was objectively unnecessary and unjustified for her to kill Earl.

This holds for virtually all cases of self-defense with a firearm, and it is no different for soldiers using firearms. It is also no different for artillery or missiles. In fact, if we are talking about war, for example against an aggressive dictator, it is mysterious why war should be *objectively* necessary at all. Why not just call the dictator, or otherwise communicate with him, and tell him all his secrets: "You have your bunkers there and there, they can be destroyed with a direct hit by this and this ammunition, you planned to go tomorrow there, and yesterday you were there, and ate this and this." If the dictator thinks he is an open book – and thus, more importantly, a sitting duck – to his enemy, then this will certainly make him very susceptible to negotiation (in fact, he will probably be scared out of his wits). Of course, the other side does not have this information, but that is irrelevant for the objectivist. After all, it is certainly physically and physiologically possible to say or write the right words to the dictator.[184] Accordingly, there is always, objectively speaking, a method short of war. And thus objectivist accounts of justified self-defense or of justified war limit the scope of these justifications in such a way that they give us no guidance for the real world and will render justified lethal (or even very harmful) self-defense and justified wars not only factually non-existent but *practically* (as opposed to logically, physically, and physiologically) *impossible.*

An important implication of this result is, as already mentioned, that it reduces McMahan's (and his followers') theory of the "moral inequality of combatants" to practical irrelevance. After all, his theory is based on the view that justification defeats liability to defensive attack, which then would make justified soldiers non-liable (in contrast to their unjustified enemy).[185] Yet he makes clear that "justification provides exemption from liability only when it is *objective*," where the objectivity is solely based on facts not having to do with the agent's beliefs.[186] However, in the real world, no state and no soldier (leaving aside astronomical blind luck) will ever be able to be objectively justified. To be sure, recently McMahan has begun to talk about probabilities in the context of the necessity requirement.[187] However, he fails to explain a) why an *objectivist* account, an account allegedly concerned with *facts*, should rely on probabilities in the first place, b) which account of probability he has in mind and why (propensity or frequentist, or something else?), and c) how, exactly, this appeal to probabilities is supposed to work. In other words, this sudden talk of probabilities is a recent import into McMahan's theory that is entirely alien to objectivism and cannot be explained by it. Thus, if one accepts McMahan's objectivist premises and takes

them seriously – instead of watering them down with *ad hoc addenda* – soldiers in the real world are all moral equals: they all use objectively unnecessary and thus unjustified means in objectively unnecessary and thus unjustified wars.

In contrast to objectivist accounts, the account defended here can explain the more lenient (and thus non-objectivist) contours of the necessity criterion[188] of self-defense and of the proportionality criterion of just war theory (which combines elements that the ethics and law of self-defense keep distinct as necessity and proportionality) in a straightforward, theoretically consistent, and plausible manner. The knowledge requirement itself is the key. The argument, basically, is as follows. Morality must provide proper action-guidance. A morality concerned with the rights of innocent people cannot, on pain of inconsistency, leave it to pure blind luck whether agents violate the rights of innocent people or not. Thus, proper action-guidance must enjoin people to take *reasonable precautions* not to violate the rights of innocent people or at least not to violate them in such a way that the violation fails to be outweighed by the greater good achieved. However, *taking reasonable precautions* involves a mental state, it requires people to act *reasonably*. Accordingly, they must have a *reasonable*, that is *justified,* belief that the other conditions of justified self-defense are fulfilled. (These conditions strike a balance between the interests, and in particular the protection of the rights, of innocent defenders, innocent aggressors, and culpable aggressors).[189] Such a justified belief is only a necessary, not a sufficient condition for justified self-defense or war, since a rights violation committed on the basis of a reasonable belief is still a rights violation and hence unjustified (barring a lesser evil justification[190]). Whether there is an attack or not is a question of fact. And given that it is a factual question whether there is an attack, mere reasonableness is not enough. Therefore, my account is *mixed*: it requires justified *true* belief.[191] That is the knowledge requirement.

Enter the principle that "ought" implies "can." The ought-implies-can principle does not help the objectivist account, since Jill *can* do the things which would amount to the objectively mildest defensive means. But the principle does enable the *mixed* account to derive a less demanding necessity principle, for while she can *do* what amounts to using the objectively speaking mildest means, she cannot *know* what that means is. Even if she accidentally does it or even if she takes a wild guess and *correctly* believes that a certain measure is the objectively mildest one, that still does not amount to a *justified* belief, and thus it does not amount to knowledge. Thus, if ought implies can and if there is a knowledge requirement of justified self-defense, then the necessity requirement must be formulated in such a way that the defender *can know* what necessity requires. And hence an account that includes a knowledge requirement can straightforwardly explain why the necessity requirement must not

appeal to physical facts that are epistemically inaccessible to defenders. The objectivist account cannot and does not explain that.

3.2.2.2 *Objections to the Previous Argument*

I consider the previous argument to be a conclusive argument against objectivism in general and thus also against the practical relevance of McMahan's just war theory in particular. That it is indeed a conclusive argument is unwittingly confirmed by the nature of the objections that I have received.[192] Let us have a look.

One objection I have come across is that some people plausibly use the term "objectivism" in a different way and that therefore my attack on objectivism fails.[193] However, I am not criticizing objectivism as defined by others, but as defined by McMahan, by me, and by the entire legal scholarship. It is non-responsive to object to the proposition that pigs can't fly by pointing out that with "pig" some people might be referring – however "plausibly" – to helicopters.

So let me repeat: As defined here and in legal scholarship, objectivism about justification is simply the view that justification contains no mental element (such as knowledge or right intention).[194] As McMahan puts it: "An act is objectively permissible or justifiable when what explains its permissibility or justifiability are facts that are independent of the agent's beliefs."[195] And my argument against objectivism is that once you accept such a fact-relative account, then there is no reason – desperate *ad hoc* assumptions are not reasons – to exclude epistemically inaccessible facts from the equation. If the facts matter, and a knowledge requirement, in fact any mental element, is rejected – why then exclude facts from the equation only because you cannot know them? How can that possibly make sense; and why, therefore, shouldn't *all* facts have to be considered?

Moreover, McMahan also embraces the consideration of all facts in his reference to Parfit's definition of objective wrongness.[196] According to that definition, some "act of ours would be *wrong* in the *fact-relative* sense just when this act would be wrong in the ordinary sense if we knew all of the morally relevant facts."[197] It would appear, however, that someone who knows all the facts and thus knows what to say to a dictator in order to scare him to such an extent that she can achieve her just cause without having to wage a war and to collaterally kill innocent civilians, including babies and toddlers, would be acting wrongly if she waged war all the same, would it not? Thus, in Parfit's objective sense of wrongness, all practically possible wars in the real world will, given that we are *not* omniscient, always be fact-relatively wrong and hence fact-relatively unjustified – which means that in the real world McMahan's "fact-relative justification defeats liability" thesis has no scope of application in the context of war.[198] It logically follows that his moral

inequality of combatants thesis likewise has no context of application in the real world.

Nevertheless, allow me to also clarify that I, for one, actually *am* interested in "objective justification" in the sense of *actual, real* justification. Note also that one cannot simply avoid the issue by making a distinction between "subjective justification" and "objective justification" (and perhaps still other kinds of justification): one cannot answer substantive legal or moral questions simply by making distinctions.[199] What we are interested in is *moral* justification, and moral justification either includes a subjective element or it does not. Obviously, I defend the view that a person is *really* justified in her self-defensive act only if she satisfies both the subjective element of the justification and the mind-independent elements (the contours of the mind-independent elements, again, are constrained by the mind-dependent element). Thus, my account is *mixed*; I do not make justification simply relative to the agent's epistemic situation. I am not talking about "belief-relative" justification. I reject (in accord with many, if not all, Western jurisdictions[200]) *both* pure objectivism *and* pure subjectivism. Objectivism and objectivity are not the same. I am criticizing objectivists. My argument is that a fact-relative account implies that the necessity condition has to be understood as referring to *literally* and *objectively* the *physically and physiologically mildest means necessary* to defend oneself or another from an attack. And therefore the fact-relative account, just like a pig, won't fly.

Another objection rejects my argument from the dictator example. Allegedly, this is a "bizarre" argument, for if the course of action described in the example would work against the dictator, this would only be on the basis of luck, not on the basis of ability in the standard sense. Using the example is therefore analogous to saying that a coin flipping machine could flip 100 heads in a row, using a fair coin. This, so the objection continues, might happen, but could not be chosen, and that, allegedly, is the relevant "could." This would-be analogy completely *distorts* what I am saying. To wit, what I am saying is actually like saying that a gambler who knows all the relevant facts, that is, who knows the sequence of heads and tails for the next 100 coin tosses, can reliably use his voice and choose to spell out what the sequence is and thereby make a fortune. Just as omniscience comes in handy for a gambler, omniscience comes in handy for a warrior. Thus, it is not my argument that is bizarre, but rather objectivism. It implies that waging justified war (and engaging in justified self-defense) is practically impossible under our actual epistemic conditions (where we do not know all the relevant facts), which is precisely my argument against objectivism.

A further objection seems to realize that the anti-objectivist argument advanced here might be potentially devastating for McMahan's theory, and in the absence of any viable counter-argument therefore reacts by creatively reinterpreting this theory – so that it no longer involves an

objectivist account of justification. To wit, the objector claims that the "most plausible" interpretation of McMahan is that he is an objectivist about *rights-forfeiture* or *liability*, but would accept that the contours of the necessity requirement of the self-defense *justification* (and of other justifications) has to be constrained by a knowledge requirement in the way I suggest. However, that can only be "plausible" to someone who ignores what McMahan actually says. Nowhere in his entire work does McMahan ever talk about objective or fact-relative liability or rights-forfeiture, but he does talk about objective justification. Moreover, since McMahan insists that the necessity requirement is *internal* to liability[201] and considers both personal self-defense and defensive war against an aggressor to be covered by a "liability-justification,"[202] he cannot consistently be a non-objectivist about the necessity requirement of such justifications while simultaneously being an objectivist about liability, can he? Finally, as already noted, McMahan repeatedly emphasizes that *only* "objective" or "fact-relative" justification defeats liability and takes this concept from Parfit, who in turn refers to omniscience.[203] Thus, to claim, nonetheless, that he does *not* officially endorse an objectivist account of justification is simply false. This is certainly not changed by the fact that, as also already noted, in recent work, McMahan has imported talk about probabilities into his talk about justification.[204] A genuinely *fact*-relative morality, however, will not base its judgments on secondary and derivative facts about the probability that something will come to pass but rather on the primary fact that it *will* pass (if it does). Or to put it another way: omniscient observers need not bother with probabilities – they *know* what will happen. Thus, if McMahan now combines an officially objectivist account with talk about probabilities, then this is simply incoherent.[205] This is a further argument against McMahan's account, not for it.

Still another objection doubts the relevance of the argument. More precisely, it doubts that the argument presented here really undermines the moral inequality of combatants, since, so the objection goes, it is not clear that a person who uses excessive force for a good end is the moral equal of someone who uses it for a bad end. In reply, it should be noted that it is also "not clear" that the soldiers on one side all fight for good ends and the soldiers on the other all for bad ends. Defending civilians, babies, and toddlers on one's own side from excessive and unjustified harm, after all, seems to *be* a good end.[206] Furthermore, it should be noted that McMahan's inequality thesis is the direct denial of Walzer's moral equality thesis. With this thesis, Walzer did not claim that soldiers on both sides are moral equals in the sense that they are, for instance, equally good husbands or fathers, but in that they have "an equal right to kill."[207] It is precisely *this* claim that McMahan attacks with his inequality thesis.[208] Translated into his language, McMahan denies that the "just combatants" and the "unjust combatants" are equally *liable*.

However, he bases this denial on his premise that "the criterion of liability to attack in war is moral responsibility for an objectively unjustified threat of harm."[209] Since, according to him, the "just combatants" pose justified threats while the "unjust" ones pose unjustified threats, the latter are liable and the former are not; relatedly, the latter can abide by *jus in bello* restrictions and the former cannot.[210]

Here the argument presented above comes in: in the real world, war and killing in war is always objectively, that is, in the fact-relative sense, *un*justified because it will always be objectively *un*necessary. So in real wars in the real world, opposing soldiers on both sides satisfy McMahan's criterion for liability to attack, that is, they will be morally responsible for posing unjustified threats of harm.[211] That will make them all liable to proportionate and necessary counter-measures. Of course, no one will be able to actually apply merely necessary counter-measures[212] – and thus they will all continue posing *un*justified threats of harm and be equally unable to abide by *jus in bello* restrictions. So in a way McMahan's objectivism indeed undermines Walzer's inequality thesis as formulated: there is no equal right to *kill* here because there is actually *no* right to kill. But this is equality again. This then is what I mean with the inapplicability of McMahan's inequality thesis: the premise the thesis relies on – namely that one side is *objectively* justified in waging war and killing people – is *never* true in the real world.[213]

If my McMahan interpretation is correct, and my argument relevant to his account, but a "revisionist" would still like to object somehow, then he or she might opt for at least doubting the argument's originality. And indeed, one critic claims that my argument is unoriginal because authors like Seth Lazar and Daniel Statman have already pointed out that a literal interpretation of the necessity requirement is untenable since it leads to counter-intuitive implications.[214] Yet we do not need Lazar and Statman to point this out – Western jurisdictions have *never* interpreted the necessity requirement literally. In fact, I have criticized Statman for misunderstanding how the necessity requirement is used in Western law.[215] Fortunately, though, I do not simply make the argument that the necessity requirement must not be interpreted literally. That would indeed be unoriginal. Rather, I make the argument that *objectivism* cannot *avoid* embracing a literal interpretation of the necessity condition – at least not without importing *ad hoc* crutches that are entirely alien to objectivism – that therefore objectivism is wrong, and that therefore all arguments based on objectivism are also wrong, including McMahan's argument for the moral inequality of combatants. These are *four* original arguments.

The last line of defense is to do exactly that – import *ad hoc* assumptions as crutches. If objectivism cannot stand – well, then let us just "qualify" it. One proposal that has been suggested to me in this context is to hold that a) morality cannot require agents to perform acts that are

not among their options, and b) that an agent's options do not include acts that she does not know how to do. This proposal (apart, again, from being *ad hoc* and alien to objectivism) misses its mark. To illustrate this by using the dictator example again: an objectivist morality of war does not *require* you to stop the dictator by telling him secrets you do not know. Rather, given that you do not know how to do that, although that is the only thing objectivist morality *would* allow you to do given its interpretation of the necessity requirement, it requires you to do nothing. This, however, is not different from a situation where you can only stop an apple thief from escaping with your apple by killing him. Many "revisionists" deem it disproportionate to kill an apple thief. If that is correct but you do not know how to non-lethally stop the apple thief, then even non-objectivist morality requires you *not* to defend your property. Thus, the proposal does not succeed in blocking the conclusion not to fight when you do not know how to fight in the "objectively" justified way. Since no one can possibly know that, the only "option" here is pacifism.

The most obvious crutch, however, is something else anyway. To wit, the objectivist might feel tempted to dilute the objectivist necessity requirement through the introduction of an *objectivized reasonability requirement*.[216] This gives up the reference to an *omniscient* observer, and thus it actually leaves Parfit's understanding of objective justification behind, as well as McMahan's via his reference to Parfit. However, it does not give up on understanding objective justification as being at least independent of the mind of the *agent*. To wit, the idea of the objectivized reasonability requirement is that whether or not certain means are "necessary" would be determined from the standpoint of a *reasonable observer* or *reasonable person in the defender's shoes*. We do not need to dwell here on the details of such an account; the important point is simply that such an objectivized reasonability requirement makes the necessity requirement less harsh on the defender *without* introducing a subjective element into the necessity justification: that a reasonable *observer* would deem a shot in the attacker's chest reasonable or "necessary" under the circumstances is not the same as requiring that the defender himself act reasonably. In fact, it does not require any mental state on the part of the defender at all.

While such a maneuver would be logically perfectly consistent for the objectivist, it has to be said that not everything that is logically consistent also makes sense. If someone says, "I hate Paris, but I would really like to live there," then this is a logically coherent statement, but it is nevertheless rather odd and calls for an explanation. Likewise, if an objectivist about the self-defense justification reaches out for a reasonability requirement, even an objectivized one, one cannot help but wonder where this requirement is now suddenly coming from and how it fits into an objectivist account. After all, while the objectivized reasonability requirement does not refer to the mental states of the *defender*, it does

refer to *mental states* (of a third party): but what are mental states doing in an objectivist account of the self-defense justification in the first place?

In other words, the problem is one of explanation. If the objectivist insists on fact-relative justification that is independent of the justified agent's mind – why then introduce the reference *to someone's else's mind*? What can possibly account for that – apart from the desperate desire to patch up a forlorn theory? Conversely, if there is a reference to the mind of a reasonable observer or reasonable person in the defender's shoes – why not go all the way and demand that the agent *himself* behave reasonably? Wouldn't that make sense? "Qualified objectivists" cannot explain any of this (they seem not even to realize that these are valid questions), nor other *ad hoc* assumptions they might wish to import into their "objectivism." Instead of a sound theory, we get a patchwork of disconnected or even mutually incompatible ideas.

In contrast, again, the account presented here can explain what it needs to explain. To put it in a nutshell: Given that attacking people is *prima facie* wrong, is an offense, morality is only willing to extend the permission to do it anyway in certain circumstances if the would-be defenders *know what they are doing*. That, it would seem, is immensely reasonable and circumspect of morality. In contrast, to tell an agent that it is quite sufficient if he *accidentally* does what a *reasonable* person in his shoes *would* do seems to be rather confused and confusing advice, not advice given by a reasonable morality. Hence, the knowledge requirement. Moreover, a reasonable morality, as opposed to a confused or even malicious one, does not give with one had what it takes away with the other. Thus, if it binds justification to a knowledge requirement, it must interpret the other requirements of a justification in such a way that it is in principle *practically possible* for the agent to know them. In principle. As already said, sometimes even reasonable people will fail. Reasonable people can make mistakes. Consequently, a reasonable morality need not grant them guaranteed success. Nor, however, must it condemn them to guaranteed failure – as does objectivism. "Qualified objectivism," admittedly, does not, at least not necessarily. Just like qualified pregnancy, it also does not make sense, though.

Let me finally also note that the needed explanation cannot be provided by what appears to be the standard account of the right intention requirement of just war theory. To wit, it is often said that in order to satisfy right intention, the war has to be fought *for* the just cause, where the just cause is conceived as some good end.[217] Yet this account of right intention, by itself, cannot constrain the other just war criteria in such a way that they can provide action-guidance. The reason for this is that the argument from the "ought implies can" principle does not work here – I *can* fight *for* a just cause (for example, with excessive force) even if I do not know that the objective requirements are satisfied. Only the knowledge requirement can provide the needed constraint. Thus, the

standard account of right intention cannot really stave off the threat of pure objectivism and is therefore doomed to succumb to the very same problem of being practically useless. It would hence have to be amended with the knowledge requirement. The knowledge requirement is hence a *necessary* element of a justification to wage war.

3.2.2.3 The Mere Knowledge Requirement Is also Sufficient

But is it also *sufficient* as far as the mental element of the justification goes? Or must it itself be amended, namely with some good intention or good motivation or no bad emotions requirement in order to have a full justification? Some authors, as we already saw, answer with a "yes" to this question. My answer is "no," and since I have argued for this negative answer already in some detail elsewhere,[218] I will not replicate my line of reasoning here. Nevertheless, some reasons for the negative answer can also be found in the present book, namely in Section 4.1.7, where I argue that the intentional killing of a person is not more difficult to justify than the "merely" knowing killing of a person. If this is correct even for intention, then it is difficult to see how underlying hostile or malicious motivations or emotions could make the *act* more difficult to justify – instead of merely reflecting badly on the *agent* and his *character*. Moreover, we already saw in Section 3.2.1.2 that the motive of retribution or vengeance can play a legitimate role in proportionality considerations and thus in justifying war. Let me employ the example used there again and vary it a bit. Imagine, once more, that Anna is about to unjustly attack Bela (an imminent attack can justifiably trigger self- or other-defense). A third person, Christine, knows that killing Anna satisfies the objective justifying conditions (necessity and proportionality) but kills Anna *not* because she intends to save Bela (she couldn't care less about Bela or about averting unjust attacks), but because she sees this as a great opportunity to shoot somebody in the head, something she has always fantasized about. Or maybe she does it because she hates Anna and wants her dead. Does Christine's act of killing Anna defy law and morality here? Obviously she will not defy law if law does not require that she *intend* to defend herself or others or that she not act out of hatred before it grants her a self-defense justification. But why *should* law make such demands? Law, at least liberal law, aims at *guiding action*, not at regulating people's preferences, beliefs, predilections, or weird tastes. Liberal morality, too, should content itself with regulating actions. The way of doing this is to tell people what they must or may do under certain circumstances instead of, rather pointlessly, telling them what intentions or motivations or emotions they must or may have while doing it. Thus, since we are dealing here with the justifiability of actions, not with purity of heart, there is no reason why a mere knowledge requirement should not be sufficient as

far as it concerns the subjective element of a justification, including the justification to wage war.[219]

3.2.3 *Just Cause and the Subjective Element: Conclusions and Practical Consequences*

The account of just cause presented here differs from two very popular accounts: one considers a "just cause" as a *rights violation* (in particular as one that is severe enough to in principle justify killing), the other one as an *aim* (namely as the aim of defending against, rectifying or punishing a rights violation). On the account defended here, however, proportionality is a subcriterion of just cause; furthermore, last resort and prospects of success are subcriteria of proportionality (I will say more on them below): whether a war is proportionate also depends on what other means are available and how likely they are to achieve the positive results the war is supposed to bring about. Thus, without knowing whether the other (valid) criteria – apart from "right intention" – are satisfied, one cannot know whether there is a just cause. Moreover, I distinguish between a party having a just cause for waging *a* war and a party having a just cause for *the* war it is actually waging; or, in other words, between there being a just cause for *a* war on the one hand and *the* war *actually* being waged having a just cause on the other.

Four differences between the account presented here and the rights violation account merit particular emphasis, not least since they have important practical implications. First, on the former account (but not on the latter), a war can have a just cause although there has been no prior rights violation: there could be a necessity justification for the war,[220] or the war could be consensual (the two parties, maybe two medieval lords, consent to settle a dispute on the battlefield), or, if this science fiction example is allowed, the enemy might not be the kind of thing (a person) that can violate your rights in the first place (though it can harm you), for example, your own robot army might have malfunctioned and turned against you.

Second, the account presented here, in contradistinction to the version of the rights violation account which insists that a just cause must be able to justify killing in principle, allows for just causes that are *not* in principle capable of justifying killing. It allows for this possibility since wars do not *necessarily* involve killing.

Since a just cause is normally considered to be a necessary condition for the justification of a war, these two differences are obviously of the highest importance: the different accounts lead to different conclusions as to which wars are justified and which are not. Of course, since it looks rather strange to basically declare a war unjustified *because* it does *not* involve killing – this concerns the second difference – a defender of the rights violation account might either reject the premise that justified

wars must have a just cause, or deny that wars which do not involve killing are really wars and then supplement just war theory with some kind of just non-lethal "wars" theory.[221] The first possibility is a radical deviation from the tradition. This would, of course, be entirely acceptable if such a deviation brought any advantages. However, it does not[222]; instead, it only unnecessarily complicates things. The same is true of the second possibility. The account presented here, however, has the attractive feature that it both continues a venerable tradition and need not be supplemented with *additional* theories (of "*jus ad vim*," for example[223]) that deal *separately* with non-lethal force and *separately* with force that answers to things other than rights violations. In short, it is both simpler and more comprehensive; two features that make this theory more useful in its practical application.

Third, the rights violation account, as I argued above, makes just causes shoot up like mushrooms and in the most unlikely places. Since even the (collectively) justified side in a war will normally commit rights violations ("collateral damage") (and some of those will not only be unjust but *unjustified*), this would mean that the opposing side immediately gains a just cause for war. However, in political discourse, we have good reasons to steer clear of a just war theory that is extremely quick in conceding just causes for war to genocidal states that have become targets of justified humanitarian interventions. Such a theory would be misleading and might have a poisonous and counter-productive effect on public and political discourse, which is again a practical reason to prefer the account presented here.

More generally, the account defended here helps to avoid the dangerous perception that one can have a just cause without actually being able to fight a justified war. In other words, it helps to block the nefarious tendency to have the mere fact that a rights violation might have occurred overshadow the other just war criteria. A rights violation, even an egregious one, does not yet provide the wronged party with a just cause for war, nor does it provide a just cause to wars that are already being fought in response to such rights violations. Keeping this in mind might help to restrain a just war rhetoric that does more to rationalize aggressive impulses than to restrain and control recourse to war.

Fourth, the rights violation account uses the criterion of proportionality (and other criteria) twice: first in order to establish whether there are *in principle* conditions under which measures involving the killing of people are proportionate and necessary means to retaliate against a foreign power's insulting one's own king (for instance), and subsequently in order to establish whether this is so *in the concrete case*. This, however, is unnecessarily complicated and uneconomical. The account presented here, in contrast, is economical and that is, again, a practical advantage.

As regards the second account of just cause, which conceives of a just cause as an *aim* (like the aim of defending against or rectifying or

punishing a rights violation), I already pointed out that it leads to the entirely counterintuitive implication that an innocent people threatened with total annihilation by a genocidal aggressor does not have a just cause at all if it does *not* aim at defending itself (or at punishing or rectifying rights violations). Conversely, it also implies that Hitler had a just cause for invading Poland (after all, he wanted to defend – this might have been at least *one* of his goals – Germans living in Poland against Polish violations of their rights). Thus, the aim-account seems to be absurd and confused: it confuses just cause with a version of right intention. It also, again, has the disadvantage of letting just causes mushroom, with all the negative practical effects this would have for political and public discourse. The account presented here avoids such disadvantages.

Finally, the distinction introduced here between a party having a just cause for waging *a* war and a party having a just cause for *the* war it is actually waging, or between there being a just cause for *a* war and *the* war actually being waged having a just cause, leads to greater conceptual clarity in our discourse about just cause and just wars in general. It enables us to condemn a particular war being waged without (sometimes implausibly) having to deny that the party has, indeed, a just cause for war (although not for the war it is actually waging).

Just cause comprises all (valid) just war criteria *apart* from "right intention" or, as it should be called, the subjective element of the justification of a war: there can be a just cause without anybody intending to fight for it; indeed, without anybody knowing it. The "right intention" requirement, in the form of a requirement that the agent must have a justified true belief that the objective criteria are fulfilled, i.e., the mind-independent conditions of the justification to wage war, is indispensable for just war theory. (Conditions can be objective/mind-independent without being objectivist, that is, without being dependent on either epistemically entirely inaccessible facts or on omniscience.) It is not an *additional* criterion, but one that *constrains* the interpretation of the other criteria so as to keep them within the realm of the practically accessible and possible. To wit, without this criterion, the only possible interpretation – short of unwarranted *ad hoc* stipulations – of the mind-independent just war criteria is purely objectivist in the form of being purely fact-relative (or "omniscience-relative"). Pure objectivism, however, condemns just war theory to irrelevance since it cannot provide proper action-guidance (and due to the limits of human knowledge, it is also useless as an evaluative tool *ex post*): it is impractically demanding. This also means that "revisionist" just war theories which base their doctrine of the moral *in*equality of combatants on the idea that objective justification defeats liability are irrelevant for the real world, where objective justification is virtually inaccessible. Moreover, only the right intention requirement in the form of a knowledge requirement,[224] as opposed to requiring "good intentions" or "acceptable motivations," can solve this problem. It is

therefore necessary for just war theory. It is also sufficient, however, that is, it need not be amended by *additionally* requiring "good intentions" or "acceptable motivations." One can justifiably wage war even with the worst of intentions or motivations, as long as one knows that the objective justifying conditions are fulfilled.[225] Therefore, and since, as I said above, it is not correct that individual soldiers cannot justifiably participate in unjustified wars, inculcating soldiers simply with *respect* for the (morally valid) rules – instead of unrealistically burdening them with some kind of emotional and motivational hygiene – would go a long way toward ensuring that they will wage and fight wars justifiably.

3.3 Proportionality (Again): The Subcriteria of Prospects of Success and Last Resort

We saw above that just cause cannot be discussed independently of the criterion of proportionality. Proportionality assessments are an *integral* part of assessing whether there is a just cause for war or for *the* war one is actually waging. Accordingly, we already discussed different aspects of proportionality above when parsing the criterion of just cause. Nevertheless, we now need to come back to proportionality once more. For the two traditionally listed just war conditions of prospects of success (Section 3.3.1) and last resort (Section 3.3.2) are not, as we will see, *independent* or *necessary* criteria of *jus ad bellum*. Rather, they are two considerations that have to be *considered*, that have to be taken into account in the evaluation of *proportionality* – without being absolute *prerequisites* of proportionality. Thus, while a war without proportionality cannot have a just cause, at least *some* wars (by no means all) can be proportionate although they lack prospects of success or are not a last resort.

3.3.1 Prospects of Success

Many just war theorists subscribe to a "prospects of success" condition of *jus ad bellum*, that is, they think that starting (and continuing?) a war can only be justified if there is a good enough chance (what "good enough" means would, of course, be open to interpretation) that the war will actually be successful. I argue that success can be interpreted in this context in two ways: as winning the war or as achieving a certain political goal. The aim of winning and the aim of achieving a certain political goal, however, can come apart; and I will demonstrate that some wars can be justified although they lack prospects of success in both senses. Thus, prospects of success is not a necessary condition for the justification of war.

Let us look at this in detail. A first question to ask when examining the prospects of success condition is what "success" is supposed to

mean. A natural interpretation is that it means *winning the war*. An alternative interpretation is that it means *achieving some goal*, often, but not necessarily, a political goal.

Winning the war and achieving the goal one pursued with the war can come apart. In fact, winning on the one hand and achieving the goal one pursued on the other can come apart in many contexts, not only in war. Let us consider a domestic example. A boxer, whom everyone expects to win his next bout, bets all his money against himself and during the fight deliberately offers his opponent an excellent opportunity to knock him out, which the opponent in fact seizes. The boxer loses the fight – but makes a lot of money, exactly as he has planned. Thus, he did not win – but he did succeed in his plan. He lost successfully, as it were.

Conversely, if our boxer would have accidentally knocked out his opponent, he would have won – but not succeeded. He would have won the fight, but not achieved his goal. He would have won unsuccessfully, as it were.

Now, do belligerents need to have any chance to win a war for the war to be justified? Or do they at least need to have a chance to reach the political goal they would pursue with the war? The answer is that they need neither.

Consider the following case. The people in state A are under attack by state B, which wants a certain part of A's territory. People in state A know that they can't win against B, but they also know (where knowledge is understood as involving reasonable true belief) that if they hold B off long enough, B will not be able to then divert its resources to commit a genocide in state C as planned (because C or its allies now have enough time to prepare). They would not fight if they did not know this. In this scenario, A has no chance to win the war and knows that, but if by waging its war it prevents a genocide, its war will have been justified if it was (as it might well be) proportionate and people in A knew that. Thus, belligerents need not have (or even as much as think they have) a chance to *win* the war for the war to be justified.

But, one might object – and this leads to the second interpretation of "prospects of success" – they obviously did have a chance to achieve their political goal, namely to prevent a genocide. However, I did not say that this was their goal. I said that they *knew* that preventing the genocide would be an *effect* of keeping the enemy at bay long enough, and that they would otherwise not have fought. That makes prevention of the genocide a *condition* of the war,[226] not its goal – they do not *want* to prevent the genocide (we are assuming that they do not really care about those threatened people), rather, they think that if the war would *not* prevent the genocide it would not be proportionate, and they are moral enough to refrain from waging wars that they know to be disproportionate. (To declare the war a "success" merely because it had a good effect, namely the prevention of the genocide, and despite the fact that it

was neither victorious nor achieved a goal that the belligerents actually had, would be to abuse the term "success" and to confuse the criterion of proportionality with that of success. In other words, the proportionality principle would make the criterion of success redundant – a proportionate war would necessarily be a successful one.)

Let us then (unrealistically but illustratively) suppose that their actual goal was to keep enemy troops busy for one week in order to prevent some of the most talented singers among the enemy generals from competing in an international song contest with regard to which the people of A have considerable ambitions. Let us, moreover, further suppose that there is no remotely realistic chance that they will achieve this goal – it could indeed only be achieved by divine intervention – and people in A actually know this, but nevertheless cheer each other on with appeals like: "Let's try, let's do our best to keep them busy for a week." Would this fuller description of the scenario now make the war unjustified? And even if it did, would this lack of justification, if the war indeed is unjustified, stem from a violation of the alleged success condition?

Let us start with the latter question. Suppose the war is indeed unjustified – isn't it utterly strange to claim that it is unjustified *because* there was no realistic chance to keep the enemy busy for a week and thereby prevent the enemy generals from competing in a song contest? Would it not be much more plausible to claim that this silly goal did not provide a just cause in the first place? Conversely, if there *had* been reasonable prospects of success for achieving this goal – would *this* then have been the one missing element that would have made the war justified? It does not seem so.

But was the war indeed unjustified given the fuller description of the scenario? If it was, then I have so far not succeeded in giving an example of a war that can be justified without fulfilling the success condition – albeit, conversely, those arguing *for* a success condition in turn could not, as we just saw, use the war of our example as proof that the violation of the success condition can make a war unjustified.

One might think that the war is unjustified because it violates *another* just war condition, namely the requirement of right intention. According to many just war theorists, a just war has to be fought *for* a just goal.[227] Yet we have already seen that this is not correct: if a state engages in an intervention that will stop a genocide *not* in order to stop the genocide but simply to enhance its power (or to keep enemy generals from participating in a song contest), but nevertheless knowingly complies with the objective just war criteria, then this power's intervention is a justified war. If, on the other hand, the state intervenes without knowing that the justifying conditions are fulfilled, then the intervention is not justified. Thus, there is a "subjective element" to the justification of a war, in the sense that the belligerent must have a justified true belief that the justifying objective circumstances pertain,

but there need not be a right intention in the sense of an *intention* to fight *for* a just cause.[228]

If this rejection of a criterion of right intention in favor of a criterion of justified true belief in the presence of the justifying objective circumstances is correct, then A's war against B is indeed a justified war, and the example hence shows that prospects of winning a war or of achieving the goal pursued with it are not necessary for the justification of a war.

However, we should consider still another, probably more straightforward example, namely the case of self-defensive wars against genocides. Here it is: If the American cavalry in the Indian wars has surrounded a tribe and now wants to slaughter men, women, and children, it hardly seems to be the case that the tribe has to refrain from defense only because it is hopeless, that is, because it would by no means save them.[229]

Anne Schwenkenbecher, who admits that "[a]t first glance" this "argument is convincing," nevertheless objects that the example "is literally an instance of (multiple) self-defence; hence it cannot sustain an argument about war." She bases this objection on her claim that a "war ... cannot be an instance of self-defence in the same way as personal self-defence," a claim which, in turn, she tries to back up with a reference to Richard Norman and David Rodin.[230]

I have two replies. First, the claim that wars can *never* take the form of instances "of (multiple) self-defence" seems to rest on a definitional *fiat* I see no reason to accept and for which Schwenkenbecher provides no argument. Second, her further claim that I seem "to conflate *jus ad bellum* and *jus in bello*," and that the prospects of success criterion is an *ad bellum* criterion that "does not require each battle in a war or conflict to be likely to succeed, but the war to be successful overall,"[231] can easily be countered by pointing out that *ex exemplo* the Native American tribe will be exterminated at the end of this (last) battle, which excludes the possibility that the tribe will be able to win the overall war. Third, Schwenkenbecher does not mention (let alone address) my *second* example, which explicitly refers to a war of *aggression* (I should have said "offensive war") and which cannot be construed as an instance of multiple self-defense.

Here it is (again): "Suppose that a Native American people has already been strongly decimated by the army and knows that it can never resume its traditional way of life, but can at best vegetate on some reservation. If this people decides to set out for a last battle in order to attack its persecutors, despisers, and oppressors, and to die together in this fight, then this is by no means reprehensible, or crazy, or fanatical; perhaps it is, as Barrie Paskins and Michael Dockrill memorably put in a similar context, a 'last flicker of humanity.'"[232] In this example, the tribe is not facing an ongoing or imminent attack, but rather seeks out their enemy themselves. Thus, we are not dealing with a situation of self-defense, but

rather with a situation of offense. But the tribe still seems to be justified in going to war (provided the other valid just war criteria are fulfilled).

An objection one often encounters in this context proceeds, perhaps somewhat ironically, by precisely *rejecting* the premise of Schwenkenbecher's objection, namely by insisting that the only plausible justification of war is self-defense and by then moreover arguing that self-defense does have a success condition, which war, if its justifiability is based on the self-defense justification, therefore must also satisfy.

However, the fact of the matter is that "success" is most certainly not a traditional requirement for the justifiability of self-defense. The requirements usually mentioned for self-defense in the face of an attack to be justified are, instead, necessity, imminence, and proportionality (a list to which legal scholarship also adds the subjective element). Where, then, does the alleged success condition suddenly come from?

One could try to argue that it is implied by one of the other conditions. Imminence is obviously a non-starter for such an argument. However, one might think that proportionality and necessity are more promising candidates. While such arguments have indeed been offered,[233] they rest on misinterpretations of the proportionality and necessity conditions of the self-defense justification and hence fail. Since I have shown this in considerable detail elsewhere,[234] I shall not say any more on this issue here.

Given that there are strong arguments against the success condition of *jus ad bellum* and that attempts to undermine those arguments fail, the success condition should be discarded. This of course does not mean that prospects of success are never part of a proper assessment. In fact, in many circumstances lacking prospects of success will make the war unjustified, precisely because it will make it disproportionate. However, having prospects of success is not a *necessary* condition for the justification of wars as such (that is, for all wars), nor is it a criterion that would be *independent* of proportionality.

3.3.2 Last Resort

The same, we will see, is true for the criterion of last resort. What does this criterion say? It would be exaggerated to interpret it to the effect that one may not have recourse to the means of war before all other means are exhausted. For obviously one can always hold a further conference. Thus, one rather has to regard it as the last *promising* resort. If, for example, one wishes to save a people from a genocide that is already in progress, one cannot negotiate with the perpetrators for years, for then there will be no population left to save. Therefore, if time is pressing and it is foreseeable that nothing can be gained by negotiations and other means, but only by war, then the condition of last resort is fulfilled.

Even in this form, however, the criterion has to be rejected. It is *not* morally mandatory to use war only as a *last* resort. It can be preferable to other means in certain circumstances. A good example is economic sanctions, which can be very costly in terms of lost lives, in particular civilian lives and the lives of children.[235] If then one has the choice between either using these harsher non-military means or war, one should rather choose war.

Suzanne Uniacke argues, however, that this objection to last resort rests on a mistaken interpretation of this criterion, namely an interpretation according to which it is presumed that war is always the most harmful means of pursuing a just cause.[236] In fact, however, there is no indication that this presumption was not part of the just war tradition, and it is certainly worthwhile to point out that last resort, interpreted in this way, is clearly wrong. In any case, the interpretation Uniacke herself suggests is different. She sees last resort as a "necessity" condition and likens it to the necessity condition in self-defense.[237]

However, taking one's cue to the interpretation of the just war criterion of last resort from individual self-defense is misleading since war can rarely be justified under an appeal to self-defense alone. "Collateral damage," the killing of innocent bystanders, for example (there are others, as we will see soon), cannot be justified with self-defense but only with a lesser evil or necessity justification. (The necessity *justification* is an independent justification different from the necessity *condition* of the self-defense justification.) However, while the proportionality and the necessity condition can be neatly kept apart in the self-defense justification, this does not quite work in the case of the lesser evil or necessity justification. German legal scholarship, for example, prefers to talk in the context of the lesser evil or necessity justification of a *balance of interests*, which basically merges elements of necessity and elements of proportionality into one criterion.

Why is this? Well, defensive measures meet the necessity condition of self-defense if there is *no milder means that promises an equally safe and effective defense*.[238] Self-defense is directed against imminent or ongoing attacks, and a defender need not compromise his own safety for the benefit of an aggressor. That is, a defender need not risk more harm to himself only to make sure to inflict less harm on the aggressor.[239] There are no tradeoffs between the security interest of the defender and the interests of the aggressor involved here. Sure, the defender must not use a harsher means of self-defense if a milder means is *equally* safe and effective – but this requirement does not amount to a *tradeoff* because it accepts the complete safety of the defender as an uncompromisable baseline.

Things are different in the case of a lesser evil justification for harming innocent bystanders to save other innocent bystanders. Tradeoffs do have to be made. While there is an asymmetry between aggressors and

defenders, there is symmetry between different non-threatening and innocent bystanders, so their interests should count equally from an impartial standpoint and still have considerable weight from an agent-relative one. But this undermines the neat separation between proportionality and necessity.

While Uniacke insists on the separation,[240] she is nevertheless aware of the fact that the case of lesser evil justifications might be more messy. To wit, she takes an example where person *A* might be able to save a child's life by destroying *B*'s property, and then explains that even when there is an "alternative, inherently less harmful means of attempting to save the child's life," *A's* act might still be "not excessive" (and thus legitimated by the necessity condition) because the less harmful means might be "insufficiently reliable; for example, *A* could try merely damaging as opposed to outright destroying *B*'s property, but this would make it much less likely that *A* could save the child's life."[241]

But why *insufficiently* reliable? By what measure? One possibility is that the alternative less harmful means is insufficiently reliable *in comparison* to A's actual act. However, such a comparison can only be relevant if A's act is *proportionate*. Why? Because in the context of the lesser evil justification it makes no sense to assess the "sufficiency" of the reliability of a means by comparing it with the reliability of means that are already ruled out. For example, it makes no sense to deem an act *a* involving the destruction of property an "insufficiently reliable" means of saving a child *C* only because an alternative act *b* involving the *killing* of ten other children would be a more reliable way of saving *C*. But this then means that on this first possible interpretation of "insufficiently reliable" *A*'s act can only be necessary if it is also proportionate. And thus the neat separation, i.e., the independence of these criteria from each other, disappears.

Another possibility is that the alternative means is *intrinsically*, as it were, insufficiently reliable: it could be the case that the probability of the good happening (saving the child's life) is so low that it cannot *outweigh* the probability of the evil happening (destroying the property.) But then this alternative means would be a *disproportionate* means for trying to achieve the end. Consequently, we would have established the *necessity* of *A's* act by establishing the *disproportionality* of a less harmful alternative act. This means that on this second possible interpretation of "sufficiently reliable," too, Uniacke's following statement is misleading as far as the alleged separation between necessity (or last resort) and proportionality is concerned:

> If ... *A* would need to resort to war to reclaim territory that was wrongfully annexed by *B*, war can represent the *least harmful option* in which *A* can reacquire territory. It is a further question whether resort to war would be a proportionate response, given the

> aim (re-acquisition of territory) to which recourse to war would be a *proportionate response.*[242]

One reason why this statement is misleading is, of course, that she now talks again about the *least harmful option* although the whole point of her "insufficient reliability" argument was that means can be necessary even if they are *not* the least harmful. But if, according to the second interpretation of "insufficient reliability" just discussed, a *more* harmful means can be a necessary option *because* other *less* harmful means are "insufficiently reliable" and thus *disproportionate*, then it cannot be a "further" question whether a necessary war is proportionate, for it can hardly be necessary *because* the other means are disproportionate if it is *itself* disproportionate.

Thus, while Uniacke claims that the conflation of necessity and proportionality "can be encouraged by characterization of judgements about the risks or costs of pursuing alternatives to wars as 'considerations of proportionality,'"[243] it actually seems that this characterization suggests itself. To insist in the context of lesser evil justifications and *jus ad bellum* on a neat distinction between necessity and proportionality, modeled on the self-defense justification, only invites confusion.

I conclude that the criterion of last resort, just as the criterion of prospects of success, is not an independent, necessary condition; it is a label for considerations regarding the available alternatives to war (or to a certain war) and their (moral) costs. These considerations ultimately form part of the *proportionality* assessment.

3.4 Summary

In this first part of the book, I have examined the criteria usually listed for *jus ad bellum*, the justification for entering or continuing a war (as opposed to *jus in bello*, the rules of engagement *in* war).

I began by examining the criterion of legitimate authority. I showed that traditional just war theory did allow private, indeed even individual war. I have also shown that recent arguments in support of legitimate authority, let alone in support of the "priority" of this criterion, fail. Even more restricted and cautious defenses of the importance of legitimate authority or "authorization" have proven to be of no avail. I argued further that what often motivates the statist and conservative insistence on "legitimate authority" is the fear that doing away with this criterion will lead to chaos and anarchy. Yet I demonstrated that proponents of legitimate authority fail to provide an argument capable of showing this fear to be rational; and I have explained why it is extremely unlikely that such an argument can ever be provided. I concluded that the idea that legitimate authority is a necessary condition for the justifiability of a war should be rejected.

I have then, given their tight connection, dealt with just cause and right intention together. I argued that the criterion of just cause is not independent of proportionality and other valid *jus ad bellum* criteria. One cannot know whether there is a just cause without knowing whether the other (valid) criteria (apart from "right intention") are satisfied. This also means that "just cause" cannot be understood as an aim. Rather, just cause is a state of affairs. The advantage of this account is that it is applicable to all wars, even to wars where nobody will be killed or where the enemy has not committed a rights violation but can be justifiably warred against anyway. This account also avoids the inefficiency of having proportionality considerations come up at two different points: in a separate criterion of just cause and in the criterion of proportionality proper. Furthermore, given that many authors argue that retribution cannot be a just cause, I have demonstrated that if just causes are aims, then there is no reason to believe that retribution cannot (sometimes) qualify. I also showed that it follows on my account that retributive effects have their role to play in the proportionality calculation (and thus in just cause). Finally, I argued – with the tradition, not as some kind of exciting new insight, as some other authors would have it – that *jus ad bellum* criteria should be continuously applied during the conflict and that both the so-called "budget account" of proportionality as well as the idea that we need a special *jus ex bello* in addition to *jus ad bellum* are mistaken.

The just cause criterion is connected to the "right intention" criterion, but not in the way this is usually understood. To wit, it is not the case that a war, to be justified, must be fought *for* a just cause, that is, with the intention to advance a just cause. Rather, the connection lies in the requirement that the agent must have a justified true belief that the objective, mind-independent conditions of the justification to wage war are fulfilled (including just cause, of course). Therefore, the term "right intention" is actually misleading; and I prefer to talk of the "subjective element" of the justification in the form of a *knowledge requirement*. This requirement that the agent must know that the objective (not objectivist), mind-independent conditions of the justification to wage war are fulfilled is *indispensable* for just war theory. It is not an *additional* criterion, but one that *constrains* the interpretation of the other criteria. To wit, without the knowledge requirement, the only possible interpretation – short of unwarranted *ad hoc* stipulations – of the mind-independent just war criteria is purely objectivist in the form of being purely fact-relative. Pure objectivism, however, condemns just war theory to irrelevance since it cannot provide proper action-guidance: it is impractically demanding. This also means, as we saw, that "revisionist" just war theories which base their doctrine of the moral *in*equality of combatants on the idea that objective justification defeats liability are irrelevant for the real world, where objective justification is virtually

inaccessible. Moreover, only the right intention requirement in the form of a knowledge requirement, as opposed to requiring "good intentions" or "acceptable motivations," can solve this problem. It is therefore necessary for just war theory. It is also sufficient, however, that is, it need not be amended by *additionally* requiring "good intentions" or "acceptable motivations." One can justifiably wage war even with the worst of intentions or motivations, as long as one knows that the objective justifying conditions are fulfilled.

I then turned to the condition of prospects of success. Many accounts of just war theory posit a prospects of success condition for the justification of a war. I argued that success can be interpreted in this context in two ways: as winning the war or as achieving a certain political goal. The aim of winning and the aim of achieving a certain political goal, however, can come apart; and by way of different examples I demonstrated that some wars can be justified although they lack prospects of success in both senses. I addressed a number of objections and showed that they all fail. Thus, the prospect of success is not a necessary condition for the justification of war.

The same is true for the condition of last resort. I argued that it is not morally mandatory to use war only as a *last* resort. It can be preferable to other means in certain circumstances. A good example is economic sanctions, which can be very costly in terms of lost lives, in particular civilian lives and the lives of children. If then one has the choice between either using these harsher non-military means or war, one should rather choose war. As we saw, however, Uniacke argues that this objection to last resort rests on a mistaken interpretation of this criterion, namely an interpretation according to which it is presumed that war is always the most harmful means of pursuing a just cause. I argued, first, that there is no indication that this presumption was not part of the just war tradition. Putting the interpretive issues aside, I then examined Uniacke's own account of last resort. She sees last resort as a "necessity" condition, likens it to the necessity condition in self-defense, and claims that it can be distinguished from proportionality. In reply, I argued that taking one's cue to the interpretation of the just war criterion of last resort from individual self-defense is misleading since war can rarely be justified under an appeal to the self-defense justification alone. "Collateral damage," the killing or harming of innocent bystanders, for example, cannot be justified with self-defense but only with a lesser evil or necessity justification. However, while the proportionality and the necessity condition can be neatly kept apart in the self-defense justification, this does not work in the case of the lesser evil or necessity justification, where necessity and proportionality merge into a "balance of interests." I demonstrated this by spelling out the implications of Uniacke's unwittingly revealing interpretation of her very own examples. I concluded that the criterion of last resort, just as the criterion of prospects of success, is not an independent,

necessary condition. Rather, it is a label for considerations regarding the available alternatives to war (or to a certain war) and their (moral) costs. These considerations ultimately form part of what just war theory has traditionally called the *proportionality* assessment – which is an assessment that *combines* the distinct necessity and proportionality standards of the self-defense justification with the proportionality standards of *other* justifications.[244]

It is of course this combined concept of proportionality that figured in my characterization of "just cause" provided above. Let me repeat it here:

> An *agent* has a *just cause* for waging war (alternatively we could say: there *is* a just cause for waging *a* war) if there is an injustice, an emergency, or an agreement to wage war between the potential parties to the war,[245] such that under the given (for example geographic, strategic, military-technological) circumstances the military rectification or punishment of the injustice or the defense against it, the military response to the emergency, or the military realization of the agreement, is not necessarily disproportionate; that is, under the given circumstances *a* proportionate war is possible.

Further combining this definition of just cause with the indispensability of both the proportionality and the knowledge requirement we can conclude:

> Agents satisfy *jus ad bellum* and are hence justified in their starting or continuing a war if they *know* (which neither requires certainty nor excludes doubts) that they *have a just cause* and that their resort to war *will indeed be proportionate.*

This account, it is worth emphasizing, must be distinguished from the disconcertingly diluted version of just war theory recently presented by Christopher Finlay.[246] Finlay's "claim is ultimately that just war is possible if it means *war that is all-things-considered justifiable in the circumstances.*"[247] So far, so good (and so trivial, I may add). But then he continues:

> This requires taking account of the inevitability of error, compromise and human failure. A possible just war is ultimately one that is less evil than the evil it resists, even if this typically means falling some way short of the 'ideal' image of just war envisaged in theory.[248]

Yet one form of human failure is moral failure, like murder, for example. The best way of "taking account" of such failures is not to "ultimately"

permit them, but to clearly prohibit them in the hope that such clear guidance might help to prevent some such murderous failures in the future. So why does Finlay want to deviate from the alleged "ideal," that is, from the pertinent moral prohibitions?

The reason, or explanation, for this is that he is convinced that "[t]he Allied fight against the Nazis in the Second Word war ... *was* a just war"[249] *although* it "didn't meet the standards of just war theory ..."[250] He thinks that this war was "a *paradigm* in twentieth-century just war theory" for a just war.[251] Accordingly, says Finlay, "our judgments about the credibility of morally justified warfare are based on the example and not the other way around."[252]

First, I guess that many who were subjected to indiscriminate Allied area bombing or whose relatives were killed in such bombing might not actually consider the Allied war against the Nazis a paradigmatic example of a justified war – even if they might well concede that the Allies had a just cause for waging *a* war against the Nazis – though not necessarily the war they actually waged. Thus, Finlay's look upon the 20th century might betray a certain Anglo-Saxon parochialism. Moreover, there are also Anglo-Saxon just war theorists who most certainly *do not* see the war in question as a "paradigmatic" example of a justified war.[253]

Second, Finlay's claim that "[a] possible just war is ultimately one that is less evil than the evil it resists" not only does not follow from his remarks about failure and error but can easily be refuted by a not only paradigmatic but quite incontrovertible example of the unjustified infliction of a "lesser evil." Consider a situation where Bill is confronted with a terrorist who is surrounded by four children and about to remotely detonate a bomb that would kill five other children far away. Bill knows that he can effectively stop the terrorist from doing so either by surgically incapacitating him with a stun gun or by blowing him up with a hand grenade that would indiscriminately kill him *and* the four children surrounding him. Bill opts for the hand grenade. While taking this option might well constitute an error, a compromise, and human failure, that only makes the action erroneous, compromised, and faulty, but hardly justified. Bill clearly should have used the stun gun.

The problem is that Finlay seems to understand the term "lesser evil justification" a bit too literally. A "lesser evil justification" does not, *pace* Finlay, simply declare an act justified if it is a lesser evil than the evil it resists. Instead it comes with *side-constraints*, in particular with a balance of interests that combines both considerations of proportionality and necessity.[254] If it is known to be entirely unnecessary to inflict a great evil to avert an even greater one, then the infliction of the great evil is *not* justified. This is also true of wars. Of course, one does not know what is and what is not "objectively" necessary, as I have explained at length above,[255] but that is to be taken into account in the balance of interests and thus not a reason to simply dismiss such balancing of the

costs and benefits of alternative means in order to instead be happy with the infliction of any evil lesser than the one resisted. In fact, that would itself be an evil to be resisted. It is one of the functions of just war theory to indeed resist it.

Notes

1 Sussman (2013), p. 428.
2 Reitberger (2013), p. 64.
3 Lazar (2017a). See also (2017b), where he basically repeats the same description of the current just war debate. Incidentally, Lazar states that there is "[no] harm in the odd sweeping generalisation about the tradition." See "Ethics Discussions at PEA Soup: Cécile Fabre's 'War Exit,' with Critical Précis by Helen Frowe," available at https://peasoup.typepad.com/peasoup/2015/05/ethics-discussions-at-pea-soup-cecile-fabres-war-exit-with-critical-precis-by-helen-frowe.html, accessed on 27 October 2019. There is, however, certainly harm in misrepresenting the tradition as well as the current debate.
4 But again, this pro-state bias of international law does not go as far as to flat-out reserve the "right to wage war" to states.
5 See on this traditional distinction also Reichberg (2013a), esp. pp. 157–158.
6 Cano (2006), p. 147 (Prima Questio), my translation. See also Molina (2006), p. 221 (Articulus Primus, Disputatio Segunda). See further Cajetan, "Commentary to *Summa theologiae* II-II. q 40, a. 1"; Francisco Suárez, "On War (De bello)," Section I, article 6; Francisco de Vitoria, "On the Law of War," Question 1, article 2, all three in Reichberg, Syse, and Begby (2006), pp. 242, 342, and 311, respectively. I have used the Latin designations to make it easier for the reader to find the relevant passages in the English (or X-ish)/Latin edition of her choice. Parry (2015a) seems to be unaware of these passages, which undermine his argument concerning the role of the criterion of legitimate authority within the just war tradition.
7 Cano (2006), pp. 147/149.
8 Aquinas (2006) p. 177 (Questio 40, "De Bello," Articulus Primus).
9 Suárez (1944), p. 820.
10 Vitoria (1964), Second Relectio, Article 9. Obviously, Vitoria uses the term self-defense here in a broader sense once ("there being no other adequate means of self-defense"), namely in the sense of self-help more generally.
11 Suárez (2006), p. 345.
12 Cano (2006), p. 147 (Prima Questio, Tertia Conclusio).
13 On "right intention," see Section 3.2.2.
14 Steinhoff (2007), Ch. 1; Fabre (2008) and (2012), Section 4.3; Reitberger (2013).
15 Johnson (2013a), p. 19.
16 Ibid., p. 20.
17 Ibid, p. 21.
18 Johnson (2013b), p. 33.
19 Aquinas (2006), p. 177.
20 This suggestion has been made by an anonymous reviewer.
21 Murphy (2014), p. 37. Coates (1997), p. 124, also claims that legitimate authority is "logically prior." Thompson (2005) seems to follow him in this respect. For a critique of their positions and some further arguments against the legitimate authority criterion, see Steinhoff (2007), Ch. 1.
22 Murphy (2014), pp. 37–38.

23 Ibid, p. 71.
24 Ibid., p. 46.
25 Ibid., p. 43.
26 See Cochran (1996); Ferzan (2004).
27 Murphy (2014), p. 81.
28 Ibid.
29 Sangero (2006), pp. 122–128.
30 Suárez (2006), p. 342. See also Molina (2006), p. 263 (Articulus Primus, Segunda Disputatio, 43).
31 Murphy (2014), p. 41.
32 Ibid., p. 40.
33 Reichberg, Syse, Begby (2006), p. 189, for Aquinas's own words, see ibid, p. 192 (Questio 188, Articulus Tertium).
34 Soto (2006), p. 129 (Articulus Primus, Dubium Sextum), my translation.
35 Card (2010), pp. 708–718, 754–762; Robinson (1984), pp. 45–68, 124–125; American Law Institute (1962) (Model Penal Code), section 3.02.
36 In Section 2 I have developed and defended a definition of war that allows for private and individual wars.
37 Murphy (2014), p. 44.
38 Ibid., p. 46. For defenses of the claim – to the extent that it should be necessary to defend the obvious – that these conditions can be satisfied by rebel movements and other non-state actors, see, for instance, Steinhoff (2007), pp. 17–18; Schwenkenbecher (2013), pp. 162–165; Steele and Amoureux (2009); Valls (2000), pp. 70–72.
39 Steinhoff (2007), Ch. 1. I allowed for some rudimentary form of legitimate authority to be retained, in the sense of an epistemic requirement, see ibid., pp. 20–21. This epistemic requirement, however, is in fact already incorporated in the subjective element of a justified war, namely "right intention," which makes an independent criterion of legitimate authority redundant.
40 Murphy (2014), pp. 64–65, n. 3.
41 Locke (2002), pp. 401–402, § 203–204.
42 Gross (2013), p. 222.
43 Ibid., p. 217.
44 Williams (2013), p. 74.
45 Buchanan (2010), p. 129.
46 Nathanson (2013), p. 165.
47 Ibid.
48 The American Model Penal Code codifies the choice of evils justification in Section 3.02. As far as I am aware, all Western jurisdictions have a lesser evil or necessity justification, either explicitly or implicitly.
49 See Blake (2013), pp. 75–81.
50 Erb (2003a), pp. 1300–1301.
51 Robinson (1975–1976), p. 269.
52 Benbaji (2015), p. 6. The capitalization of "Requirement" is Benbaji's.
53 Ibid., p. 5.
54 Ibid., p. 20.
55 Ibid., p. 14.
56 Benbaji himself accepts that an authority can be overridden if it is "clearly mistaken" (ibid., p. 20).
57 See Section 3.2.2. Purves and Jenkins (2016) as well as Janzen (2016) have recently argued that the right intention criterion should be given up altogether. For a response specifically to them, see Steinhoff (2008). Note also in the present context that if they were correct, then their entirely

objectivist position would undermine Benbaji's epistemic or probabilistic argument for the "veto rights" of "Beneficiary" and "Bearer" as much as my account of right intention.

58 Benbaji (2015), p. 17.

59 Ibid.

60 More generally, other-defense does not become unjustified only because the defended person does not want to be defended. Neither a police officer nor a private citizen needs the pacifist's consent to use necessary force against a person who is about to murder the pacifist. Even if such defense would involve some "wrong" against the pacifist (which I strongly doubt), this wrong is not weighty enough to undermine the justifiability of the defense. See in this context my criticism of Finlay's (2010) claims to the contrary. Uwe Steinhoff, "Finlay on Legitimate Authority: A Critical Comment," unpublished ms., available at https://philpapers.org/rec/STEFOL-2. In fact, since self- and other-defense (unlike the lesser evil justification) is also a *prerogative*, the supposed "wrong" here would appear to have virtually no weight at all. See on the idea of self- and other-defense (also) as a prerogative Steinhoff (2020), Section 2.1.2.6. The importance of this element is overlooked by Parry (2017).

61 Lazar (2016c), p. 220.

62 Ibid., p. 224.

63 Ibid., p. 213.

64 Steinhoff (2007), p. 97.

65 Lazar (2013).

66 Lazar (2016c), p. 220.

67 Ibid., p. 221.

68 Vitoria (1964), Second Relectio, § 13.

69 Kamm (2011), p. 119.

70 This also affects Lee's (2012) account, according to which a "just cause is a *justifying reason*, that is, a reason for an action, such as going to war, that morally justifies (or helps to justify) it. A state goes to war for a reason or reasons, which may be just or unjust." See ibid., p. 73. However, although Lee clearly conceives of a reason here as something that people are actually acting on, his position could be modified (and saved from said objection) by insisting that there can *be* a reason to do something without anybody *knowing* that there is such a reason. See Steinhoff (2000), pp. 87–88. Yet it should be pointed out that Lee's own official account of a just cause as a reason that helps to justify a war is incompatible with his neat separation between just cause and the other *jus ad bellum* criteria. Proportionality, prospects of success, and even right intention also help to justify a war. Yet while I argue below that just cause is indeed not independent of proportionality and its subcriteria, it is independent of right intention. Therefore, my two more precise formulations of "just cause" below are preferable to Lee's account of just cause as justifying reason.

71 For a related example, see McMahan (2005b), pp. 15–16. McMahan, however, denies that such wars have a just cause. Yet he has no plausible argument for this denial. Moreover, while McMahan rightly states that one's use of the terms "just war" and "just cause" should preserve a certain "conformity with the ways in which they are commonly used," his own use of "just cause" decidedly deviates from common usage. To give just one example: on his account (both old and new), which connects just cause to the moral responsibility of those warred against, a people defending itself against a collective of genocidal but psychotic (and hence non-responsible)

enemies would have no just cause for war. However, according to common sense, a proportionate war of self-defense against genocide certainly does have a just cause, whether the *génocidaires* are psychotic or not.

72 I do not regard last resort and prospects of success as *necessary* conditions for the justification of a war, though; still, they need to be taken into account. See Section 3.3. Compare also Steinhoff (2007), pp. 23–25 and 28–30.

73 Suárez (1944), p. 816, my emphasis. Compare also Cano (2006), p. 151 (Prima Quaestio, Sexta Conclusio).

74 Molina (2006), p. 271 (Articulus Primus, Disputatio Segunda, 50), my emphasis.

75 Ibid., p. 247 (23), my emphasis.

76 See Section 2.5.

77 See, for instance, Gross (2010), Ch. 4; Allhoff, Adams, and Henschke (2013), Part III.

78 See the United States Department of Defense Non-Lethal Weapons Program at http://jnlwp.defense.gov/.

79 See Section 2.2; see also McMahan (2009a), p. 5.

80 Moreover, the idea is also – quite rightly, as we just saw – accepted by one of the authors I am criticizing here, namely McMahan. We will get back to this below.

81 Not necessarily in absolutely all wars.

82 McMahan (2009a), pp. 9–10.

83 See Sections 4.1.5 and 4.1.6.3. See also Steinhoff (2020), Sections 3 and 4.3.2.

84 This latter view, unlike the former, *also* succumbs to the above-mentioned problem that it simply stipulates that only rights violations can be just causes – but there is no reason to accept such a stipulation. I overlooked this actually rather obvious additional problem in Steinhoff (2014a).

85 McMahan (2005b).

86 McMahan (2014a).

87 McMahan (2005b), p. 11.

88 McMahan (2014a), p. 434.

89 He had already talked of "potential liability" in McMahan (2009a), pp. 19–20, but made no further use of the concept there.

90 Ibid., p. 8. To *wrong is to violate/infringe a right*.

91 Ibid., pp. 7–37; see also McMahan (2012b), p. 296.

92 McMahan (2014a), pp. 433–434.

93 Ibid., p. 433.

94 Ibid.

95 McMahan (2009a), p. 35.

96 An additional reason for rejecting McMahan's definitions of "just cause" and also of "just combatants" and "unjust combatants" is that they make his thesis of the "moral inequality of combatants" true by stipulative definition (and irrelevant for practice). I had already pointed this out in Steinhoff (2012a), Section 4.1. I further develop and defend this argument below in Section 4.1.6.2. McMahan has never addressed this issue, let alone overcome it.

97 McMahan (2014a), p. 434.

98 Anscombe (1981), pp. 72–81, esp. at 73.

99 The idea of a (justified) consensual war will seem absurd to many people. However, see Steinhoff (2007), pp. 23–25. Eberle (2016), pp. 84–85, esp. n. 39, criticizes my view, but has little to offer beyond stipulation. He promises

his readers to offer "a full-scale critique" of my "dubious claim" on another occasion. I will postpone my criticism of his own dubious claims until then.

100 In Steinhoff (2014a) I had forgotten to include emergencies in my final formulation of the conditions of a just cause, although of course the importance of emergencies (which give rise to necessity justifications) was and is part of my criticism of accounts which claim that just cause is necessarily connected to wrongs or injuries.

101 See Brunstetter and Braun (2013). These two authors overlook the fact that we can also "recalibrate" (to use their term) our understanding of the moral use of force as I did here, namely by recalibrating *jus ad bellum* instead of coming up with an additional theory of *jus ad vim*.

102 There are many different characterizations of what "retribution" and the philosophical view called "retributivism" amount to. For an overview, see Walen (2015). For a critical discussion of retribution as a good insofar as it satisfies the victim's desire for revenge, see Boonin (2008), pp. 152–154 and 269–275. I find Boonin's criticism of this "revenge-based retributivism" entirely unconvincing, but need not go into this here.

103 Kemp (1996); McMahan (2008d); Luban (2012); Biggar (2013), p. 161; Tadros (2014), pp. 19–20.

104 Ferzan (2004); Kaplan (2013), pp. 236–238.

105 See Sections 4.1.3 and 4.1.4. See also Steinhoff (2020), Sections 2.2.3.1, 2.2.3.7–2.2.3.10, and 4.1–4.2.

106 Steinhoff (2013a), pp. 150–153.

107 Rodin (2002), pp. 127–138.

108 Rodin (2014a), p. 81.

109 Rodin (2002), pp. 43–48 and 127–138.

110 Section 4.1.2.

111 Luban (2012), p. 305.

112 Ibid., p. 322.

113 It would also be interesting to know whether Luban thinks that treason should not be judged in the state against which it is committed.

114 Luban (2012), pp. 317–318.

115 Ibid., p. 318.

116 See Strawson (1962).

117 Luban (2012), p. 319.

118 Ibid., p. 326.

119 Luban might think that this is clearer in the case of defense than in the case of punishment, but in fact there exists a heated debate within present-day just war theory as well as self-defense theory more generally on who, exactly, is "liable to defensive attack" and who is not. See for instance various contributions in Fabre and Lazar (2014) or in Coons and Weber (2016).

120 Luban (2012), pp. 326–327.

121 Ibid., pp. 329–330.

122 Ibid., pp. 300–301.

123 McMahan (2008d), pp. 83–84.

124 Ibid., p. 84.

125 McMahan (2009a), pp. 60–65; (2011b), pp. 555–559. The fact that here McMahan also declares people liable who are responsible for *appearing* to be a threat of unjustified harm does not undermine his objectivism, for they do in fact have to be responsible for this. Incidentally, how someone can "appear" to be a threat if he does not appear at all (bombers usually don't see who they bomb) is not entirely clear.

126 Walzer (2006); Lazar (2009) and (2010).

127 McMahan (2011b), p. 559.
128 See Uwe Steinhoff, "To Be Killed or Not to Be Killed: On McMahan's Failure to Draw a Line Between Civilians and Combatants," ms. available at http://philpapers.org/rec/STETBK-2.
129 McMahan (2008d), p. 84.
130 There might actually be an exception to this rule, but I think this exception will have little if any relevance for practice; I will therefore not pursue it here.
131 McMahan (2008d), p. 84.
132 See Section 2.5.
133 For a history of human warfare, see Gat (2008).
134 Wilson, Boesch, Fruth, *et. al.* (2014).
135 See Section 2, esp. 2.3.
136 See Texas State Historical Association, "Glanton, John Joel," available at https://www.tshaonline.org/handbook/online/articles/fgl02, accessed 18 April 2016.
137 Most members of the gang were in fact killed in a retaliatory attack by the Yuma. Given the location of the attack, there is a possibility that innocents were killed too. However, my point is simply that killing the whole group would certainly have been possible without thereby also harming innocent bystanders. See ibid.
138 McMahan (2008d), p. 84.
139 Luban (2012), p. 299, my emphasis.
140 For further elaboration, see Steinhoff (2020), Section 2.2.5.4.
141 Moellendorf (2008) and (2015); Rodin (2008) and (2015); Fabre (2015).
142 Steinhoff (2007), p. 2; Schulzke (2015); Eberle (2016), pp. 105–107. Schulzke (2015), p. 266) claims that "[c]ontemporary just war theorists tend uncritically to accept the synchronic conception of *jus ad bellum*" (according to which there is *jus ad bellum* throughout the war if it is there at the beginning). I don't think that is quite correct, and I at least have explicitly stated that *jus ad bellum* applies to both the initiation and continuation of war. Be that as it may, unlike the three authors from note 141, Schulzke realizes (ibid., p. 266) that "[m]ost medieval and early modern just war theorists ... do not impose temporal restrictions on the application of concepts" (namely on the just war criteria), which means that, indeed, traditionally *jus ad bellum* already covers "jus ex bello," "jus terminatio" or the ethics of "war exit."'
143 Rodin (2015), p. 677.
144 Ibid., p. 678.
145 Ibid., p. 687.
146 Ibid., p. 689.
147 Ibid., p. 687.
148 See also Moellendorf (2015), p. 659.
149 Rodin (2015), p. 687.
150 Ibid.
151 Ibid., p. 688.
152 Moellendorf (2015), p. 663.
153 McMahan (2015), pp. 703–704. He provides another good and rather convincing example, see ibid., p. 708.
154 Moellendorf (2015), p. 663.
155 Ibid., pp. 661–662, italics removed.
156 This is also true for Lazar's (2018) "discount view." Moreover, Lazar's account succumbs to the very "problem" that he, just like Moellendorf (see

the last paragraph in the main text), takes to be a reason for *rejecting* the prospective view. Ironically, this might be the least of its many problems. For a detailed critique, see Uwe Steinhoff, "Lazar on 'Moral Sunk Costs' and the 'Discount View,'" unpublished ms.

157 If one *knows* that one will be attacked again and again and perhaps that each defense would produce slight collateral damage, then this could go into the proportionality consideration. However, this would of course be forward-looking.

158 See, for instance, Coady (2008), pp. 98–99; Fisher (2011), p. 72; Lee (2012), p. 83; O'Brien (1981), pp. 34 and 166; Pollard (2013), pp. 94–95; Regan (1996), p. 85.

159 This I had not yet made clear in Steinhoff (2007), pp. 27–28.

160 These are sometimes not even mentioned anymore or at best in passing – an example is Lee (2012), pp. 69 and 73–78 – although recently there has been a renewed interest in the punishment justification, mostly by way of rejecting it. See for instance Gould (2009) and Luban (2012). Kaplan (2013), however, provides a qualified defense of punitive warfare.

161 See on this, for example, Rodin (2002), chs. 6–7.

162 See, for instance, Fisher (2011), p. 67. Admittedly I, in the past, also only *listed* it under *jus ad bellum*, but at least I also *discussed* it with respect to the individual soldier. See Steinhoff (2007), pp. 2–3 and 28–28.

163 See, for example, Aquinas (1948), II-II.66.8: "Nevertheless even they who are engaged in a just war may sin in taking spoils through cupidity arising from an evil intention, if, to wit, they fight chiefly not for justice but for spoil." I thank Gerhard Beestermöller for steering me to this passage.

164 See Erb (2003a), p. 1333, Rönnau and Hohn (2006), p. 470, Günther (2010), Rn 134. For an overview of the Anglo-Saxon debate on this issue, see Sangero (2006), pp. 231–236. I submit that the fact that this construal of the subjective element is popular in the legal scholarship provides it with additional credibility.

165 All McMahan (2005b), p. 5, has to say on the issue is: "It is not obvious to me that Right Intention is a valid requirement [for a just war]." Other "revisionists" seem to be equally skeptical or even seem to take the irrelevance of the criterion for granted.

166 Purves and Jenkins (2016); Janzen (2016). For a response to them, see Steinhoff (2018c).

167 Clear examples are Eberle (2016) and Biggar (2013), esp. Ch. 2. Murphy (2014), pp. 92–138, on the other hand, thinks that motives are at best relevant in an indirect way, but he does emphasize the importance of intention.

168 Aquinas (2006), p. 177 (II-II, q. 40, art. 1). Aquinas quotes from Augustine, *Contra Faustum* (Book XXII, Art. 74).

169 Objectivism about justification is simply the view that a justification contains no mental element (like knowledge or right intention). That is compatible with appealing to notions of "objective probability" or to what an idealized observer would say. However, objectivists would then need to *explain* why one should not simply forget about probabilities and idealized observers and directly appeal to the *facts* (as, again, many objectivists explicitly do). I have nowhere found any plausible explanation for this; in fact, objectivists have so far not realized the impracticality problem that I describe below. In contrast, I straightforwardly explain why a knowledge requirement cannot simply be *combined* with a fact-relative account but instead *constrains* the interpretation of the objective criteria (foremost necessity).

170 See McMahan (2009a), p. 43.

171 Ibid., esp. pp. 38–51. For a critique of McMahan's claims (as well as similar claims by others), see Sections 4.1.5 and 4.1.6.3. See also Steinhoff (2020), Sections 3 and 4.3.2; and Hosein (2014) and (2017).

172 This is not to say that the thesis cannot be reformulated with the help of a mixed account, but such a reformulation will be more difficult than some might expect. However, the arguments made in the articles mentioned in the previous note would also apply to such a reformulation, since they do not rely on the inequality thesis being formulated in fact-relative terms. Moreover, it should be noted that it would not inspire confidence if philosophers who first insist that *only* objective justification defeats liability suddenly change their mind in order to protect their preferred conclusions.

173 This was also an implication of a position I had defended earlier, which endorsed what *almost* amounted to a mere knowledge requirement. I have meanwhile corrected myself and now endorse indeed a *mere* knowledge requirement. For a detailed explanation of the difference and why the latter position is preferable, see Steinhoff (2020), Section 2.2.5.4, esp. pp. 195–197.

174 Christopher (1995), p. 229. I have come across the objection that one could follow Walen in distinguishing acts from actions, so that the "act" may be "justified" or "permissible" without satisfying the *Dadson* principle while the "action" is not, and in that way have one's cake and eat it, as it were. However, one simply *cannot* have one's cake and eat it, and this case is no exception. See Steinhoff (2020), pp. 196–197.

175 As Fletcher (1978), p. 557, states: "The consensus of Western legal systems is that actors may avail themselves of justifications only if they act with a justificatory intent." However, many Western legal systems seem to consider knowledge as sufficient. I argue elsewhere that it is indeed sufficient, but this point need not concern us here. The argument here is rather that it is *necessary* and cannot be *replaced* by specific intent or reference to motivations.

176 For overviews, see Sangero (2006), pp. 217–237; Christopher (1995).

177 Robinson (1975–1976), p. 291.

178 Robinson (1996), pp. 47–48; Hurd (2008), pp. 263–264.

179 Ibid., p. 263.

180 Incidentally, it seems to me almost deliberately obtuse to simply reiterate here that one is culpable for acting on the intention to do what would be objectively impermissible if the world were as the agent thinks it is. Again, if this is *not* immoral – whence the *moral* complaint?

181 Christopher (1995); (1994); (1998a); (1998b).

182 For some such doubts, see Dilloff (2002), pp. 1558–1564; and Westen and Mangiafico (2003), p. 877, n. 92. Moreover, Rivera-López (2006) shows that some accounts of justified self-defense that include a subjective element also run into a logical contradiction. As it stands, therefore, I prefer not to rely on Christopher's arguments since I am not entirely convinced by them.

183 It is mistaken to claim that this is a question not of knowledge but of ability. She simply has the physical ability to do it (she can hold her hands in all kinds of positions), and she can practically and reliably do it if she *knows* what to do (knowledge, incidentally, need not be propositional): so if she knows how to hold the gun and when to pull the trigger then that is sufficient for her to do it (she could even be blind: hand-eye coordination has nothing to do with it). And this is so every time this happens to her (as long as she has the relevant knowledge). The dictator example in the next

paragraph, which does refer to propositional knowledge, makes the point even clearer.

184 Thus, this example is clearly about knowledge. After all, if the person knows what to say, there is no problem of ability: people reliably have the ability to pick up a phone and to utter the sentences they want to utter.

185 See notes 170 and 171.

186 McMahan (2009a), p. 43. See also McMahan (2013), p. 135; and (2014c), pp. 118–123.

187 McMahan (2018), pp. 435–437.

188 The criterion I propose is the following: "A defender fulfills the necessity requirement of justified self-defense if and only if he or she chooses a way of defending himself or herself that would in the eyes of a reasonable person under the conditions of the self-defense situation be (one of) the *mildest means* among those means that promise a *safe, instant and conclusive defense* against the attack or – if this is not possible under the circumstances – among those means that *promise the best possible defensive results*. The defender, however, is free (but not required) to forego the *best* defensive results for the purposes of choosing an even milder means even if this heightens his or her own risk of being harmed." That this is a non-objectivist criterion can be seen in the fact that it refers to a merely reasonable observer (where reasonability is partly defined by community standards), not to an omniscient one, and thus also not to all the facts. I have defended this criterion at length in Steinhoff (2020), Section 2.2.2.

189 See ibid., Sections 2.2.1 and 2.2.4.

190 However, plausible lesser evil justifications are mixed too – they refer to both certain facts and certain epistemic requirements. For details, see ibid., Section 4.2.

191 So yes, there is still a reference to objective facts (again: the account is *mixed*). But the truth the agent needs to know under the account presented here is in principle accessible because the knowledge requirement functions as a *constraint* on the *range of facts* the agent needs to know. There is no such constraint in the objectivist account. Thus, there is a difference between objectivity and objectivism.

192 These objections are all taken from the comments of different anonymous but clearly "revisionist" referees who commented on a previous draft of this Section 3.2.2.

193 This particular critic seems fond of Lazar's definition of objective wrongfulness (and thus, implicitly, of objective justification). That is not a good choice. Lazar (2015), p. 6, says that an act "is *fact-relative wrongful* if it is wrongful in light of all the non-moral facts." Due to the "all," however, this definition inescapably succumbs to the anti-objectivist argument presented here. Moreover, the definition is unhelpful as far as definitions go. Unless the meaning of the second occurrence of "wrongful" is explained, the definition is uninformative. If it is to be understood in the fact-relative sense, it is circular. If, in contrast, it is to be understood in, for example, the belief-relative sense, then the definition would appear to be incoherent, to the extent that it is even intelligible. If, finally, Lazar, like Parfit, is relying on some ordinary understanding of wrongfulness, then it should be pointed out that Parfit acknowledges that the ordinary understanding is most certainly not the fact-relative one. See Parfit (2011), esp. pp. 159–160. But to say that an act is *fact-relative wrongful* if it is wrongful – in some sense that is *not* fact-relative! – in light of all the non-moral *facts* does not make sense. Haque's definition runs into exactly the same problems. See Haque (2017), p. 8.

194 For a classic statement of objectivism in legal scholarship, see Robinson (1996). For a critique, see Steinhoff (2020), Section 2.2.5.
195 McMahan (2009a), p. 43.
196 McMahan (2013), p. 135.
197 Parfit (2011), p. 150.
198 Nor in any other context, but this need not concern us for present purposes. But see Steinhoff (2020), Section 2.2.5.
199 "Revisionists" are very fond of this distinction, which leads them to ignore the substantive issue and the possibility of a mixed account – although the mixed account of justified self-defense is the dominant one in Western jurisdictions. For a critique of the strategy of simply distinguishing different "senses" of "ought" that is equally applicable to "justified," see Zimmerman (2008), pp. 6–8. Note also, as an aside, that Parfit never gives a straightforward answer to the question whether justification in "the ordinary sense" includes a mental element or not. In fact, he does not even ask the question. (His definitions of fact-relative, belief-relative, and evidence-relative justification, remarkably enough, *all* explain these concepts with reference to someone who would be justified in the *ordinary* sense if he *believed* or *knew* something. But the way this is done does not amount to presupposing the necessity of a mental element for ordinary justification; it rather side-steps the issue. That is unsatisfactory.) Moreover, the substantive moral distinctions Parfit seems to be after can be made by using and combining concepts like justification, excuse, or rights violation in their ordinary senses. Replacing them with *extra*ordinary uses of the term "justification," therefore, leads only to confusion, not to clarification.
200 See notes 174, 175, and 176.
201 For example, McMahan (2009a), p. 14; (2014a), p. 433. He defends the view at length in McMahan (2016), esp. pp. 195–206.
202 McMahan (2013), p. 124; (2012a), p. 138; (2014c), p. 115.
203 McMahan (2013), p. 135. Parfit (2011), p. 150.
204 McMahan (2018), pp. 435–437.
205 This incoherence is also confirmed by the fact that after he has introduced the reference to probabilities all that McMahan comes up with is the (in terms of action-guidance quite uninformative) claim that "what the necessity constraint requires is that one choose, from among the proportionate defensive options, the one that is overall morally best" (ibid., p. 437). If what is "morally best" is to be assessed from the fact-relative perspective, then all the objections adduced above return. And if it is not to be assessed from a fact-relative perspective, then *this* kind of justification with *this* necessity constraint *cannot* defeat liability according to his own repeated assertion that only fact-relative justification can do so.
206 See also Steinhoff (2012a), Section 4.1.
207 Walzer (2000), p. 41. Obviously, Walzer means a liberty-right.
208 See McMahan (2009a), p. 4.
209 Ibid., p. 35.
210 Ibid, p. 6.
211 Could one somehow still get to unequal liability by positing unequal responsibility/culpability? If necessity is, as McMahan claims, internal to liability, certainly not. Second, even if one could do that: that would be a *different* argument from the one based on unequal justification. Moreover, such a move would appear to have no practical relevance unless it implies the justifiability of unequal treatment – which is not the case given that only objectively necessary counter-measures against liable persons are

permissible anyway. Finally, variances in culpability/responsibility will not neatly correspond to sides in a conflict.

212 That I am not *able* to inflict necessary force on you does not imply that you are not *liable* to it. That you are liable to it only implies that you *would* not be wronged by it *if* I inflicted it on you. It implies absolutely nothing about my abilities.

213 Thus, the solution implied by McMahan's objectivism is pacifism. But while there are some good arguments for pacifism, an objectivist account of justification is not one of them.

214 The critic refers to Statman (2011) and Lazar (2012).

215 Steinhoff (2012c), p. 231, or (2020), pp. 51–52. I have also, for other reasons, criticized Lazar's account. See ibid., pp. 98–99.

216 Another possibility that might come to mind is to appeal to accounts of objective probability. This would amount to using the usual suspects: propensity accounts or frequentist accounts. I will not discuss this alleged possibility since I have to readily admit that I have not the slightest idea how one could even begin to make sense of it. However, if objectivists think that they can provide an even remotely plausible objectivist probabilistic rendering of the necessity requirement, then I would like to see it.

217 See note 158.

218 Steinhoff (2020), Section 2.2.5.4.

219 Again, for a detailed argument to this effect, see Steinhoff (2020), Section 2.2.5.4.

220 One might object here that the war then is at best justified, but not *just*. I agree, but wars in which innocent bystanders are killed ("collateral damage") are also at best justified, but not just: after all, they violate the right to life of innocent bystanders, and that is *un*just. The term "just war theory" is a misnomer; it should rather be "justified war theory." Yet the former term is used for reasons of tradition, and I use the term "just cause" in the same spirit: with an understanding that it refers to something that is necessary for the *justification* of war. Necessity justifications, however, are justifications too. See also Neu (2012) and McMahan (2012c).

221 The first option is McMahan's, as we saw above.

222 McMahan does certainly not spell out any advantages such a deviation from the tradition might have.

223 See note 101 above. In that context, it is also entirely unnecessary, *pace* Moellendorf (2008) and (2015), Rodin (2008) and (2015), or Fabre (2015), to "complement" *jus ad bellum* with a category like "*jus terminatio*," "*jus ex bello*," or "war exit." *Jus ad bellum* concerns the justification for entering *and continuing* a war (see Section 3.2.1.3), which should be quite obvious: if you *cease* to have a just cause, you cannot be justified in *continuing* the war anyway.

224 Note again that if one accepts that there *are* mind-independent requirements (for example the presence of an imminent attack in the case of the self-defense justification), justified belief cannot be enough; there must be justified *true* belief, and thus a *knowledge requirement*.

225 See also Steinhoff (2020), Section 2.2.5.4.

226 See Kamm (2011), pp. 119–128.

227 See note 158.

228 See Section 3.2.2, esp. 3.2.2.3. See also Steinhoff (2007), pp. 25–28; and (2020), Section 2.2.5.4.

229 I first adduced this example Steinhoff (2007), p. 29.

230 Schwenkenbecher (2012), p. 97.

231 Ibid.
232 Steinhoff (2007), p. 29. Paskins and Dockrill (1979), p. 176.
233 See Statman (2008) and Statman (2011).
234 See Steinhoff (2020), Sections 2.1.1.1, 2.1.1.7, 2.2.2.3, and 2.2.5.2.2.
235 Compare Pierce (1996); Steinhoff (2007), pp. 28–29. Aloyo (2015) has recently made the same point again.
236 Uniacke (2018), p. 108.
237 Ibid. Uniacke uses the scare quotes herself.
238 For a representative statement of this account in one of the leading German commentaries on the penal code, see Erb (2003a), esp. p. 1296. For my own sustained defense of this account, see Steinhoff (2020), Section 2.2.2.3.
239 Lazar (2012), esp. p. 12, denies this without argument. For arguments as to why this denial is implausible, see Steinhoff (2020), Section 2.2.2.3.
240 Uniacke (2018), p. 110.
241 Ibid., pp. 106–107.
242 Ibid., p. 110.
243 Ibid.
244 Of which the impartial lesser evil justification is only one example, as we will see below in Section 4.1.4.
245 See note 99.
246 Finlay (2019).
247 Ibid., p. xiv.
248 Ibid., p. xiv.
249 Ibid., p. 92.
250 Ibid., p. 97.
251 Ibid., p. 93. Emphases in the original.
252 Ibid., p. 94.
253 Different contributions in Primoratz (2004) attest to that.
254 See the discussion of a balance of interests in Section 3.3.2. See also Steinhoff (2020), Sections 4.1 and 4.2, esp. pp. 288–289.
255 Sections 3.2.2.1 and 3.2.2.2.

4 *Jus in Bello*

Justifying the Use of Force in War

Jus in bello concerns legitimate conduct in war, that is, it lays down the moral rules of engagement. Two criteria are usually mentioned: the principle of discrimination (or distinction) and (*in bello*) proportionality. The function of the first criterion is to distinguish legitimate from illegitimate targets in war; the function of the second is to determine which courses of action are proportionate (both toward the targets and regarding the so-called collateral damage, that is, regarding innocent bystanders and their property or even regarding animals and the environment). There are two salient ways to answer the questions raised by the two criteria. One approach is to decide what is proportionate and which objects or persons constitute legitimate targets in war by simply relying on the answers given to these questions by ordinary peacetime morality and applying these very same answers to the case of war. I will discuss this first approach, exemplified *par excellence* by "revisionist" just war theory, in Section 4.1. In Section 4.2, in contrast, I reject the moral fundamentalism of this first approach and defend an alternative. I shall explain how moral mechanisms based on a principle of *reciprocity* cause widely accepted laws and conventions to be *partly constitutive* of the *moral* rules that apply in a conflict. This moral force of widely accepted laws and conventions means that we are not enslaved (as "revisionists" think) to a "deep morality" of war but have the moral power – precisely *through* the customs and laws of war – to at least *partially* devise the morality of war.

4.1 Ordinary Morality and *Jus in Bello*: Correcting "Revisionist" Misrepresentations of Domestic Peacetime Morality and Its Implications for War

By dividing this book into a part on *jus ad bellum* and a part on *jus in bello*, I am of course suggesting that these parts *can* be kept apart (in a sense to be clarified in the following). In particular "revisionist" authors deny this. McMahan claims that "unjust combatants" (who, by his definition, fight in a war that "lacks a just cause"[1]) *cannot* abide by *jus in bello* restrictions.[2] I will show below that McMahan's terminology and

his definitions are unhelpful since they are question-begging.[3] Instead of talking about "unjust combatants," we should talk about combatants on the (or a) unjustified side of a war (where "side" refers to a collective), or about combatants fighting in an unjustified war (where "war" refers to a collective action).[4] Once we do that, we can see that the claim that individual combatants cannot justifiably participate in a collective's (for example a state's) unjustified war is wrong. To show this, one need not even – as revisionists might suspect – invoke some special features of war that absolve individual soldiers of their moral responsibility. Instead, one can simply point to the following quite general truth: it is not the case that the *individual* participation in, or support of, an unjustified *collective* action is necessarily unjustified itself.

Imagine, for example, that in some city street, small group A tries to murder the innocent individuals of group B. There is individual C, who cannot stop A by herself but can instigate the individuals D, E, and F, who are known both for their considerable fighting skills and for their brutality, to stop A. C knows that if she does so instigate D, E, and F, A will become the victim of an impermissible collective act, namely of excessively brutal other-defense. Nevertheless, if the damage done to A is still much less bad than the death of the members of group B would have been, and C has no other means to interfere, than C is clearly allowed to support D's attack against A. She is also allowed to *join* D, E, and F in their attack against A if this heightens the chances of the defensive collective succeeding in their rescue of B. (For starters, she would, if needed, have a lesser evil justification. It is not clear that she needs one, though, for it is not clear that her participation *is* an evil.) In short, that the *group* uses excessive and thus unjustified violence (or pursues illicit goals, for that matter) does not imply that each *member* does. This ordinary morality of the peacetime use of force can be extended to the case of war: individual soldiers can abide by *jus in bello* even if the side they are fighting on does not satisfy *jus ad bellum*.

Moreover, this separation also works in the other direction. To wit, a collective using force can have *jus ad bellum* on its side even if each and every of their fighters violates *jus in bello* restrictions. For instance, imagine a group of five democratically decides to help group B of our example. However, as things stand, only two members of the group are able to do the actual fighting (let us further say these two voted against the use of force, but feel bound by the majority decision), and everyone in the group knows that the two will use excessive force. They also know that unless the group sends the two into the fight, the members of group B will be killed. Under these conditions, the group still has a lesser evil justification to decide to resort to war; it has *jus ad bellum* on its side, although the individual fighters will violate *jus in bello*. This is also true writ large, that is, if we are talking about a state deciding to go to war, for example to stop a genocide. The decision to engage in a humanitarian

intervention can be justified – namely as long as the resort to this war remains proportionate – even if it is foreseeable that the combatants will violate *jus in bello* restrictions. Of course, if it is reasonably possible for the state to prevent its soldiers (with permissible means) from violating *jus in bello* and it does not do that, *then* it does *not* have *jus ad bellum* on its side.

This last sentence shows that "separation" does not mean "isolation." What will foreseeably happen *in* war does of course have to inform the decision about going *to* war in the first place. All that talk about "separation" means is that a belligerent (like a state or some other collective) *can* have *jus ad bellum* on its side even though its combatants violate *jus in bello*; and that combatants can at least in principle (but not always and in every war) abide by *jus in bello* restrictions although they do not have *jus ad bellum* on their side – which simply means that they can justifiably participate in an unjustified war. These are, indeed, good reasons to discuss *jus ad bellum* and *jus in bello* separately.

So this part of the book then turns to *jus in bello*. However, there is a further important two-part division *within* this discussion. To wit, three paragraphs ago I stated that the insight that individual soldiers can abide by *jus in bello* even if the side they are fighting on does not satisfy *jus ad bellum* simply extends the ordinary morality of the peacetime use of force to the case of war. Readers acquainted with the debate will have detected the irony of this statement and its implicit criticism of "revisionism": "revisionists," after all, claim that the application of the ordinary morality of the use of force to the case of war leads to exactly the opposite conclusion. This is precisely my criticism: "revisionists" like to *claim* that they extend the "ordinary" morality of the use of force to the case of war,[5] yet they do not.

The main problem with "revisionist" accounts of the ethics of war is their treatment of the self-defense justification. The problem is twofold, and the two parts are related. To wit, one part of the problem is their very (almost obsessive) *focus* on the self-defense justification, and the other part is their *misinterpretation* of this justification. The latter mistake appears to be partially responsible for the former. To wit, by not paying due attention to (or by downright ignoring) certain elements of the self-defense justification, such as in particular the subjective element and the imminence requirement, and by not realizing that the different elements are not isolated items on a list but *interconnected*, "revisionists" not only misunderstand the self-defense justification itself but also fail to distinguish it from *other* justifications. What makes these other justifications *morally different* (so that we are not merely quibbling about words, that is, about what to *call* them) is not only that one such element might be missing, but also that *due* to this absence the *other* elements will not quite be what they are in the self-defense justification proper. This, of course, can have far-reaching consequences – both for

"ordinary peacetime morality of the use of force" and for the ethics of war. One therefore needs to *distinguish* these different justifications instead of tarring them all with the same brush of "self-defense." Let me explain this two-fold problem in more detail.

First, "revisionists" clearly take self-defense (understood as including other-defense) as the paradigmatic justification for killing, harming, and destroying in war. While they are aware that at least the lesser evil justification has a role to play too, they either fail to distinguish different *kinds* of emergency justifications (the impartial lesser evil justification is only one) or, blinded by their focus on self-defense, overlook the far-reaching implications of the existence of these other justifications for the ethics of war. This one-sidedness, ironically enough, is the mirror image of a mistake committed by traditional just war theory from Aquinas to the scholastics, which took the punishment or law enforcement justification as paradigmatic. It is a mirror image because *both* justifications – the self-defense justification as much as the law-enforcement justification – are asymmetrical: there is no self-defense justification for countering force justified by a self-defense justification, and there is no law-enforcement justification for countering force justified by a law-enforcement justification. There most certainly are, however, lesser evil justifications for countering force justified by lesser evil justifications, and there are self-defense justifications for countering force justified by lesser evil justifications. It is not surprising, therefore, that scholars who focus on *asymmetrical* justifications and neglect, if not entirely ignore, justifications giving rise to symmetry on two sides, might easily come to draw sweeping and unwarranted conclusions regarding the moral *inequality* of combatants. (This is, of course, what in fact happened, and we will come back to this in Sections 4.1.5 and 4.1.6.3.)

Not only the almost exclusive focus *on* the self-defense justification is a mistake; there are also mistakes being made regarding the *contours* of the self-defense justification. Some of these mistakes stem from ignoring the legal scholarship on the self-defense justification. To wit, one big issue in legal scholarship is the debate about objectivism vs. non-objectivism, or, as others call it, the debate about the deeds theory vs. the reasons theory. Revisionists entirely ignore this debate,[6] with fatal consequences. I have already discussed this in Section 3.2.2 and shall say no more on it here – apart from pointing out that, relatedly, revisionists also have little to say on the actual contours of the necessity requirement. While revisionists like to discuss among themselves whether necessity is "internal" or "external" to liability, that is, whether someone can only be liable to necessary force or not,[7] very few of them actually explain *what exactly necessity requires. When*, under *what identifiable conditions*, is the use of a certain kind of force necessary? This omission is not surprising given that revisionists focus on "fact-relative" justification – which

naturally suggests a *literal* interpretation of the requirement to only use the mildest means necessary. However, while it indeed appears that most revisionists presuppose such a literal interpretation, we already saw that such an interpretation of the necessity requirement is impractically demanding and hence inacceptable.[8]

Yet McMahan has recently hinted towards a non-literal interpretation of the necessity requirement, talking of probabilities and trade-offs.[9] Putting aside the fact that this flatly contradicts his avowed emphasis on "fact-relative" or "objective" justification,[10] his remarks are also rather vague. He does not say *what exactly necessity requires*; he does not say under what *identifiable conditions* the use of force is necessary. This, too, is not particularly surprising, since he seems to be inspired by Lazar's treatment of the "necessity" condition.[11] Lazar's criterion states:

> Defensive harm H is necessary to avert unjustified threat T if and only if a reasonable agent with access to the evidence available to Defender would judge that there is no less harmful alternative, such that the marginal risk of morally weighted harm in H compared with that in the alternative is not justified by a countervailing marginal reduction in risked harm to the prospective victims of T.[12]

This formulation not only appears to collapse under the weight of its own complexity, but it is also, due to its formalism, compatible with *any* substantive interpretation of necessity. For instance, it is compatible with denying that a defender needs to accept *any* additional risk for the benefit of the defender *and* also with affirming that he must take *considerable* additional risks for the benefit of the defender. The formulation simply does not reflect how action-guiding principles must be formulated. While self-defense law, too, often refers to reasonable agents, the reasonability invoked there – in contradistinction to Lazar's approach here – is invoked with regard to judgments concerning *facts*, not concerning *norms* or *moral judgments*. The rationale for this is that reasonable agents can often widely disagree about normative questions (so that a criterion referring to normative reasonability is useless in law since it cannot guide action). Thus, what Lazar's criterion excludes or allows depends on what counts as "reasonable" in the normative sphere. Of course, Lazar has *opinions* on this. For instance, he declares that "such a uniformly absolute discount" of the aggressor's interests as the German model of self-defense implies "is implausible."[13] Yet Lazar rests content with this statement, providing no explanation as to *why* this is supposed to be "implausible."[14] Moreover, saying what is *implausible* is not yet the same as saying what is plausible. In telling a self-defender that the German Penal Code's substantive interpretation of the necessity requirement is mistaken, Lazar has not yet told him what substantive interpretation is correct. In fact, Lazar does not provide any substantive

interpretation – and thus he leaves a potential defender without a clue as to what to do.

McMahan's own formulation, while more succinct, shares this problem. While Lazar relies on an uninformative normative "reasonable," McMahan relies on an uninformative normative "best." To wit, he states that what "the necessity constraint requires is that one choose, from among the proportionate defensive options, the one that is overall morally best."[15] Again, this formulation is compatible with *any* substantive account of necessity. Unless McMahan explains *how, by which criteria* the "best" balance can be *determined*, this criterion provides no practical action-guidance whatsoever. Moreover, even if such a clarification were given, one would also like to have a further philosophical explanation as to why one should accept the suggested criteria (instead of others). McMahan provides neither explanation.[16] Nor do other "revisionists."

To summarize, most "revisionists" do not say what, practically speaking, the necessity criterion actually requires. Given that they focus on fact-relative justifications, they might deem this superfluous since they simply presuppose a *literal* interpretation of the mildest means requirement.[17] If so, then they presuppose something that is clearly wrong and useless.[18] If, on the other hand, this is *not* their interpretation, then they should tell the interested reader what their interpretation *is*. Virtually none of them does. McMahan finally did say a bit more on this issue. Yet he basically follows Lazar's account, which amounts to empty formalism that cannot provide substantive action-guidance. In other words, "revisionists" might *talk* about necessity, but they don't *say* very much – at least nothing that would provide practical guidance.

While their reliance on "objectivism" and "fact-relative justification" seems to blind "revisionists" to the need to describe (and philosophically defend) the *substantive contours* of the necessity criterion, their reliance on their "moral responsibility account of liability to defensive force" blinds them to the importance of the *imminence* requirement (which is satisfied if an attack is imminent but also, of course, if it is even more than imminent: namely *ongoing*). There is, after all, an intense debate in legal scholarship on whether the self-defense justification only applies to ongoing or imminent attacks or also to temporally far removed future attacks or threats. Yet again, virtually no "revisionist" has anything to say on the imminence requirement.[19] Only McMahan – long after he had *already* accepted the moral responsibility account – has offered a more substantial effort to undermine the imminence requirement.

Elsewhere I have demonstrated at length and in detail that his (and other) efforts to do so fail, and I shall not here repeat my defense of the requirement. Instead, I merely want to draw attention to the fact that their – in my view: poor – initial choices lead "revisionists" to commit the double mistakes of overabstraction and underdifferentiation.

I already explained the overabstraction regarding the necessity requirement as partly induced by emphasizing "fact-relative" justification. By ignoring the importance of the subjective element of the self-defense justification, "revisionists" and others fail to see that the subjective element *constrains* the interpretation of the necessity requirement and that one hence needs an action-guiding concretization of the criterion. Likewise, by relying on their moral responsibility account of liability to defensive attack, "revisionists" are impeded from seeing the importance of the imminence requirement – a requirement that affects the necessity condition of self-defense, namely by making it particularly permissive for the defender and particularly harsh on the attacker.[20] It also explains why the necessity requirement and the proportionality requirement can be kept neatly apart in the self-defense justification, instead of having to be merged in a balance of interests, as is the case with the lesser evil justification.[21] Moreover, the imminence requirement also serves to distinguish the self-defense justification, which is only triggered by threats in the form of ongoing or imminent attacks, from *another* justification, known in German law as *justifying defensive emergency*, which is triggered by *other* threats stemming from agents (or their property). This justification is *at least* as important as the self-defense justification for justifying killing and harming in war but it has very different features than the latter justification – and this, as we will see, has far-reaching implications for the ethics of war.

Thus, neither the "revisionist" focus on self-defense, to the detriment of other justifications and the differences between them, nor their particular account(s) of the self-defense justification itself or of "liability to defensive attack" are representative of widely shared intuitions as expressed in Western law. (I submit that Western law is expressive of widely shared intuitions in the West, since otherwise it would not enjoy much popular support.) The same is true for a number of other claims they make (some of which are to be further discussed below). Far from extending the "ordinary" peacetime morality of the use of force to the case of war, "revisionists" actually extend their quite *extra*ordinary, namely *idiosyncratic* accounts of the permissible use of force to the case of war, engendering all the counter-intuitive results that hence are to be expected. Of course, their idiosyncratic accounts could, in principle, still be correct, but given their suspicious idiosyncrasies one would certainly like to see particularly compelling arguments in their support. "Revisionists," in my view, have failed to provide such arguments – not least since they ignore large parts of the legal scholarship on justifications and seem to be more interested in discussing among themselves than in critically reflecting on the merits of their own framework in the light of outside objections.[22]

Thus, what animates this first part (4.1) of this section on *jus in bello* is the simple insight that if you try to extend the "ordinary" morality

of the use of force in peacetime to the case of war, then you should at least get this morality right. Within the confines of this book, I cannot provide my own elaborate analyses of different justifications – that is *another* book, to which I refer the interested reader.[23] What I can and will do here, however, is to summarize and highlight those features of different justifications for the use of force that are of particular relevance for the ethics of war, and in that context correct recently influential misperceptions.

Nonetheless, there are four issues on which I will spend more time. A first is McMahan's "*Responsibility Account*," to be considered in Section 4.1.1. According to this account,

> the criterion of liability to defensive killing is moral responsibility, through action that lacks objective justification, for a threat of unjust harm to others, where a harm is unjust if it is one to which the victim is not liable and to which she has not consented.[24]

This approach to self-defense is, with slight variations, accepted by most revisionists. I shall argue that this account faces a fatal problem that McMahan acknowledged early on – but never solved (nor did anybody else). Accordingly, this account is not so much part of the "ordinary morality of the use of force" (there is no jurisdiction that accepts this approach) as rather a non-starter.

A second issue stems from the "revisionist" misinterpretation of yet another element of the self-defense justification, namely the *proportionality* requirement. This mistake has given rise to the so-called "bloodless invasion" argument popularized by David Rodin. There is, in my view, a very simple and quite obvious reply to this argument. Yet "revisionism" ignores this reply and spends considerable energy developing remarkably "sophisticated" solutions to a problem that does not exist in the first place[25] – at least not if one indeed takes the *ordinary* morality of self-defense seriously. I will develop this argument at some length in Section 4.1.2, not least to make it considerably more difficult to ignore it.

While Rodin makes a mistake regarding the proportionality requirement of the self-defense justification, interpreting it as far more restrictive than it is, he is, as far as I can see, the only "revisionist" who rightly accepts the *imminence* requirement for the self-defense justification. He is wrong, though, in thinking that therefore intentional force against non-imminent threats cannot be justified. McMahan, conversely, is quite right in thinking that force against non-imminent threats can be justified – however, he is wrong in thinking that it can be justified by a self-defense justification. Both mistakes can be corrected by pointing to a *different* justification, namely to the *defensive emergency justification (rechtfertigender Notstand)* to be found in German law.[26] Accordingly, in Section 4.1.3, I will first briefly describe the common understanding

of the self-defense justification and then, in Section 4.1.4 and as a third issue, lay out the distinguishing characteristics of the emergency justification and explain their implications for the ethics of war. In addition, I will also correct a typical "revisionist" misinterpretation of the *lesser evil justification*. While "revisionists" use this justification to justify *foreseen* harm to *innocent bystanders*, I will show that one of its indispensable uses in the context of war is the justification (under certain conditions) of the *intentional* destruction of targets that only *might* be sources of death and harm – whether they actually *are* such sources or not. This shows that "fact-relative justification" is as irrelevant for the lesser evil justification as it is for the self-defense justification.

A fourth issue calling for a more elaborate and detailed treatment – not least due to its centrality in the current debate – is of course the "moral (in)equality of combatants" and the claim that "justification defeats liability." I will turn to this issue in Section 4.1.5. While I reject Walzer's sweeping equality thesis, there is also, as I will demonstrate, no reason to accept McMahan's equally sweeping inequality thesis – at least not, again, if one really relies on the *ordinary* morality of the use of force. In particular, I will show how the interplay of, or clashes between, the self-defense justification and choice of evils justifications (which come in both *impartial* and *agent-relative* forms) can lead to *symmetry* between combatants.

While with this I could perhaps rest my argument against the sweeping inequality thesis, it must be noted that the attraction of a theory does not always stem purely from its arguments but sometimes from other features – in the case of "revisionism" from its rather astonishing ability to pose as an exciting innovation. The very term "revisionism" encapsulates this posture. In order to correct this misleading self-presentation of "revisionism," I will, in Section 4.1.6.1, set the historical record straight and show that the thesis that soldiers on the justified side in a war are not morally equal to the soldiers on the unjustified side is actually the *traditional* view from Aquinas to Anscombe and beyond. If anyone was "revisionist" in regard to the tradition, it was Walzer, not McMahan.

Moreover, in Section 4.1.6.2, I will demonstrate that McMahan's inequality thesis is not only no innovation because it was taken for granted for centuries, but also because his particular formulation of the claim turns out to be a mere tautology with no substantive implications for actual conflicts. The reason for this is McMahan's not particularly helpful terminology, which has also led other "revisionists" astray. Of course, the claims he wants to make can be more adequately reformulated, but that only turns a tautology into a falsehood.

This will be further confirmed in Section 4.1.6.3, where I will briefly retrace the revealing course the debate on the "justification defeats liability" doctrine has taken. This doctrine, which is central to the "revisionist" argument for the inequality thesis, was initially introduced

without argument. Only later was it defended against different objections. Meanwhile, however, with the barrage of objections not abating, it has devolved into a dogma – many revisionists prefer (and I will provide evidence for this) to not even *mention* critics and their objections anymore, giving their readers the impression that "justification defeats liability" is an unchallenged truth. However, it is neither unchallenged nor a truth.

Another doctrine, and a fifth issue on which I will focus closer attention (in Section 4.1.7), is the so-called "doctrine of double effect," which prominently figures in attempts to morally distinguish "conventional war" from "terrorism." While such a distinction might well be possible, it has to rely on something other than the doctrine of double effect. For starters, nearly all "revisionists" (and, unfortunately, quite a number of other just war theorists) accept this doctrine (or some related doctrine, like "the means principle") without ever providing an argument for it. Nevertheless, at least *some* revisionists (and other authors) did try to provide argumentative support for this doctrine or related ones. I will show that the way defenders of the doctrine frame the issue is biased and that the methodology they use is inadequate. In addition, the constant claim that the doctrine reflects "ordinary intuitions" regarding the moral difference between intentional harming and foreseen harming is made without any evidence to support it. We will see that once one pays attention to the actual evidence and uses neutrally formulated examples and an adequate methodology, the doctrine of double effect, the means principle, and related doctrines turn out to be baseless.

4.1.1 McMahan's "Responsibility Account" of "Liability to Defensive Force" as a Non-Starter

Many "revisionists" accept, with perhaps slight variations, McMahan's "responsibility account." This is curious, for this account is riddled with problems, some of which I have already pointed out. Let us have another look. McMahan states:

> According to what I will call the *Responsibility Account*, the criterion of liability to defensive killing is moral responsibility, through action that lacks objective justification, for a threat of unjust harm to others, where a harm is unjust if it is one to which the victim is not liable and to which she has not consented.[27]

It is important to note, first, that McMahan thinks that (barring special circumstances) an aggressor's *liability* to defensive killing translates into the defender's *justification* to kill him, which is precisely the reason why McMahan talks about "liability justifications."[28] That a person is

liable to be killed means in McMahan's account that he has forfeited the right not to be killed. Second, in McMahan's account "moral responsibility" is *not* to be equated with culpability. However, I shall postpone the explication of McMahan's account of "moral responsibility" until the sixth point of this section, for the first five problems of the account are not engendered by the reliance on "moral responsibility." So let us have a look at these five problems first.

The first problem, already discussed at length above, is that on this account very harmful let alone lethal force as well as the destruction brought by war will be ruled out, since in practice agents will virtually never be *objectively* justified in using such means, given that such means are not *objectively* necessary. This also means that in any real wars, both sides will inevitably lack objective justification – and hence combatants on *both* sides will, in any real wars, be liable to attack. In other words, the only humanly, practically possible way to live up to the demands of objective justification is to become a pacifist.[29]

A second problem is that McMahan's Responsibility Account contradicts his emphasis (shared by virtually all other "revisionists") on the "relevance of intention to permissibility."[30] After all, he states that "[a]n act is objectively permissible or justifiable when what explains its permissibility or justifiability are facts that are independent of the agent's beliefs."[31] But then intention *cannot* be relevant to objective justification or permissibility, since an agent's intentions are of course *not* independent of the agent's beliefs. This, in turn, also contradicts McMahan's treatment of terrorism. He insists that terrorism is worse than conventional warfare because the intentional killing of innocents is worse than the foreseen killing of the innocent.[32] In terms of *objective* justification, however, this is simply wrong because mental states are entirely irrelevant for objective justification. Accordingly, all else being equal, the intentional killing of innocents is objectively not more difficult to justify than the foreseen killing of innocents, and "just terrorists" will have no bigger problem in being non-liable on McMahan's Responsibility Account than "just combatants."

A third and related problem is that this account also contradicts McMahan's occasional suggestion that people might only become liable to be killed "for certain reasons."[33] Given that McMahan believes in "liability justifications"[34] and thus believes that a target's liability is precisely what provides the "objective justification" of attacking the target, and given, further, that objective justification is mind- and thus also reason-independent, reasons *cannot* play any role here. In fact, this is what *defines* objectivist accounts of justification, which are sometimes also called *deed* theories and, not surprisingly, opposed to *reasons* theories.[35] On an objectivist account of justification you very well can be justified in frivolously (namely for the mere fun of it) killing a person you deem to be innocent.[36]

A fourth problem (or set of problems) lies in McMahan's recent expansion or amendment of his Responsibility Account. Answering to Lazar's objection that this account fails to make all or even most "unjust combatants" liable to attack given that many "unjust combatants" are no real threats to begin with,[37] McMahan explains:

> [E]ven though only a certain proportion of unjust combatants who have combat roles end up killing someone, it is true of almost all of the others that they go armed into a war zone and would kill just combatants rather than allow themselves or their comrades to be killed. That their circumstances do not prompt them to kill is a matter of luck in avoiding a situation in which they must kill or be killed. Because they are able and conditionally committed to kill, and because the conditions that would prompt them to kill have a significant probability of arising, they significantly increase the objective risk that people who are not liable to be killed will be killed by them. They are therefore responsible for making it unavoidable that, unless they are killed, others will remain at significant risk of being wrongfully killed. That is the basis of their liability ...[38]

I will explain later (in Section 4.1.6.2) why this is question-begging as an answer as to *why* (nearly) all unjust combatants are liable to attack while "just combatants" are not. I also would like to point out again that this talk about *risks* in the context of an allegedly *fact-relative* account makes no sense. However, if one talks of risks anyway, then one should at least explain what precise *account* of risk is being used here (which is anything but obvious), what the *threshold* of risk is at which one becomes liable (without such a threshold virtually everybody would become liable because we all pose *some* risk to others), and how that risk is going to be *measured*. McMahan does not provide a single one of these explanations, which means that his claim that the unjust combatants are liable is exactly that, a mere claim – and it also means that, again, we are left without practical action-guidance.

Even putting all these points of the previous paragraph aside, however, there is still a further problem with this expanded account of liability. To wit, part of McMahan's original Responsibility Account, quoted above, is that you only become liable "through action that lacks objective justification."[39] But why should combatants who pose a mere *risk* of killing people but who would *not actually* kill anyone not have an objective lesser evil justification for imposing that risk if they otherwise would *actually* go to prison (for instance)? In other words, why – on an objective, fact-relative account of a lesser evil justification – should the evil of the mere *risk* that one will kill someone not be outweighed by the evil of *in fact* going to prison – in particular if, *in fact*, one will *not* kill anyone? McMahan does not explain that either – which means that he

fails to show that the merely risk-imposing combatants in question really become liable. He merely assumes it.

A fifth problem lies of course in McMahan's claim that you only become liable "through action that lacks objective justification."[40] This is precisely his "justification defeats liability" doctrine, which is of central importance for his moral inequality thesis. I will discuss this thesis and the corresponding doctrine separately in Sections 4.1.5 and 4.1.6.3.

While, as we will see below, the "justification defeats liability" doctrine makes McMahan's responsibility account of liability to defensive attack *too restrictive* in one dimension by denying that justified attackers of innocent people are themselves liable to attack, McMahan account suffers from still a sixth, arguably even bigger problem, namely the problem that McMahan's account is, in another dimension, also *far too permissive*. In fact, it is *absurdly* permissive.

Here is why. From the very beginning on McMahan has admitted that his account has counter-intuitive implications. It would imply that the mother of a culpable attacker would be liable to be killed (if the threat cannot be averted otherwise) because she "chose to engage in an activity (having a child) that had a tiny probability of resulting in an unjust threat" and this threat now materialized. McMahan then rightly points out that the mother is not liable, but he claims that "it is less obvious what the right explanation is of why the mother is not liable."[41] Actually, the explanation *is* obvious: McMahan's account is simply wrong. Elsewhere I have already given further counter-examples to his account.[42] Here is a different one: Bill produces and sells many hammers, foreseeing that there is a chance that a criminally insane person will use one of his hammers to kill an innocent person (he actually googled "killed with a hammer"). On McMahan's account the hammer manufacturer would become liable to defensive force if the threat cannot be otherwise averted. But again, that is absurd.

It seems that some people think that the account can be tamed by appealing to "minimal responsibility" or to differences in causal contributions. Unfortunately, while the term "minimal responsible threat" and the talk about "degrees of responsibility" have recently become more fashionable in this context[43] (McMahan himself actually started this kind of talk), they do not make much sense within the McMahanian framework. After all, the moral responsibility account of liability to defensive killing is meant as an *alternative* to the culpability account.[44] Someone can be morally responsible yet entirely innocent.[45]

For example, a blameless, non-culpable "conscientious driver" whose car veers out of control for no *fault* of his and now threatens a pedestrian satisfies McMahan's criterion of moral responsibility for an objectively unjustified threat of harm because "he is a morally responsible agent who has acted voluntarily [namely by deciding to drive the car in the first place] in a way that foreseeably imposed risks on others and now

threatens the pedestrian with unjust harm."[46] Or as Lazar describes McMahan's account of responsibility quite correctly: "The criteria for responsible agency include some degree of physical and psychological self-control, and the capacity for rational choice."[47] But then it is somewhat misleading when McMahan says that "[r]esponsibility for an unjust threat can vary in degree, and liability varies concomitantly. A person's liability is therefore greater when his action is culpable ..."[48] McMahan is confusing things here. To wit, if someone is culpable, then he is *culpable*, not *merely responsible*; and thus the reference to culpability cannot demonstrate that there are degrees of responsibility *within mere responsibility* (as opposed to culpability). In other words, unless somebody explains how and by which criteria (and one would also like to hear concrete examples) a minimally responsible, morally entirely innocent threat is to be distinguished from a maximally responsible, morally entirely innocent threat, "minimal responsibility" simply means responsibility and will thus be of no help to either the mother or the hammer manufacturer. As McMahan himself states (he is not talking about the hammer manufacturer, although what he says applies): "Although he is responsible for the threat he poses, he is only minimally responsible, *by which I mean* 'merely responsible,' or responsible though not culpable."[49] (Incidentally, I suggest that it would help to avoid a lot of meanwhile rather widespread confusion to then just say "merely responsible" instead of "minimally responsible.")

The other strategy might be to distinguish different degrees of causal contribution. Yet it is simply mistaken that given equal responsibility for a threat one's liability diminishes with a reduction of one's causal contribution to the threat. While the claim is often made, obvious counter-examples abound.[50] In McMahan's conscientious driver case (his flagship example for a responsible but non-culpable threat) a morally responsible contribution comes not only from the driver, but also (for instance) from the people at the gas station, the car manufacturers, the salesman, and the adult daughter who gave her father the key he just couldn't find. Yet we would hardly deem any of these other people liable even though, at least in terms of "but-for causation" (and, incidentally, also in some other terms), the daughter, the lone employee at the gas station, and the salesman who just sold the car this morning contributed no less to the threat than the driver himself. At this point, then, one might want to appeal to morally responsible proximate causation. Unfortunately, while we thereby get the daughter off the hook, we also get the principals of hired killers off (a problem of which McMahan is aware[51]) while getting the hammer manufacturer back on (he would be the proximately morally responsible cause in case the attacker is insane). In short, McMahan's moral responsibility account is simply too draconian to be accepted, and remedies of this situation are not in sight.[52] The account should simply be abandoned.

Why hasn't it been? I can only think of one explanation, and it is not the one it would appear McMahan wants to suggest himself. He states: "Like the other accounts, however, the Responsibility Account, at least in the form in which I have stated it, faces a battery of objections."[53] Thus he might want to say that other accounts face objections too, so that such objections cannot decide against his account. Yet McMahan's criticism in particular of one account, namely Thomson's rights-based account, is remarkably weak (if not question-begging).[54] In fact, what he claims are "problematic" implications of that account are taken by defenders of that account to be exactly the right implications – and McMahan has certainly not shown otherwise. In contrast, *he himself* acknowledges that one implication (the liable mother) *of his own account* is *obviously* wrong.[55] But although McMahan and his followers have failed to amend his account so as to avoid obviously mistaken implications, he states: "I believe that some version of the Responsibility Account will turn out to be the best account of liability to defensive killing."[56] Thus, what supports the moral responsibility account of liability to defensive force in "revisionist" debates is faith. For a just war *theory*, that is not enough.

4.1.2 *Rodin on Self-Defense and the "Myth" of National Self-Defense: A Refutation*

In the previous section, we saw that McMahan and other "revisionists" are mistaken in thinking that the "Responsibility Account" captures "the basis of moral liability to defensive killing."[57] I have already pointed out that they are not only mistaken about the basis, but also about the restricting elements of the self-defense justification, in particular about the subjective element and the necessity condition. However, they also misinterpret the *proportionality* requirement. This mistake – the focus of the present section (although we will also encounter a mistake about necessity again) – has, as mentioned, given rise to the so-called "bloodless invasion" argument popularized by David Rodin.

While many revisionists actually *reject* this argument, they nevertheless accept the mistaken premise on which it rests, as we will see, namely the far too restrictive interpretation of the proportionality condition of self-defense. This unfortunate double-bind then prompts them to engage in stunningly intricate[58] but quite futile – and certainly unnecessary – attempts to get the right conclusion while nevertheless subscribing to the wrong premise.[59] Thus, clarifying where the "bloodless invasion" argument goes wrong also helps to distinguish the curious "revisionist" renderings of the proportionality requirement from its actual form in ordinary morality.

So what, then, is the "bloodless invasion" argument? Briefly put, Rodin denies that defensive wars against unjust aggression can be justified

if the unjust aggression limits itself, for example, to the annexation of territory, the robbery of resources or the restriction of political freedom, but would endanger the lives, bodily integrity, or freedom from slavery of the citizens *only* if the unjustly attacked state (or someone else) actually *resisted* the aggression. In other words, Rodin argues that a state has to surrender to an unjust invading enemy credibly saying, for instance: "Your territory, or your lives. But if you give us your territory, your lives will be spared (and you will not be mutilated or enslaved)." (Rodin calls this the "conditional threat" made by the agents of a "bloodless invasion" or "political aggression," another expression occasionally used is "lesser aggression.")

Rodin is right in claiming that his position is a significant departure from just war theory and from international law. His position is not correct, however. I will show this in several steps. First, I draw attention to the fact that Rodin gives the impression that his account of self-defense closely follows domestic self-defense *law*. In fact, however, Rodin's comments on the necessity condition and its relation to an alleged "duty to retreat" misinterpret the law, and a correct interpretation of the law is not only compatible with, but *implies* a permission to resist the "bloodless invader." Second, I will turn to Rodin's remarks on proportionality. Here Rodin advances a free-standing moral argument, but again he also suggests that the moral reasoning he appeals to underlies self-defense law. If his argument at this point were correct, it could perhaps save his invocation of a duty to retreat. I will argue, however, that his argument is flawed. Rodin's remarks on the proportionality of self-defense against conditional threats focus on physical or material harm but implausibly ignore the severity of the violations of autonomy and of the socio-legal or moral order that such conditional threats involve. Third, I will turn to a more recent piece of Rodin where he basically argues that ("often") defensive wars against "political aggression" are disproportionate because they risk the lives of those defended in an attempt to secure lesser interests. I will argue that this take on proportionality misses the point in an important respect, namely by confusing wide and narrow proportionality, and makes unwarranted assumptions about the alleged irrationality or impermissibility of incurring or imposing lethal risks to safeguard less vital interests. Next, I will also show that while Rodin talks of a "myth of national self-defense" and of the necessity of moving beyond traditional just war theory and international law, it is actually his interpretation of just war theory and international law that weaves myths. Finally, I will argue that Rodin's views on national self-defense on the one hand, and "war as law enforcement" on the other, are incoherent.

4.1.2.1 Necessity and the "Duty to Retreat"

Rodin states that the "legal and philosophical literature on self-defense has identified three intrinsic limitations to the right [of self-defense].

The limitations are necessity, imminence, and proportionality."[60] When he then analyzes these limitations over the next eight pages, he distinguishes between morality and "legal discussions" only in the case of imminence, thus giving the impression that his account of the other two conditions is both *legally* and morally adequate. This impression is further supported by the fact that he references more legal texts than philosophical ones in these pages. In other words, his discussion here at the very least implicitly seeks support from the authority of the law. Precisely for this reason it bears emphasizing that in fact the law does *not* support Rodin's rendering of the conditions of necessity and proportionality.

Rodin's misinterpretation of the law affects his moral arguments against national self-defense. He claims that a "corollary of the requirement of necessity is that there is a general duty to retreat from an aggressor, if it is possible ... to avoid harm [or rights violations, as Rodin makes clear in the next sentence] in this way."[61] He employs this duty to retreat in an argument against what he calls the "reductive strategy" of justifying national self-defense, namely the strategy of a) seeing "national self-defense as simply an application, *en masse*, of the familiar right of individuals to protect themselves and others from unjust lethal attack," [62] or b) of seeing self-defense as an occasion on which the *state* exercises its "defensive right, though the lives of individual persons are viewed as the end of the right."[63] Arguing against option (a) he states:

> The second reason why the purely reductive view is inadequate is that, as we have seen, the requirement of necessity which is implicit in the right of self-defense generates a requirement for threatened persons to retreat if it is possible to avoid harm without resort to force by so doing. But if national-defense were nothing but an exercise *en masse* of self-defense, this would seem to give rise to a general requirement to appease international aggression, if it were possible to avoid bloodshed in this way. ... This strongly suggests that national-defense cannot be reduced to the defensive rights of individuals.[64]

Let me point out, first, that the expression "duty to retreat" must not be interpreted literally. But interpreting it literally seems to be precisely what Rodin is doing here. It is, however, wrong that according to the legal duty-to-retreat-doctrine I am under an obligation to retreat from an aggressor who is intending to step on my toe if by retreating I can avoid this harm and my only alternative means of avoiding it is to chop off the aggressor's head. Rather, I am completely justified and well within my rights if I stay where I am and endure the aggressor's stepping on my toe. Thus, the so-called "duty to retreat" is no duty to retreat at all, but at best a duty not to fight back if you could also avoid the threatened harm by retreating.[65]

Second, according to the majority of scholars of British law there is no duty to retreat in British law.[66] This can already be seen in the fact that British statutory law in principle offers even private persons the permission to arrest offenders.[67] It is, however, hardly possible to arrest an offender while retreating from him. There is also no duty to retreat in a number of state jurisdictions in the USA[68]; in fact, the duty to retreat seems to be retreating there.[69] And there is definitely no duty to retreat in German law. A foundational principle of German law is "*Das Recht muß dem Unrecht nicht weichen* ("Justice/law need not yield to injustice/the unlawful" or "Right need not yield to wrong").

Third, the duty to retreat, if there were one, would not be a "corollary of the requirement of necessity" at all, but one of the requirement of *proportionality*. This is a conceptual and logical point no less true in morality and philosophy than in law. As Boaz Sangero points out, in the event of an unjust attack, and

> despite the possibility of safe retreat, defensive force is necessary ... [A]lthough the interests necessitating defence do not include the life of the person attacked and his bodily integrity – since these can be saved by means of a retreat – they do include less central interests: the defence of the social-legal order, the freedom of action of the attacked person, and his honour.[70]

And Sangero makes it clear that these interests – "less central" or not – are still very important and thus militate against a duty to retreat.[71]

Fourth, there is most definitely no duty to retreat in Western jurisdictions for law enforcement officers. This is confirmed even by legal scholars who support a far-reaching duty to retreat in the case of private citizens.[72] Thus, there certainly are "individuals," namely police officers, whose "familiar right ... to protect themselves and others" involves absolutely no duty to retreat. Therefore, and in particular given that as bearers of state force soldiers are more like police officers than like private citizens, the reductive strategy works just fine as far as it concerns the lack of a duty to retreat in the context of national defense.

Rodin's much discussed "bloodless invasion" argument[73] against version (b) of the reductive strategy does not fare better than his duty-to-retreat argument against version (a). The first premise of the "bloodless invasion" argument is the following conditional:

> [I]f ... there are acts of international aggression which generate a legal and moral right [according to traditional just war theory] of national-defense and yet which threaten the lives of no citizens, then the attempt to ground national-defense in the end of defending the lives of citizens must fail.[74]

The second premise is that the "bloodless invasion" example establishes the correctness of the antecedent of the conditional.

Let us just grant, for the sake of argument, that it does establish that. The argument still fails since the first premise is both irrelevant and wrong. It is irrelevant because there is no need for the reductive strategy to ground national defense in the end of defending the *lives* of citizens – it is quite sufficient to ground it in the end of defending their *rights*. In fact, however, the strategy succeeds in doing both. This is shown again by the rights and duties of law enforcement officers. There are, after all, also acts of *domestic* aggression that generate a legal and moral right of the state to use severe force against the aggressors yet which threaten the lives of no civilians. Police officers do not have to throw away their guns and run if armed robbers, in an attempt at bloodless robbery, clearly communicate their intention not to kill anybody as long as they get what they want, and are now approaching the citizen in order to steal his coin collection. If the armed robbers continue their approach and do not surrender, the police are permitted to use force, deadly force, if necessary to defend their own lives (and they are citizens too) while defending the property of others.[75] In other words, the reductive strategy, version (b), *pace* Rodin, does not at all imply that there cannot be a right to national-defense in the face of a "bloodless invasion." It implies exactly the opposite.

4.1.2.2 Proportionality in Self-Defense

The example of the law enforcement officers also shows that there must be something severely wrong with Rodin's ideas about proportionality and "conditional threats." After all, he thinks that the defense against the bloodless invasion – in contrast to what traditional just war theory suggests – is actually *not* justified. The bloodless invasion example, according to Rodin, thus also "points out that international aggression need not pose an imminent threat to any right of sufficient magnitude to make *proportionate* the use of defensive force."[76] If this were true, however, then my bloodless robbery example would, for the same reasons, also "point out" that police officers should not resist the robbers in my example with defensive force but rather hand the coin collection over to them. This is absurd, of course, and so, again for the same reasons, this is also a *reductio ad absurdum* of Rodin's argument.

What, then, has gone wrong? Rodin answers "No" to the question of whether it is "justifiable to use lethal force against a threat to life (or some other central right) which is conditional but not imminent."[77] If you can save your life either, for example, by killing the armed mugger or by giving him the dollar he demands, you should give him the dollar, the argument goes, since the use of lethal violence in defense of property is disproportionate (and Rodin also thinks that it is disproportionate in defense, for instance, of your right to vote or of your right to free expression).[78]

But *why* should it be so "clear"[79] that killing the mugger in this situation is disproportionate? After all, there are at least three problems with Rodin's account.

First, Rodin underestimates the depravity of both the conditional threat and its agent and ignores how this depravity affects proportionality considerations. Rodin first claims that "the right to respond is in some way proportional to the value of what is being extorted."[80] But that is simply wrong, as Rodin then admits two pages later. After all, there might, as Locke pointed out, be good reasons to doubt that the mugger will content himself with the money. Accordingly, Rodin revises his earlier statement as follows: "... a right of response to conditional threats ... is bounded by two factors: the value of what is extorted and the risk incurred."[81] Yet this is also wrong, as Rodin again makes clear himself in a later article and another context: "... proportionality for liability ... is a relationship between the normative status of the acts of agents (of which the good and harm that they produce are but one contributing factor)."[82] However, it should be clear that the normative status of the pickpocket's act of stealing a dollar out of your pocket and running away with it is very different from the normative status of the armed robber's act of holding a gun to your head and shouting at you "Give me your f... money or I blow your f... brains out." This difference is acknowledged by both law and morality and explains why armed robbers are justly punished much more severely than mere pickpockets. Thus, since armed robbery is such a severe attack, such a severe rights violation – an actual one, not merely a conditional one – it can be dealt with accordingly.

In addition, not only the depravity of the act, but also the culpability of the agent is, as again Rodin elsewhere admits, important for the agent's liability.[83] But since Rodin's mugger is willing to kill an innocent person for a mere dollar, any claims to protection on his part are obviously severely diminished. He is anything *but* innocent, but rather guilty of a blatant disrespect for other people's lives.[84] Therefore he is hardly in a position to complain if the innocent defender does not value the guilty aggressor's life more than the aggressor values the life of the victim, and hence he is not being wronged if the defender does to him in self-defense what he, the aggressor, would do to the victim in an act of aggression.

Second, Rodin's underestimation of the depravity of the mugger and his act is mirrored by his misperception of what is at stake on the part of the victim or defender. Rodin makes it appear as though the only thing that would be directly or "imminently" threatened by the mugger is the victim's property. After all (Rodin seems to think), the victim can save his life by just giving the mugger what he wants. This view, however, is again not sufficiently informed by legal discussions, and in this case (as in so many others) that also undermines its moral validity. To repeat the Sangero quote from above:

> [A]lthough the interests necessitating defence do not include the life of the person attacked and his bodily integrity –since these can be

> saved by means of a retreat [or, in this case, by handing over the money] – they do include less central interests: the defence of the social-legal order, the freedom of action of the attacked person, and his honour.[85]

And again, even if these interests were "less central," they would still be very important.

In particular, the defense of the (integrity of the) social-legal order seems to be very important and not peripheral at all. Thus, it should be pointed out that the reigning theory of self-defense in German law (and in many Continental Western European jurisdictions that have been influenced by German law) is the so-called *dual theory*, according to which the defender defends not only himself or herself but *also* the (integrity of the) social-legal order.[86] In Germany this is often used to explain the lack of a proportionality requirement (there is only something like a no-gross-disproportionality-requirement). But of course the dual theory also exists in Anglo-Saxon jurisdictions.[87] In fact, Section 3 of the British Criminal Law Act of 1967 can arguably be read as a recognition of that theory, as can be the distinction between "private" and "public defense" and the actual role it plays in jurisprudence: the defensive act of an individual can often (in fact, it seems, always) be justified as *both* private *and* public defense.[88] Last but not least, this dual theory of self-defense is not only a legal theory, but of course also a moral one: it is a venerable part of the natural law tradition,[89] and indeed, of just war theory.[90] Every crime harms and violates the integrity of the social-legal order, every unjust act harms and violates the integrity of the moral order; and this must weigh heavily in favor of resistance against attackers in any proportionality consideration.

Considerations of honor and autonomy must also enter the proportionality considerations. Having a dollar stolen by a pickpocket is not by far such a humiliating experience as being mugged at gun point, having the will of the mugger directly imposed on one's bodily actions – which also points to the fact that the violation of one's autonomy is much more severe in the latter case than in the former. If some pickpocket runs away with my dollar, I will not be able to use that dollar to buy something with it, and in this respect the thief can be said to violate my autonomy. However, I can still *move* how I want, jump up and down, throw a right hook, etc. In other words, the thief violates my ownership of the dollar, *but not my self-ownership*, my ownership of my own body. This is different with the mugger. Under the threat of lethal violence he unjustly tells me what to *do*: to put my hand into my pocket to give him the dollar, or not to grab his arm when he tries to do it himself, or not to try to knock him out with a right hook. In other words, the mugger temporarily takes control of my body, he temporarily enslaves me. This is an extremely grave violation. Thus, in contrast to Rodin's suggestion,

there is much more at stake here than simply property: namely, at the very least, also honor, self-ownership and the integrity of the social-legal order. These factors must not be ignored, and they change the balance of the proportionality considerations dramatically.

4.1.2.3 Wide Proportionality and Imposing the Risk of Death on People One Defends

There is still a third problem with Rodin's account. To set the scene, it should be noted that Rodin's conditional threat argument is certainly not new. Like the bloodless invasion argument, it had already been made before him, although in other terms, by Richard Norman. I have elsewhere briefly discussed this argument and drawn attention to an early objection to it by Jan Narveson (and later by Jeff McMahan): surely one must have a right to *some* form of resistance against the mugger, and if this then provokes a violent reaction on the part of the mugger (that is, if he is about to make good on his threat), one is at least *then* justified in using lethal self-defense if necessary (and perhaps anticipating this development one is even justified in shooting the mugger right away).[91] I had pointed out, however, that this argument could also be reversed: "If it is clear that the initially non-violent resistance will in the end lead to the killing of a person because of a dollar, shouldn't one then completely forgo resistance?" Yet I went on to argue that this reversion does not quite work, and that the defender has at best a Kantian *Tugendpflicht* (duty of virtue) but not a duty of justice (*Rechtspflicht*) not to shoot the mugger right away: shooting him is well within his or her rights.[92] I would like to add now that while I think that the defender might have a *Tugendpflicht* not to shoot the mugger *right away* (if this is not necessary to stop the mugger), he certainly does not have a *Tugendpflicht* to not resist *at all, even if* he knows that this resistance will escalate and lead to the mugger's death. The reasons for this have of course to do with the two previous problems with Rodin's views about proportionality discussed in the last paragraphs.

In any case, Rodin now, in a still more recent piece, does want to avail himself of the reversion of Narveson's argument I just mentioned.[93] However, the way he does this is most peculiar. Let me explain.

To begin with, it has to be noted that in *War and Self-Defense*, Rodin's discussion of proportionality in the context of conditional threats dealt with the question of whether lethal force *directed against an aggressor* posing a certain kind of conditional threat (like the mugger) can be proportionate in light of the nature of the mugger's aggression. Accordingly, my discussion in the last paragraphs also dealt with this question. It is, however, a *completely different* question whether the "collateral damage" *done to innocent bystanders* in the course of the defensive act against the aggressor is proportionate. Law, for example, keeps these

two things neatly (and helpfully) apart: even if the harm that has been inflicted on an aggressor and simultaneously on innocent bystanders has been so inflicted by one and the same act (discharging a shotgun, for example), law answers the question as to whether the force directed against the aggressor was justified under the heading of self-defense, while it uses the heading of choice of evils (or necessity or emergency) to answer the question as to whether the violation or infringement of the bystanders' legally protected interests was justified. This is very wise indeed since the criterion of proportionality operates very differently in these two cases, and for good moral reasons.

Therefore, even if you want to deal with both kinds of proportionality under the heading of self-defense in such a case like the shotgun case (so that the act of self-defense would only be justified if it satisfied *both* proportionality constraints), you still need to distinguish between these two different constraints, that is, between proportionality with respect to the aggressor and proportionality with respect to innocent bystanders.[94] And finally, you also have to distinguish between harm that befalls bystanders directly through the defender's action (as in the shotgun case), and harm that is (partly) caused by the defense but befalls other people in very indirect ways or through the intervening action of others (including the aggressor himself). McMahan calls the first kind of proportionality "narrow" and subsumes the second kind of proportionality and proportionality considerations regarding very remote harms under the term "wide proportionality." [95] I will make use of this terminology for present purposes.

With these preliminaries in mind, let us now see how Rodin tries to reverse the Narvesonian argument. He claims:

> [W]hen a direct threat to a lesser interest is accompanied by a contingent threat to a vital interest, this provides a moral reason *not* to defend the lesser interest, even if using the same level of defensive force would have been proportional, absent the contingent threat.[96]

I suppose that by "a moral reason" Rodin means a *pro tanto* reason, not an overriding reason. After all, you certainly *are* allowed to knock out the mugger, or to pepper-spray him, or to knock the gun out of his hands or at the very least to violently push him back in order to then quickly shut the iron door in front of him. (You would be allowed to do that even if you were not allowed to fight back against the violence the mugger might now use in response to your resistance.)

But even if interpreted in this way, that is, as meaning that "the likely infliction of the contingent portion of the threat counts against defensive action in the proportionality calculation,"[97] Rodin's statement here is mistaken if it is meant to apply to *narrow proportionality*. It would imply, after all, that you may direct *more* force to and inflict *more* harm

upon the relatively harmless pickpocket running away from you with a dollar than to and upon the relatively depraved armed mugger putting a gun to your head, threatening your life, and severely violating your autonomy. This, however, defies law, morality, and reason.

I need not discuss this any further, not least because Rodin himself does not discuss it any further. Instead, in the remainder of his chapter he talks only about the proportionality of harm inflicted on *bystanders*, that is, about *wide* proportionality. This is part of the reason why I said that Rodin's way of availing himself of the reversion of the Narvesonian argument is "peculiar." Recall the course of the discussion: the original question was whether lethal force directed against an *aggressor* posing a conditional threat to a person's life can be proportionate, and Rodin's comments on the disproportionality of taking a life in defense of "peripheral" interests like the protection of property were supposed to show that it is not. The third objection against this view was the argument that surely one must have a right to *some* form of resistance against the mugger, and that if this then provokes a violent reaction on the part of the mugger one is at least *then* justified in using lethal self-defense if necessary. But against this Rodin now offers – and therein lies the peculiarity – his discussion of disproportionate harm to *bystanders*. That is, he offers a discussion that is simply not pertinent to the issue in question: after all, that killing an armed mugger *and 12 innocent bystanders simultaneously* with your shotgun is disproportionate certainly does not imply that *killing the armed mugger* is disproportionate. In other words, Rodin's "answer" to the third objection misses the point. Thus, the third objection stands unrefuted.

But maybe the discussion of the harm inflicted on bystanders in war can still somehow save the conclusion Rodin wants to draw. After all, the so-called war pacifists have already argued against war with the argument that the "collateral damage" it produces is unjustifiable (of course, Rodin gives this argument a different spin).[98] So let us have a still closer look at Rodin's peculiar reversion of the Narvesonian argument. After stating, in the quote above, that the conditional threat against the vital interest provides a moral reason not to defend the lesser interest, Rodin states:

> Some actions to defend the political interests of members of a community that would be permissible against a straightforward direct threat (for example, non-violently barricading the way against an aggressor), may become impermissible when the direct threat to those political interests is backed up by a contingent threat to life.
>
> This counter-intuitive conclusion follows from the fact that the permissibility of engaging in defensive action is in part determined by the foreseeable consequences that the defensive action will produce.[99]

I agree with this, with one exception: Rodin is quite wrong to claim that there is anything "counter-intuitive" about this conclusion. Far from being counter-intuitive or innovative, it is banal, and completely in line with traditional just war theory. After all, the tentative "may" in Rodin's statement is entirely justified – and no just war theorist has ever denied that or said anything that would imply such a denial.

Rodin, however, thinks that the distinction between direct and conditional threats is particularly consequential for "political aggression," which he defines as "primarily directed towards obtaining a political or material advantage for the attackers"[100] (in contrast to "genocidal aggression," against which Rodin considers defensive war to be unproblematic):

> There is, indeed, no obvious precedent of morally justified acts of individual self-defence that have the typical structure of war against political aggression – acts of self- or other-defence that have the foreseeable likely consequence of generating greater harm to the vital interests of the very people the defensive action is intended to benefit. Expressed in this way, defensive war against political aggression is often straightforwardly self-defeating and hence morally irrational.[101]

But again: what is supposed to be the new insight here that traditional just war theory did not have? *Of course* defensive war against political aggression will often be self-defeating and, indeed, unjustified according to traditional just war theory. After all, there is a *proportionality requirement* in traditional just war theory. As the United States Conference of Catholic Bishops succinctly put it in their "Pastoral Letter on War and Peace" (which will hardly count as a document of "unorthodox" just war theory) in 1983: "In terms of the *jus ad bellum* criteria, proportionality means that the damage to be inflicted and the costs *incurred* by war must be proportionate to the good expected by taking up arms."[102] (Incidentally, if defensive war against political aggression is only "often," but not always, "morally irrational," Rodin's talk about the "myth" of national self-defense would appear to be a somewhat sensationalist overstatement.)

Rodin's argument, moreover, is rather one-sided in trying to explain why defensive war against political aggression "may" "often" be unjustified, while not elaborating on his reasons for his converse implicit concession that at least sometimes it will be justified (at least as far as the "interests of the very people the defensive action is intended to benefit" are concerned). In any case, and *pace* Rodin, there are actually countless pertinent and obvious precedents within individual self-defense that have the allegedly "typical" structure of war against political aggression.

The empirically quite common example of the armed mugger who would successfully kill someone (or that person's friends or family members whom he also threatens) for resisting is obviously one such precedent.

However, giving this common example a moment's thought immediately reveals an obvious fact: since resistance against muggers posing conditional threats, even if those conditional threats are directed against your friends or relatives, is often anything but "self-defeating" and "morally irrational," resistance against "political aggression" will also often be anything but "self-defeating" and "morally irrational." The reason for this is, of course, that defense against conditional threats, whether they come in the form of muggers or enemy troops, is sometimes highly effective. Sometimes, if you kill the mugger or the enemy dictator, or if you sink the approaching warships or destroy the approaching troops, you remove both the "imminent" and the conditional threat. Rodin actually admits that, but claims that this is "rarely the case in war."[103] But rare or not, it happens, and there is certainly nothing self-defeating about such use of force.

Moreover, even if it is foreseeable that some citizens will die in a defensive war (while surrender would have saved the lives and vital interests of all), the conclusion Rodin draws does not follow. Recall that he claims that it is "typical ... of war against political aggression" that it has "the foreseeable likely consequence of generating greater harm to the vital interests of the very people the defensive action is intended to benefit" than surrender or non-resistance would generate, and he then immediately concludes: "Expressed in this way, defensive war against political aggression is often [that is, in the 'typical' case, I assume] straightforwardly self-defeating and hence morally irrational."[104] But this is too hasty. It seems to be an underlying assumption of Rodin's argument that in valid proportionality considerations the anticipated death of *some* citizens due to their states' defensive war will always outweigh the anticipated successful defense of the vast majorities' property, political freedom, self-determination and way of life. However, while this assumption indeed is innovative and not shared by traditional just war theory, it is also entirely unwarranted.

By way of illustration: if it were wrong for politicians to call their compatriots to arms against a "political aggression" because in the defensive war against it some citizens will be killed, then it is also wrong for politicians to call for the construction of big bridges, for almost inevitably some workers will be killed there too. People are also necessarily killed in car traffic (according to the World Health Organization there are about one million traffic deaths annually, most of them stemming from car traffic) without it in the least being the case that more people would die without traffic than with it (you can, after all, have ambulances without private traffic). People know how dangerous car traffic is and that they themselves might succumb to it; yet (most) people accept

the danger of death in car traffic because they appreciate the additional freedom and convenience car traffic gives them. In other words, most people do not think that the loss of some lives necessarily outweighs any gains in the realm of additional mobility. Why, then, should they think that it outweighs the defense of political freedom or one's way of life? And why should politicians think that citizens think that?

These considerations also shed light on Rodin's idea that citizens have a duty of care towards each other. He considers the objection (against his view on conditional threats and "the myth of national self-defense") that perhaps

> when faced with a political aggressor the members of a community implicitly waive their rights to care. By doing so they may morally empower their fellow citizens to engage in defensive acts that will expose them to greater risk of death.[105]

In his reply, he invokes "familiar problems" with consent theories but also identifies a "deeper problem," namely that the duty of care towards a person (he takes the duty of a father towards his son as an example) is not simply grounded in the person's right to care, and that therefore the person "may waive his rights to care ..., but he cannot so easily waive the duty that arises out of the paternal bond that I have to him."[106]

Even if this were true, the conclusion against national self-defense against conditional threats of "peripheral" interests like political freedom follows at best if one makes again the unwarranted assumption I just criticized. In other words, if the anticipated death of *some* citizens due to their states' defensive war does *not* always outweigh the anticipated successful defense of the vast majorities' property, political freedom, self-determination and way of life, politicians and citizens engaging in a defensive war against a "political aggression" are *not* always violating their duty of care.

To put Rodin's own example of a father's duty to his son to good use: (healthy) children obviously have a vital interest in their life. However, they also have, for example, a non-vital interest in riding a bike or a sled, climbing up a tree, visiting friends, being driven by Mom through all the highly dangerous traffic to soccer practice. Yet engaging in these non-vital activities heightens the risk of the children's death. Does this mean that a father who does not keep his children in the house is a bad parent, and that he violates his "duty of care" by telling his son to switch from a very safe activity to a non-vital more dangerous one: "Stop watching TV, go outside and play"? Certainly not. On the contrary, a fetishistic obsession with absolute security makes for very bad parenting – and very bad politics – indeed, for the obvious reason that a better life often has to be paid for with a higher risk of death. This *is* a fact of life.

This also explains why there is a simple reply to Rodin's talk about "familiar problems" with consent: you simply do not need the children's consent to make them engage in somewhat riskier but more rewarding activities; and in the case of adults, you are often entitled to *assume* that the person whom you expose to a certain risk for certain reasons would consent, namely because it is in his or her own interest. A doctor, for instance, who faces an unconscious patient whose nose she could save from amputation with a simple injection, but refuses to give the injection because there is a 1:10,000 chance that it might kill the patient, is certainly *not* exercising good care (I would take that chance; wouldn't you?).

But at least in some wars against "political aggression" the citizens or politicians opting for the defensive war know that some citizens *actually will die*, so there is more than a mere risk imposed on those citizens, isn't there? No, not really. After all, the citizens or politicians do not know *ex ante* who exactly will die, so when making the decision to engage in defensive warfare against political aggression each and every citizen will *ex ante* only be faced with the *risk* of death: they are not condemned to certain death. Consider a variation of the injection example: in state *A* there are for some reason every year about 100,000 people whose noses, ears, pinkies, and other non-vital body parts could be saved, while they are unconscious, through the above-mentioned injections. However, due to legal and insurance issues the injections are never given, and each year 100,000 people lose non-vital extremities. Fed up with this, people want a political change. And so indeed, the legislature succeeds in passing a law that makes giving the injection under the described conditions obligatory for doctors. Given the odds involved, this means that each year ten people will die from these injections. However, this of course does not imply that these ten people have been treated unjustly or unfairly (traffic accidents, after all, are no examples of injustice, either). *Ex ante* there was only a *risk* of death imposed on them, as on everybody else, and accepting this risk was no less rational for them than for the others – *ex ante* it was in their own best interest. So these ten (or, more precisely, their relatives) are in no position to complain about the policy afterwards if it turns out that in the end it was them who drew the short straw.[107]

But suppose now that there are a couple of people in state *A* who have such an extreme fear of death that they oppose the new law (suppose further that it is for certain reasons unfeasible to search unconscious people for their "injection objection card" or something of that sort: it is not possible to selectively exempt certain people from the application of this injection law). Is this then a sufficient reason to abolish the new law? Obviously not. We also do not allow people with an extreme fear of dying in a traffic accident to bring private traffic to a grinding halt, nor do we allow people with an extreme fear of being killed by dogs to

end dog-keeping in society – nor should we allow anything like this. Sometimes the rational interest of the many morally trumps the fear of the few, and politicians who do not see that and act accordingly are certainly not taking good care of their citizens.

Thus, Rodin's argument fails because it is not true that the risk of death (both to combatants and civilians) associated with a defensive war against "political aggression" always outweighs the chances to successfully protect political freedom, territory, property, one's way of life and other "non-vital" interests.[108] There are even some things worth dying for, and there are certainly an infinite number of things worth *risking* death for. We do it all the time; we also often impose, quite justifiably, such risks on our children or fellow citizens. Thus, it all depends – and isn't this obvious? – on how high the risk is, on the value of the goods defended, and on the chances of successfully defending them. Of course, *sometimes* the risk of death will be too high and the chances to safeguard non-vital interests too low to make a war proportionate. But just war theory has never denied that.

4.1.2.4 *Rodin on Just War Theory, International Law, and "Copernican Moments"*

Speaking about just war theory: Rodin's chapter "The Myth of National Self-Defense" has all the air of an iconoclastic piece bringing down centuries of thought, in this case traditional just war theory and international law. Therefore, it is worth examining how accurate Rodin's interpretation of these traditions is. I will restrict myself to a few central points.

Rodin claims that "it is a foundational principle of just war theory and international law, that states have the right to defend their sovereign independence through war."[109] He then claims that this principle, in just war theory, is partly explained by the value of the community that the state represents.[110] But this, he argues, leads to a contradiction: for it would be "madness" to "accord to non-national communities, such as Cadbury [a chocolate company that according to Rodin was 'an independent and self-determining community'[111]], rights to defensive force comparable to those possessed by states."[112]

Let me point out that the principle Rodin refers to is not "foundational" for international law at all. To substantiate his rather bold claim to the contrary, Rodin refers in a footnote to the Charter of the United Nations, Art. 51. However, the latter article does not grant a right to violently defend national sovereignty against *any* threat, but rather states that there is a right to defend it against an ***armed attack***, as Rodin correctly quotes in the same footnote (only to then ignore this fact).

Thus, the big contradiction Rodin thinks to have identified is simply not there. For example, with regard to the company Cadbury he states

that "it never occurred to anyone, on either side of the debate, that the takeover [through another company] could be resisted through force of arms."[113] That is true. However, it is also true that it never occurred to anyone, on either side of the debate, that the complete destruction of the state formerly known as "Democratic Republic of Germany" through a takeover of its *Länder* (federal states) by the Federal Republic of Germany could be resisted through force of arms. A big part of the reason for this is certainly that the takeover was *non-violent*.

In fact, at some point Rodin does considers this – quite obvious – possibility. Yet he makes the surprising claim that "[t]his suggestion doesn't take us very far":

> Suppose Kraft's takeover bid was conducted through fraudulent action that was not only criminal, but also violent: breaking into the offices of Cadbury's accountants to falsify documents and killing a security guard in the process. It would certainly be permissible to use force to prevent the unjust killing of the guard. But the fact that the violent break-in was an unjust threat to the continued independence of the Cadbury Corporation adds little or nothing to the permission to use defensive force against the perpetrators (or to the permission to inflict foreseen but unintended harm on innocent bystanders). It is the life of the guard, not the independence of Cadbury that is properly defended with force.[114]

As a reply to my point that the big contradiction Rodin sees is a myth of his very own, these remarks of his here are *beside* the point: which is that *both* companies *and* states may defend themselves (if other relevant just war criteria are satisfied) against unjust armed aggression. And Rodin seems to flatly concede this point here. *Why* they may so defend themselves is irrelevant as far as the alleged contradiction is concerned.

The principle in question is also not "foundational" for just war theory, which might explain why Rodin does not provide any textual evidence to support his claim. While it is correct that just war theory does not always only regard unjust *violent* acts (or their continuing unjust results) as just causes for war and is more permissive than international law, it is not nearly as permissive as Rodin makes it out to be. For example, it does not regard all infringements on sovereignty as just causes for war, but only, of course, unjust infringements; and in this respect it is important to see that in traditional just war theory a just infringement on sovereignty can be triggered by something else than the previous unjust infringement of the defender's *sovereignty* (humanitarian intervention, for example, is certainly not a modern invention).[115] In other words, sovereignty is not nearly such an important concept in traditional just war theory as Rodin claims it is. Moreover, the whole obsession with *states* is completely *alien* to traditional just war theory.

Finally, Rodin also informs us that:

> [W]e are indeed living through a Copernican moment in international ethics. In the old paradigm, prevalent since the establishment of the Westphalian order, the rights and interests of individuals metaphorically 'orbited' those of the state – they were conceptually and normatively subordinated to the rights and interests of the state. But the human rights revolution inverts this order of priority.[116]

Really? What "old paradigm" is Rodin talking about? He does not say. One cannot avoid the nagging suspicion, though, that he simply means Michael Walzer, about whom he states: "Walzer's arguments belie a thoroughgoing subordination of the rights and interests of individuals to the rights and interests of states."[117] But Walzer is certainly not a founding father of international ethics (which includes the just war tradition), nor are his views, contrary to popular opinion, particularly representative of the just war tradition, which did not simply disappear with the Wesphalian order – not least given Grotius's lasting influence. As already said, Walzer's obsession with sovereignty and states is not shared by traditional authors. If, however, Rodin really means Walzer, then this is slightly amusing if contrasted with the following statement by Seth Lazar: "Individual rights were first placed at the heart of just war theory in Michael Walzer's *Just and Unjust Wars*."[118] Of course, this surprising claim – I am sure Suárez, Vitoria, Molina, Grotius, and Anscombe would have found it surprising indeed – is not backed up by Lazar with any evidence. The reason for this, and the reason why all these just war theorists would have found Lazar's claim surprising, is, of course, that in their accounts the rights of individuals were central and indeed "foundational," and certainly did not merely "orbit" – whatever Rodin might think – the rights and interests of "the state."[119]

Finally, Rodin offers his own position as a "new normative position intermediate between just war theory and pacifism." And he explains:

> It is not just war theory because within that theory defence against political aggression is not only permissible, it is paradigmatic. ... But neither is this position a form of pacifism as traditionally conceived, because it permits coordinated, lethal, defensive violence against genocidal aggression.[120]

"Paradigmatic" for what? For justified war? But defense against political aggression is not paradigmatic for justified war in just war theory; rather, wars that satisfy the just war criteria are paradigmatic for justified wars in just war theory. Hence, *disproportionate* defensive wars against political aggression would be paradigmatic for unjustified war in traditional just war theory no less so than in Rodin's "new normative position."

It should also be noted, moreover, that his position in *War and Self-Defense,* which prohibits defensive war against what he now calls "political aggression" but allows it against genocidal war,[121] might not be that new either, but rather is already discernible in the writings of philosophers such as Richard Norman or Frank de Roose.[122] Their "pacifism" is, after all, somewhat qualified, which is precisely why they do not actually call themselves pacifists but explicitly say that they take an "intermediate" position between just war theory or "defencism" on the one hand and pacifism on the other. Thus, the similarities between their positions and Rodin's should not go unnoticed.

However, Rodin's views about the permissibility of war in the form of effective and proportionate forceful law enforcement do distinguish him considerably from authors like Norman or de Roose, given that this law enforcement is now also permitted against political aggression. Unfortunately, such a stance flatly *contradicts* Rodin's own premises and his whole previous argument. Some of the reasons for this should be clear by now, but let us have a closer look.

4.1.2.5 War as Law Enforcement and Punishment: The Incoherence of Rodin's Account

That there is at least a "tension" in Rodin's account has already been noted a few years ago by Jacob Blair. Blair correctly notes the obvious (which, however, is worth noting): "If national-defense is a disproportionate response to conditional aggression, then punitive war [and war as law-enforcement, as Blair makes clear later on] is a disproportionate response as well."[123] That is correct, but calling this a "tension" is an understatement. Blair later on says that Rodin faces a "dilemma,"[124] and this is certainly a more accurate characterization. Rodin's position is contradictory.

Rodin himself has never answered to Blair's challenge, but Peer Ilsaas tries to defend Rodin, claiming that Rodin's position is "not ... necessarily dilemmatic." Why? Because, says Ilsaas, within an unjust international order (case 1) the "lesser aggression" (that is what Rodin now calls "political aggression") of state A against state B only "violates the rights of the citizens of B," while in an international system governed by Rodin's "ultra-minimal universal state" (case 2) such an aggression "both violates the rights of B's citizens *and* offends against the just international legal order," and this "arguably renders what ... would have been a disproportionate response [in case 1] – the killing of the aggressing soldiers of A – proportionate."[125]

A first problem with this reply to Blair's challenge is this: one of my criticisms above was that Rodin ignores factors that are highly relevant to proportionality considerations, for example, precisely the importance of a just social-legal order. It is, however, inconsistent to appeal to this

factor (once you need it) on the international level but to completely ignore it on the domestic one. In other words, if the political aggressor's violation of the just international social-legal order makes killing him proportionate, then the mugger's violation of the just domestic order makes killing him proportionate, too. But with this the very foundation of Rodin's whole argument, namely the claim that killing a mugger who poses a conditional threat is *not* proportionate, crumbles away. Thus, *pace* Ilsaas, Rodin's overall position is indeed inconsistent.

A second problem is that the justice of the social-legal order is irrelevant for the *moral* argument. After all, you can also defend *justice,* the *moral* order, and *natural* law against unjust attacks that are perfectly *legal.* A slave defending himself against the unjust attack of his "master" might violate the legal order, but not the moral one, on the contrary: *every* defense against a morally unjustified attack is not only a defense of the defender's rights, but also a defense of the integrity of *natural* law, of the *moral* order, of *justice.* This is no less true in an unjust international legal order than in a just one, and therefore no less true in Ilsaas's first case than in his second one: Blair's challenge stands unrefuted.

Rodin's position, however, is not only inconsistent, but involves a bizarre – and so far widely overlooked – inversion of moral facts and values. To wit, first Rodin argues that it would be disproportionate to kill the mugger in self-defense, and states that our appraisal of the "comparative worth of life and property" is the "ethical bedrock" underlying that proportionality assessment.[126] From this domestic context he then draws conclusions on the international level: defense against political aggression is unjustifiable. But then, however, he develops a justification of war as law enforcement, ignores that self- or other-defense against unjustified aggressors *is* law enforcement, focuses on punishment,[127] and argues that killing soldiers *as punishment,* of all things, for their political aggression *is* proportionate.

This is, as I said, bizarre; and we can see just how bizarre it is by being consistent: if you can draw conclusions from the domestic level for the international one, then this must also work in the other direction. But applied to the domestic level Rodin's argument implies: yes, it is disproportionate to kill the mugger posing a conditional threat in *self-defense,* but no, it is *not* disproportionate to kill him as *punishment.* How does this square with "our" intuitions and the "ethical bedrock" Rodin was referring to? In fact, he seems to be turning things on their head.

Of course, Rodin would not allow private punishment.[128] But that does not make it better. To mirror the international case, in the domestic case, it would now have to be permissible to condemn the mugger *in absentia* to death and to send the police out to kill him in execution of the sentence (even if, moreover, the stolen goods had meanwhile been returned to their rightful owner: punishment has to be distinguished from restitution, after all). This, however, seems not to be particularly desirable.

Besides, another "ethical bedrock" of our legal and moral tradition is that it is better to let many guilty people go unpunished than to punish one innocent person. But Rodin knows very well that modern wars come with considerable "collateral damage," which implies that he seems to be quite willing to leave this principle of our legal and moral tradition behind. Of course, "collateral damage" can be justified. But it can be justified by such justifications as "otherwise we could not have saved those many other innocent people," and not, as Rodin's approach suggests, by such a justification as "otherwise we could not have punished those few guilty people."

And finally, regarding Rodin's argument about care: if it is not permissible to risk the life of people one cares for *even in defense of their own non-vital interests*, then it is certainly not permissible to risk their lives for the mere purpose of punishing somebody.

Thus, while Rodin claims that the right to national self-defense is a "myth" and "unsupported by coherent moral reasoning,"[129] it is actually the moral reasoning underlying his own position that is incoherent.

4.1.2.6 Conclusion

Rodin's position regarding the "myth" of national defense is mistaken because, as we saw, his analyses of necessity, the alleged duty to retreat, and proportionality are defective both from a legal and from a moral perspective. But even if we were not able to say exactly why Rodin's position is mistaken (though we are), there can be no doubt *that* it is mistaken. After all, Rodin's opinion that we must not resist an aggressor who uses a "conditional threat" against life in order to extort from us or others the sacrifice of non-vital interests implies nothing less than the surrender to bullies and the breakdown of law enforcement even on the domestic level. Given that on the other hand Rodin tries to justify "war as law enforcement," this is probably the strongest possible *reductio ad absurdum* imaginable.

4.1.3 Self-Defense Redeemed: The Common Understanding of the Self-Defense Justification

The last two sections were negative: I explained how *not* to conceive of the self-defense justification. It is time now for me to state how to positively conceive of it, and thus to describe its central features. These features, I submit, basically reflect self-defense accounts found in Western jurisdictions and thus the actual ordinary morality found in those jurisdictions. I have elaborated upon, explained, and defended these features in great detail elsewhere.[130] For present purposes, a summary will have to suffice. Here we go:

> *Self-defense* (understood as including other-defense): The self-defense justification is *triggered* by an *imminent or ongoing attack*,

where "attack" refers to a *rights violation* (justified or not) in form of the *act* of a *person*.[131] Thus, the self-defense justification does *not* apply to *any* other kind of threat, and it only justifies harm inflicted on the attacker. ("Collateral damage" would have to be covered by another justification.)

What does "imminent" mean?

> *The imminence requirement*: For an attack to be *imminent* there has to be a *manifestation of the aggressor's intention* to attack *immediately*.

For example, "threateningly approaching the defender in a way that aims at the immediate use of violence" can trigger the applicability of the self-defense justification.[132] The imminence requirement is important (*pace* "revisionism") because the imminence or ongoingness of the attack triggers the harsh *necessity* criterion unique to the self-defense justification as well as a particularly harsh proportionality requirement. There are a number of reasons for this. The two most important ones are that a defender faced with an imminent (let alone an ongoing) attack has no time to engage in elaborate deliberations as to *how* to defend himself. Therefore, requiring him to compromise his safety for the aggressor's sake would be grossly unfair and unreasonable. Conversely, the aggressor, due to empirically documented psychological reasons, is *extraordinarily unlikely to change his mind*, which allows the defender to act on the strong presumption that indeed he will go through with his aggression.[133]

Because of these effects of imminence, the two requirements of necessity and proportionality can be kept separate; they do not merge into a balance of interests, as with the lesser evil justification.[134] This means that the necessity requirement does *not* require trade-offs between the interests of the defender and the aggressor. For the two reasons stated in the previous paragraph, it firmly stands with the defender, rendering the necessity requirement as follows:[135]

> *The necessity condition of the self-defense justification*: A defender fulfills the necessity requirement of justified self-defense if and only if he or she chooses a way of defending himself or herself that would in the eyes of a reasonable person[136] under the conditions of the self-defense situation be (one of) the *mildest means* among those means that promise a *safe, instant and conclusive defense* against the attack or – if this is not possible under the circumstances – among those means that *promise the best possible defensive results*. The defender, however, is free (but not required) to forego the *best* defensive results for the purpose of choosing an even milder means even if this heightens his or her own risk of being harmed.[137]

As already said, the proportionality requirement also takes a specific form. In particular, unlike the proportionality criterion of the lesser-evil justification, it does *not* weigh *all* the social benefits (including all harms it avoids) of the defender's defensive action against all its costs.[138] If it did, one would not be permitted to use lethal self-defense against a culpable aggressor whom one knows is about to save three other people tomorrow, let alone against someone who is on the brink of saving *many* others because he is about to invent the cure for some disease (which in case of his death will not be found for some time to come). Yet legally one clearly is, and it is strongly counter-intuitive to claim that morally one isn't.[139] It is precisely the fact that the self-defense justification applies to force used against ongoing or imminent *attacks* that gives its proportionality condition this specific form:

> *The proportionality criterion of the self-defense justification*: The proportionality condition of justified self-defense weighs the severity of the defender's counter-measures against the severity of the aggressor's attack, where the factors determining this severity include the threatened physical or material harms, the culpability of the aggressor, and the degree to which the attack violates the victim's honor and autonomy and the social-legal or moral order.[140] How exactly these respective weights are to be determined does not depend on a one-size-fits-all formula valid across all societies and contexts, but rather depends on community standards and reciprocal understandings, which are indispensable to concretize the requirement in its given context.[141]

Finally, there is of course still the subjective element, the importance of which I have stressed repeatedly. While the imminence requirement helps to explain why the necessity requirement is particularly harsh on the aggressor – by not asking the defender to make trade-offs between his own safety and the aggressor's interests – it can only do so on the condition that an objective, purely fact-relative account of the self-defense justification has already been rejected. The reason for this is that an *omniscient* defender, who knows all the facts, is quite able to avoid tradeoffs even while simultaneously availing himself of incredibly mild means that are practically unavailable to defenders in the real world, given that the latter are not blessed with the gift of omniscience.

> *The knowledge requirement of the self-defense justification*: In order to have a self-defense justification, the defender must have a justified (and thus reasonable) true belief that the objective conditions (imminent or ongoing attack, necessity, proportionality) of the self-defense justification are fulfilled.

Thus are the features of the self-defense justification. These features, I submit, indeed reflect – in contradistinction to the "revisionist" Responsibility Account – the *ordinary* morality of the use of force in Western liberal democracies, not least because they follow accounts of self-defense found in Western jurisdictions. And it is in particular the feature of *imminence* which distinguishes this justification from another one, namely the defensive emergency justification.

4.1.4 *Beyond Self-Defense: The Defensive and the Aggressive Emergency Justification*

Even philosophers who are determined to stretch the moral concept of self-defense beyond imminent attacks sometimes acknowledge that "[i]n the law, while a threat of imminent attack may justify an individual's resort to force in self-defence, there is no right to use force to prevent attacks that are not imminent."[142] That is, on the account of self-defense found in law – and defended here – one cannot avail oneself of the self-defense justification in just any case in which one is using (necessary and proportionate) force against an "unjust threat" but rather only in cases in which this "unjust threat" comes in the form of an *ongoing or imminent attack*.[143]

Of course, there are sometimes kinds of threats that do not come in the form of ongoing or imminent attacks but against which violent counter-measures might seem to be justified. But the point is that they cannot be justified under an appeal to self-defense. Yet since Anglo-Saxon law does not have the justifying emergency exemption found in German law, not only Anglo-Saxon philosophers but also some Anglo-Saxon lawyers, judges, and juries are tempted to justify counter-measures against severe threats that do not come in the form of imminent or ongoing attacks by stretching the concept of self-defense beyond its proper limits, for example by conveniently overlooking the fact that, for instance, US self-defense statutes require self-defense to be directed *against the actual or at least imminent (or "immediate") use of force*, and not against things that will (or even only might) *lead up to* the imminent or actual use of force tomorrow, let alone in two weeks. While there might be pre-emptive self-defense, there exists no such thing as preventive self-defense: we cannot simply jettison the imminence requirement, or we will be talking about a *different* kind of justification.[144]

This different kind of justification I have in mind here is the moral equivalent to a particular part of the German emergency or necessity justification.[145] The German legal concept of "justifying emergency" or "justifying necessity" (*rechtfertigender Notstand*) does *not* – at least not without additional interpretative efforts on the Anglo-Saxon side – coincide with the Anglo-Saxon concept of the lesser evil justification.

This latter justification can justify violating a law (for example against speeding) for the far greater good. So can justifying emergency. More importantly for present purposes, however, the lesser evil justification is primarily used to justify harms and wrongs inflicted on *innocent* (or at least not sufficiently guilty) *bystanders;* and it can only be used to justify (offensive) conduct such that "the harm or evil sought to be avoided by such conduct is *greater* than that sought to be prevented by the law defining the offense charged."[146] Justifying emergency, in contrast, can justify harming the innocent (in which case it is called "justifying *aggressive* emergency," to which I will turn in a moment), but it also includes, under the label "justifying *defensive* emergency," the special case of harming the not-so-innocent or harming the interests of those from whose "sphere" the harm or evil to be avoided emanates in the first place.[147] In the latter case, the *harm* to be avoided need most definitely *not* be greater than the harm inflicted.[148] For instance, in the famous trolley example, the one innocent person to whom the trolley is being diverted to save five other innocent persons is neither posing a threat nor responsible for the threat. Nor would a parked car to which you avert the trolley to save the five be a threat. In contrast, the innocent falling man (lifted up by the wind or thrown against his will by a villain) in Nozick's example,[149] who is about to crush the person below him, does pose a threat. His own body is the threat. Likewise, if the brakes of a parked car fail and it rolls downhill toward your car, then by destroying the runaway car you destroy something that actually poses the threat to your car. German law treats these two pairs of situations very differently. The former two situations are examples of "aggressive emergencies." The latter two situations, in contrast, exemplify the "'defensive emergency,' where the emergency act is not directed against a bystander but against a person (or his property) who has a connection to the source of the danger."[150]

Aggressive emergency justifications essentially comprise *impartial lesser evil justifications* (where conflicting interests are weighed from an impartial point of view) and *agent-relative necessity justifications* (where the agent's interests and responsibilities are given special weight.

Defensive emergencies are special in that the proportionality standards are much more relaxed than in the case of aggressive emergencies. To wit, all else being equal, in order to avoid the threat, you may inflict significantly more harm on a person who is (like the falling man) connected to the threat than you may inflict on a person who is a mere bystander. Likewise, you may destroy the car running downhill toward yours even if the other car is more expensive than yours (and would, robust as it is, not be destroyed if it crashed into yours). You would not, in contrast, be allowed to turn away the trolley from your cheaper car to another person's more expensive (but non-threatening) car.[151]

Now, I indicated in the previous two paragraphs that the Anglo-Saxon lesser evil justification could perhaps capture the difference I just described with the help of "additional interpretative efforts." The reason for this is that, for example, the American Model Penal Code I quoted states, to repeat, that "the harm *or evil* sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged."[152] One could be inclined to make the argument that one and the same amount of harm is *less* of an *evil* if it befalls a threat like Nozick's falling man or the threatening car running down-hill than when it befalls a non-threatening bystander or a non-threatening car. Yes, one could, but then in the interest of avoiding arbitrariness and confusions one should do this *explicitly*, which means, of course, that one should make precisely the distinction German legal scholarship makes, namely the distinction between justifying aggressive and justifying defensive emergency.

Having clarified the difference between justifying aggressive and justifying defensive emergency, we can now focus on the difference between the *self-defense* justification and the *defensive emergency* justification. The difference is, of course, precisely that self-defense is exclusively directed against imminent or ongoing *attacks* while measures taken in justifying defensive emergency are directed against *other* threats stemming from humans (or their property); for example against a potential aggressor whose (potential) attack is neither ongoing nor imminent.[153] This difference is *important* because the two legal and moral defenses are not subject to the same conditions of justification.[154] The absence of the imminence requirement has consequences for how the *other* criteria have to be interpreted. To wit, the self-defense situation (an imminent or ongoing attack) triggers a) a necessity criterion that is very harsh on the aggressor (and thus cannot be simply interpreted as requiring "the mildest means"), b) a *no-gross-disproportionality criterion* (the so-called social-ethical limitations of self-defense: German self-defense law does not officially recognize a proportionality criterion), which, again, is very harsh on the aggressor, and c) the *asymmetry* between defender and aggressor (there is no justified self- or other-defense against justified self- or other-defense). In contrast, the justifying defensive emergency situation triggers a) the inapplicability of the harsh necessity requirement of the self-defense justification, and b) a proportionality requirement that is significantly more lenient (towards the aggressor) than the no-gross-disproportionality requirement of the self-defense justification.[155] Moreover, c) the moral justifying emergency justification is compatible with the *symmetry* of the antagonists, so that they may use force against each other.[156]

Of course, some authors (and politicians) talk of "preventive defense" anyway. However, from the legal perspective this seems to be an abuse

of language.[157] Moreover, and most importantly, this abuse of language also leads us morally astray: putting defense against imminent or ongoing attacks in the same bag as counter-measures against non-imminent or inchoate threats suggests that measures against these two kinds of dangers are governed by the same moral or legal criteria, which they are not.[158]

Let me add a final note on aggressive emergency or the lesser evil justification. "Revisionists" use this justification exclusively to justify harm inflicted on innocent bystanders in the process of averting an actual, objectively existing threat. Prime examples are diverting an actually existing trolley that would otherwise kill five people away from them toward a single innocent bystander, or destroying an actually existing ammunitions factory (thereby saving many) while foreseeably killing (fewer) innocent bystanders. It is not surprising that "revisionists," who are so very fond of "objective," "fact-relative" justification, cannot, accordingly, conceive of the lesser evil justification in any other way. Yet not all threats are actual or objective in the sense that if one does not intervene they would, in fact, result in the threatened negative outcomes. Sometimes there is only a *risk* of a negative outcome, in the sense that an agent has very good reason to ascribe a high probability to the occurrence of a certain outcome. That he has good reason to do so, however, is quite compatible with the possibility that the feared outcome will then fail to materialize even if one fails to intervene. While the omniscient agents appealed to as implicit or explicit standards for objective justification do not face such risks (after all, they know everything), real human beings do. And intuitively they can be morally justified to act accordingly. To wit, it would appear that a non-omniscient, human agent has a lesser evil justification to do x if the moral risk of not doing x *outweighs* the evils (including rights violations) produced by x in a balance of interests.[159]

To give an example: if a general has, on grounds of the intelligence provided, good reason to believe that there is a) an extremely high probability that the enemy will soon launch a missile from point y that will destroy thousands of innocent lives, and b) that a strike against y will prevent this from happening but also cause the death of one innocent bystander, then the general seems to have a justification to launch the preventive strike even if later it should turn out that only the innocent bystander was located at y, but not the feared missile. At some point, at some numbers of lives risked, the risk involved in not launching the preventive strike seems to outweigh and hence justify the death of one innocent person.

This form of justification is not unique to armed conflicts. We also know it from medicine. Doctors often inflict harms on their patients (they cut them open or knowingly give them drugs with severe side-effects) in order to avert the risk of something much worse happening

to the patient. Provided the doctor acted reasonably and followed established medical procedure, we regularly deem such courses of action justified – even if later we find out, for example, that what the doctor reasonably took for the symptom of a dangerous disease was actually only there due to freak but entirely harmless circumstances. Note that it will not do to claim that the doctor has a justification to inflict harm anyway, thanks to the patient's consent. While the patient's consent removes one obstacle to legitimate harming, namely the patient's *right* not to be harmed, it does not remove another obstacle, namely the intrinsic *value* of the patient's life and health. I am not *justified* in killing or severely harming someone only because that person has consented to such harming – I still need a positive reason, a justification to inflict harm.[160] But again, intuitively a doctor does have a justification to engage in a medical procedure that inflicts harm if the risk of not so doing outweighs the actual harm inflicted – even if, unbeknownst to the doctor, the harm to be averted would not actually have materialized.

Just as it is unreasonable to hold doctors to the standards of "objective justification" given that they have to deal with uncertainties, so it is unreasonable to hold soldiers to such standards given that they have to deal with "the fog of war." Hence the general in the example can well be justified in doing what he does. Note that this is not simply an iteration of the argument above that "revisionists," due to their endorsement of "fact-relative justification," are stuck with an absurdly stringent necessity requirement for justified self-defense. Rather, the objection now goes a step further: even if they could solve the problem objectivism implies for the interpretation of the necessity requirement of self-defense, this would still not enable them to accommodate the intuition that the general in our example acts justifiably. After all, for the preventive strike to be justified self-defense on "revisionist" accounts, it has to be directed against an objectively unjustified threat of harm. But here there is no *objective* threat of harm *at all*. Of course, in one point, I actually agree with "revisionists": the self-defense justification does not apply here, since it indeed only applies to cases where one is faced with an *actual* attacker. However, this is not true for the lesser evil or aggressive emergency justification – it also applies to cases where one is faced with the mere *risk* of unjust harm, even if the harm the risk refers to would never actually come about. This, however, is not a path "revisionists," qua objectivists, can take. On an objectivist account, one can only have a lesser evil justification to inflict a harm in order to avert a threat if this threat is not a mere *risk* of harm but a harm that would actually materialize unless counter-measures are taken.[161] Such an objectivist interpretation of the lesser evil justification, however, limits the scope of the justified infliction of harm in both medicine and war to such an extent as to be intuitively entirely implausible. This is a further reason to reject both objectivism and "revisionism."

4.1.5 Self-Defense vs. Justifying Emergency: Implications for Participating in War

I have not *defended* my account of self-defense and of justifying emergency here in all its features. I have, as already noted, done so elsewhere, discussing every single element of the self-defense justification in detail, and arguing for the necessity of distinguishing it from the justifying emergency justification at length.[162] "Revisionists," in contrast, have not provided detailed arguments for their rejection of the imminence requirement (even McMahan's treatment of the topic is comparatively superficial); thus also not for rejecting a separate emergency justification referring to non-imminent threats; nor for their embracing "objective justification"; nor for their failure to provide a *substantive* account of the necessity requirement. They also rely on an unwarranted "responsibility account" of "liability to defensive force" the admitted defect of which in the form of entirely counter-intuitive implications they have failed to overcome – without this keeping them from holding on to this account. These are all rather severe shortcomings of the "revisionist" approach.

Setting aside the theoretical foundations, the roots as it were, of these competing accounts, we can, however, also judge them by their fruits, that is, we can assess their implications. For the purposes of this book I am obviously interested in the implications for the ethics of war. As repeatedly pointed out, "revisionists" like to claim that they come to revisionist conclusions about the ethics of war by applying the ordinary domestic or peacetime morality of the use of force to the realm of war. In fact, however, it is the other way around: while some of their allegedly particularly unorthodox conclusions about the ethics of war can only be called "revisionist" if one ignores or misinterprets the actual just war tradition, the "revisionists" are quite mistaken in claiming that they extend the *ordinary* morality of the use of force to the realm of war. On the contrary, once one pays attention to the actual ordinary morality of the use of force, certain "revisionist" claims regarding the ethics of war are undermined. We already saw one example of this: the "bloodless invasion" argument popularized by Rodin is,[163] contrary to his claims, not supported but deflated by the ordinary morality of self-defense.

The same is true for the sweeping inequality thesis. There are a number of reasons for this. First, a justified soldier's "search and destroy" mission cannot be justified by self-defense since such missions are not (or are at best accidentally) directed against an ongoing or imminent attack.[164] There could be a defensive emergency justification though. Yet as already pointed out, there is permissible self-defense against acts justified by defensive emergency.[165] The sleeping soldier whose throat is about to be slit by the justified searcher and destroyer need not let this passively happen. He is permitted to defend himself. This does not lead to moral equality, but it is certainly a severe dent to the sweeping

inequality thesis. A second reason stems from the role risk assessments legitimately play in emergency justifications. I have just explained this at the end of the previous section. Here too situations of symmetry can arise: it is quite possible that in certain situations both sides in a war (or both sides contemplating a preventive strike against an enemy) have an emergency justification to engage in a military strike against their enemy. Given that "objective justification" is not needed (and can practically never be acquired) to provide a genuine moral justification, it is to no avail to claim that both sides can at best have "evidence-based" or "belief-based" justifications. No, they can both have a valid *moral* justification to attack.

Yet in the following, I will set aside symmetry on the basis of emergency risk assessments. I will also set aside symmetry on the basis of justified self-defense against defensive emergency measures. Instead, I will focus on the mirror image to this latter symmetry, namely on symmetry based on justified self- or other-defense or justified defensive emergency measures against attacks and threats that are themselves justified based on an *aggressive* emergency or lesser evil justification. This simply means that I will focus on measures taken in defense of the *innocent* and initially non-threatening victims of justified attacks. The fact that attacks and rights-infringements against the innocent can only be justified by an *aggressive* emergency justification (since they *are*, justified or not, *aggressions* against the innocent,) and thus by a lesser evil or necessity justification, shows better even than the previous two reasons that the constant "revisionist" invocation of the asymmetry between the innocent self-defender and the responsible attacker in support of their sweeping inequality thesis is entirely misleading. The actually ordinary morality of the use of force we have to pay attention to when we look into an extension of this ordinary morality to the case of war is one comprising the *interplay* of, or *clashes* between, the self-defense justification on the one hand and choice of evils justifications seeking to justify the killing and maiming of the innocent on the other. Once we pay attention to this interplay, the sweeping inequality thesis reveals itself to be both counter-intuitive and theoretically unfounded.

Thus, in this section, I shall argue that in some wars both sides are (as a collective) justified; that is, they can both satisfy valid *jus ad bellum* requirements. Moreover, in some wars – but not in all – the individual soldiers on the unjustified side (that is, on the side without *jus ad bellum*) may nevertheless kill soldiers (and also civilians as a side-effect) on the justified side, even if the enemy soldiers always abide by *jus in bello* constraints. The reason for this is straightforward with regard to the self-defense justification: this justification provides one with an act-specific prerogative (the specific act being self- or other-defense) to discount the mediated consequences of one's act, so that the act can be justified although it does *not* avert more harm or even evils than it

inflicts or produces. Nor do acts justified by the agent-relative necessity justification need to avert more harm or evil than they inflict or produce. Rather, they allow the agent (hence they are "agent-relative") to give special weight to her own interests and the interests of those to whom she has special responsibilities when assessing the proportionality of said acts. This is in particular so in the case of foreseeably preventing innocent and non-threatening people from being saved (for instance, by shooting down a tactical bomber who would have saved them by destroying an ammunitions factory) but less so in the case of the intentional or foreseeable direct harming of innocent and non-threatening people (dropping bombs on people standing near an ammunitions factory). In the light of these considerations, I will then– still entirely from within the perspective of the "ordinary morality of the use of force" – answer the question as to when soldiers may justifiably participate in war (and when not).

4.1.5.1 Equality and Inequality in War: Background and Conceptual Clarifications

On the traditional view in just war theory, there cannot be a (morally) just cause for war on both sides. Call this the "*jus ad bellum* inequality doctrine."[166] Moreover, on the traditional view combatants participating in a justified war may kill their enemy combatants participating in an unjustified war – but not vice versa (at least not as long as the combatants on the justified side always abide by *jus in bello* requirements and the unjustified combatants know their war to be unjustified). Call this "the *jus in bello* inequality doctrine."[167] The opposing view, in contrast, claims that as long as the combatants on the unjustified side abide by the *jus in bello* requirements, they may kill the combatants on the justified side (and, of course, vice versa). Call this "the *jus in bello* equality doctrine."[168]

I think that all three doctrines are wrong – the reality is more complicated and differentiated. In some wars both sides are (as a collective) justified, that is, they can both satisfy valid *jus ad bellum* requirements. Moreover, in some wars – but not in all – the individual soldiers on the (as a collective) unjustified side (that is, on the side without *jus ad bellum*) may nevertheless kill soldiers on the justified side, even if the latter always abide by *jus in bello* constraints. In the present section, I will focus on the two *in*equality doctrines, but my conclusions will also contradict the *jus in bello* equality doctrine.[169] However, I will also argue that there can be justified wars in which soldiers participate *un*justifiably, even if they abide by *jus in bello* requirements.

While the moral inequality thesis is indeed the traditional view, as I will show in Section 4.1.6.1, and authors like McMahan do therefore not "revise" the tradition in this respect, there is certainly a shift of attention as far as the paradigmatic justification for war and for harming

and killing in war is concerned. To wit, the tradition largely relied on the punishment and authorized law enforcement justification,[170] while current-day writers, including "revisionists," largely rely on the self-defense justification. Interestingly, however, *both* foci – the recent one on self-defense, and the traditional one on punishment or authorized law-enforcement – are prone to lead, and have led, to the *same* mistake, namely to the rather premature endorsement of the inequality theses. This is so because both self-defense and law-enforcement are *intrinsically asymmetrical* justifications: there is no justified self-defense against justified self-defense,[171] neither in law nor in morality; nor is there justified law-enforcement against justified law-enforcement. More precisely: if Albert has a self-defense justification for using force against Berta, then Berta cannot have a self-defense justification for using force to counter Albert's defensive force; likewise, if Albert has a law-enforcement justification to use force against Berta, then Berta cannot have a law-enforcement justification to use force against Albert's law enforcement.[172] However, there *can*, as we will see below, be justified self-defense against force that is justified by a *necessity justification*,[173] and there can be force justified by a necessity justification being used against force that is *also* justified by a necessity justification. The necessity justification is *not* intrinsically asymmetrical.

To explain both the mistake and the way to avoid it in more detail, I will first, in Section 4.1.5.2, consider the main argument that has been offered for the two inequality doctrines and argue that it is unconvincing. The main problem with the argument is that it proceeds by giving certain clear examples of conflicts where only one side may justifiably kill the other, and by then assuming the applicability of these examples to *all* wars in which there is a justified side. The two main examples are – not surprisingly in the light of what has been said above – paradigmatic self-defense examples (one isolated culpable aggressor vs. one isolated innocent defender) and typical law-enforcement examples (a police officer trying to stop a murderer in a surgical way, that is, without endangering innocent bystanders). However, there are, as we will see, also clear examples – examples involving the unduly marginalized necessity justification on at least one side – where *both* sides in a conflict may justifiably kill each other; and while some wars indeed correspond to the first group of examples, there are *also* wars that correspond to the second group of examples. They do so in two ways: there are some wars where both sides, as collectives, are justified; and there are some wars in which one side is justified and the other is not but where nevertheless soldiers on the unjustified side may justifiably kill those on the justified side.

Moreover, one common and mostly unspoken assumption underlying the two inequality doctrines is that an agent contemplating the use of force against an attacker or threat must not give special weight in his proportionality calculations to himself, to those near and dear to

him, or to those towards whom he has special obligations. Once this assumption is dropped, the two doctrines in question become untenable. Accordingly, in Section 4.1.5.3, I will provide (additional) examples that strongly suggest that the proportionality of the use of force is, indeed, partly dependent on agent-relative considerations. For instance, a person may do things to save one's own child that he or she would not be allowed to do in order to save an unknown child. Applying this idea to wars further helps to rebut the moral inequality doctrines.

In Section 4.1.5.4, I will try to give an (admittedly general, but nevertheless practically meaningful and applicable) answer to the question of which wars soldiers may justifiably participate in. I will also address there the issue of the soldier's personal responsibility. It should already be noted here that not only the rejection of the equality thesis, but also the focus on the individual's responsibility is most certainly not an innovation of "revisionist" just war theory but a stock-in-trade of the tradition.[174] Traditional just war theorists from Augustine to Elizabeth Anscombe have argued that it is impermissible for a soldier to take part in a war if he knows the war to be "unjust," that is, unjustified. Anscombe flatly states: "Nor, if we know that a war is wrong, may we take part in it without sin, however grievous it may seem to stand apart from our fellow countrymen."[175] Walzer, who himself subscribes to the moral equality thesis, confirms this view of the tradition: "Catholic writers have long argued that [men] ought not to volunteer, ought not to serve at all, if they know the war to be unjust."[176] As already indicated, I will argue that this view is wrong. However, this does not amount to an endorsement of the moral equality thesis. Instead, I will argue that whether or not an *individual* may justifiably participate in a war is not already decided by the war's justifiability or unjustifiability; rather, the concrete circumstances of the individual have to be taken into account too. Thus, a conscientious soldier might not only be one who deliberately serves in a justified war or deliberately refuses to serve in an unjustified war, but also one who deliberately refuses to serve in a justified war or who deliberately does serve in an unjustified one. However, it is the soldier himself who has to come to an understanding of whether the objective circumstances that would make his participation in the war justified obtain or not. Without such an understanding, the soldier's participation would still be unjustified. Thus, morally, there is neither an *a priori* reason to condemn soldiers for their participation in unjustified wars, nor a reason to simply let soldiers "off the hook."

4.1.5.2 The Dubious Argument for the Two Inequality Doctrines

The clearly most popular and most widely discussed argument for inequality in war proceeds on the assumption that killing in war must

be justified as a form of law enforcement or as a form of self- or other-defensive killing, emphasizing the asymmetry between law enforcer and criminal or between culpable aggressor and innocent defender respectively, and from there drawing conclusions for the ethics of war.[177] Hugo Grotius, for example, states that "no Man [has] a Right to oppose Force to a just Attack, no more than a Criminal can plea a Right of defending himself against the publick Officers of Justice, who would apprehend him, by Order of the Magistrate."[178] And Jeff McMahan states (more than 400 years later):

> If a murderer is in the process of killing a number of innocent people and the only way to stop him is to kill him, the police officer who takes aim to shoot him does not thereby make herself morally liable to defensive action, and if the murderer kills her in self-defense, he adds one more murder to the list of his offenses.[179]

The underlying assumption here is that if the murderer in the domestic context may not defend himself against a justified law-enforcer or defender, soldiers in the international context are not allowed to defend themselves against soldiers justifiably defending their nation or enforcing natural law either.

The problem, however, with Grotius's and McMahan's examples are that they abstract from certain realities of many wars. To wit, there are at least two important disanalogies between the examples and many wars. First, domestic police officers can, at least in some states, be regarded as having been in some sense authorized (through democratic and constitutional procedures, for example) by the majority of the population of the very state on whose territory they are operating, while in contrast the soldiers justifiably invading *another* state in order to stop the majority from killing a certain minority group there often cannot be regarded as having been authorized by the majority of the population of the invaded state on whose territory they are now operating. Second (and more importantly for the line of reasoning in this section), in many wars justified soldiers kill not only culpable aggressors and criminals but also *innocent* people ("collaterally").

If one reintroduces these realities (that is, *lack* of authorization by the majority of the population of the very state on whose territory the agent is operating and *presence* of "collateral damage") into one's examples, the picture changes. Consider, for instance, this example:

> *Bob and Juanita*: Vigilante Bob plans to kill the drug cartel's hitman Carlos on Thursday because he knows that otherwise Carlos will kill 15 innocent witnesses on Friday. Juanita knows that. As it so happens, Juanita, her two young daughters, Carlos, and Bob all run into each other. Unfortunately, Bob could only procure a shotgun,

> and he is about to use it to kill Carlos (this is his only opportunity). However, if he shoots, Bob will, due to the dispersion of the pellets, also kill Juanita and her two daughters. Juanita shoots Bob in defense of herself and her daughters.

Was Juanita morally justified in killing Bob? Intuitively it seems so. She would also have been justified under the law of practically all Western jurisdictions (as far as I can see), and this would even be the case if she had not been with her daughters. The self-defense justification gives defenders a *prerogative* to defend themselves against an aggressor even if, from an impartial, consequentialist point of view, the evils produced by the self-defensive act outweigh the goods.[180]

One might object here that Bob was not justified in attacking Carlos in the first place and claim that therefore the example cannot show that there is justified self-defense against justified attackers. Yet as far as proportionality considerations are concerned, Bob's act does seem to be justified. Another way of denying that Bob's act was justified is to claim that his attack was *preventive* (while Juanita reacts to an imminent or ongoing attack, and thus in self-defense). However, while its preventive nature rules out that Bob's act can be justified by a *self-defense justification* – which only applies to force used against *ongoing* or *imminent* attacks[181] – it can still be justified by a *necessity* justification.[182] (Incidentally, even if one allowed for "preventive self-defense," the self-defense justification applies only to inflicting harm on an aggressor, not to inflicting harm on an innocent bystander like Juanita[183]; therefore Bob's act cannot be justified by the self-defense justification anyway. If it is to be justified at all, a lesser evil or necessity justification must come in.) After all, it is extremely implausible to claim that all use of preventive force is impermissible, as for instance real examples of battered women and a swathe of hypothetical examples demonstrate. An absolute prohibition of preventive force amounts in certain situations to condemning innocent people to death – as it does in the example of Bob. It is difficult to see how this could be justified.[184] Moreover, most killings in war are of course also preventive: soldiers do not, nor are they morally required to, restrict their use of force to situations where they are facing an ongoing or imminent attack. Rather, they engage in "seek and destroy" tactics and prefer to surprise the enemy. They are preventively pro-active, not merely defensively reactive. If such preventive killing were unjustified, it would be difficult to see how wars could ever be justified.[185] Intuitively, however, preventive killing, both in and outside of war, *is* sometimes justified. Incidentally, it does not do to claim that in war soldiers are *already* faced with an imminent or ongoing attack, namely the attack of the other state. First, this is not true if the war waged is itself preventive; and second, that the other state has already attacked does not mean that the individual soldiers have attacked – yet,

it is killing *them* that needs to be justified. Moreover, if one declares (for no good reason, it seems) the individual soldiers imminent or ongoing attackers only because they belong to an organization (the state) that has already attacked, then the same is true of Carlos, since his organization, the cartel, has also already attacked.

To avoid confusions and unwarranted suspicions, it might also be worth emphasizing again that while it is indeed an established principle in criminal law that there cannot be justified self-defense against justified *self-defense*,[186] law in many jurisdictions does allow self-defense against *other* kinds of justified acts,[187] for example, against acts that are justified by a necessity justification.[188] And as far as morality is concerned, McMahan himself once explicitly stated that "people are permitted a necessary and proportionate defense of their rights against both violation *and infringement*," and with "infringement" McMahan means a *justified* transgression against a right.[189]

If, however, one wanted to object that Bob's act is not justified precisely because he had no legal authority, then let us modify the example:

> *Bob and Juanita in Mexico*: FBI agent Bob goes to Mexico to kill the drug cartel's hitman Carlos on Thursday because he knows that otherwise Carlos will kill 15 innocent witnesses on Friday. Mexico and the USA have entered into a contract that gives their law enforcement officers a legal liberty-right (in analogy to the legal liberty-right to kill enemy soldiers that international law grants soldiers in an international conflict) to attack armed Cartel hitmen if such attacks are necessary and proportionate under the circumstances. Juanita, a Mexican, knows that. As it so happens, Juanita, her two young daughters, Carlos, and Bob all run into each other. Unfortunately, Bob could only procure a shotgun, and he is about to use it to kill Carlos (this is his only opportunity). However, if he shoots, Bob will, due to the dispersion of the pellets, also kill Juanita and her two daughters. Juanita shoots Bob in defense of herself and her daughters.

It does not seem that the existence of the contract and thus of Bob's legal authorization undermines Juanita's moral justification of defending herself and her children.

4.1.5.3 Proportionality and Special Responsibilities or Prerogatives

If Juanita's defense against Bob is justified, a reasonable explanation seems to be that there is a special prerogative about killing in self-defense,[190] so that normal proportionality considerations do not apply and Juanita can give special weight to the survival of herself and her

children.[191] This permission to give special weight to one's own interests also applies, as we will see, to the necessity justification.

That people may give greater weight to their own interests and must give greater weight to the interests of their close relatives and friends than to the interests of strangers in deciding what to do is a common sense assumption. If people were not allowed to give greater weight to their own interests, they would become slaves to the common good; and if they did not have to give more weight to the interests of friends or their own children, friendship would cease to exist and the parent-child relation would be diminished to a purely biological one.

Note that this position is entirely compatible with the well-known tenet that all persons have "equal moral worth."[192] Parents who deem themselves justified in caring more for their children than for the children of others need not think that their children are intrinsically or from an impartial point of view more valuable than the children of other parents. They can (and mostly will) simply think that they have an agent-relative prerogative – and probably even obligation – to care more for their children than for those of others. To wit, even someone who as emphatically endorses the equal moral worth of all persons as the "social justice cosmopolitan" Thomas Pogge concedes that human beings "need to have the option, at least, to have special relationships with friends and family that cause their conduct to be at variance with the cosmopolitan requirement of impartiality."[193] McMahan himself even expands this idea to the relation between a government and its citizens, stating that a "government ought to give greater weight to economic benefits to its own citizens than it should give to equivalent benefits to foreigners" (and it stands to reason that then the government should also give greater weight to the *lives* of its own citizens).[194] Likewise, Cécile Fabre (who embraces the moral inequality thesis) endorses a "principle of fundamental equality whereby individuals have equal moral worth"[195]; yet she also permits "patriotic partiality"[196] and admits that "individuals are permitted to confer greater weight on their own goals, projects, and attachments."[197] Thus, this latter principle or permission is intuitive and widely accepted, and it stands unrefuted.[198]

Accordingly, a defender is not obliged to sacrifice herself or others for the lives of any larger number of people. In self-defense or the defense of others, proportionality simply is not a utilitarian or consequentialist calculus. Even if one accepted that there might be *some* number high enough to make self-sacrifice obligatory – maybe in a case where one is attacked by a culpable attacker who one knows to be developing a cure for a disease that otherwise would cost thousands or even millions of lives – there is still much room below this threshold, room enough to allow a defender like Juanita to kill a justified attacker like Bob even if she knows that due to her defense someone else will later kill a larger number of people than she has saved now.

In a *certain* sense, one might say, her self- and other-defense was "disproportionate" – by saving only three innocents she contributed to the death of 15 innocents at the hands of someone else in the near future (and killed one justified attacker now). However, as far as the moral and legal self- and other-defense justification is concerned, it was not disproportionate in the *relevant* sense.[199] (For that to be the case, the harm inflicted on *Bob* would have to have been disproportionate. Of course, Juanita might herself "collaterally" and directly harm innocent bystanders – maybe she also only has a shotgun. Such harm might be covered by a necessity justification, but it could not be covered by the self-defense justification, which only deals with the harm inflicted on an attacker. However, in the example Juanita simply does not, herself, directly harm any bystanders.)

Of course, the claim that an agent may prevent someone from saving a certain number of innocent people in order to save a *smaller* number of innocent people – maybe simply herself, or those towards whom she has special responsibilities – might be flat-out rejected. That is, one might simply reject the idea that in contemplating the permissibility of interference with justified agents one may give special weight to one's own interests or the interests of those with whom one has special ties. Yet such a flat-out rejection appears to be rather implausible. Consider the following three further examples:

> *Boat*: Carl hates children and has thrown the children of Anna and the children of Betty into different parts of the lake to see them drown. Anna can only save her three children by stealing Bill's boat from his property at 2:50 PM and rushing out to the lake; and Betty can save her eleven children only by stealing Bill's boat from his property at 3:00 PM. Thus, if Anna steals the boat at 2:50 in order to save her children, she would thereby prevent Betty from saving her greater number of children.
>
> *Lions*: Carl hates children and lets a pride of lions loose on Betty's children. Betty has only her grenade-launcher to kill the rapidly approaching pride of lions that would kill all her eleven children. The grenade would, however, kill Anna's three children, who are in a security cage (safe from the lions) near the point where the grenade will hit the ground. Anna could only keep Betty from killing Anna's children by shooting her dead.
>
> *Clan*: As in *Lions*, with some differences: Betty asked to use the stun gun of Anna's family clan, but the clan, through its leaders, denied the request, and there is nothing Anna can do about it. When the clan realizes that Betty has a grenade-launcher, is about to use it, and would thereby kill Anna's children, they open fire at Betty. They are all terrible shots, apart from Anna. Anna could only keep Betty from killing Anna's children by shooting her dead.

It seems to me quite clear that intuitively Anna is justified in *Boat* to give precedence to the lives of her own children and go ahead and steal the boat,[200] although she would thereby *not advance the greater good* (considered from an impartial perspective) and, moreover, *would advance someone's unjust cause or aim*, namely Carlos's aim to see Betty's children drown (and given that B has more children, he prefers, if he cannot have both, to see Betty's children drown rather than Anna's children). Moreover, it also seems that intuitively Anna is justified to kill Betty in *Lions* and *Clan*.

This view can be corroborated by a look at law. This is also important since, of course, part of the force that some might attribute to Grotius's (and McMahan's) example is that it is clear that the criminals in that example would not have a legal defense (that is, a legal justification) for killing the agent of the magistrate or the police officer. Thus, the example need not merely rely on moral intuitions, but can also enlist the authority of the law.

What does the law say in the three cases just described? The first example, *Boat*, would be covered by a necessity justification. The reason is that Anna is infringing Bill's property rights as well as laws against theft or unauthorized use of other people's property. Section 3.02 of the American Model Penal Code – which is not law, but has influenced actual jurisdictions[201] – provides a so-called "Choice of Evils" justification for such cases:

1 Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:

   a the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
   b neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
   c a legislative purpose to exclude the justification claimed does not otherwise plainly appear.[202]

Now, the harm or evil Anna seeks to avoid is the death of her three children, and the harm sought to be prevented by the law she breaks is the harm that befalls Bill if someone takes away his boat. It is the case, however, that the first harm by far outweighs the second harm, and thus Anna clearly has a choice of evils justification. Thus, a crucial feature of this justification is that not *all* resulting harms or consequences enter the proportionality considerations, but only the harm or evil sought to be prevented by the infringed law and the harm or evil that the infringement of the law sought to prevent.[203]

But, one might wonder, is there not a law that prohibits doing something (like stealing a boat) if the moral benefits (like the survival of three) of doing it are significantly less than the moral costs (like the deaths of eleven children) of doing it? And would not breaking that law then be what needed to be justified, and not merely the theft of Bill's boat? The answer is that there simply is no such law. If there were, a defender would be legally obliged to desist from defending herself against someone whom she knows would, but for her defensive action, do a good that would be greater than the harm he would inflict on her if she did not defend herself. Yet, again, there is no such legal obligation.

Section 35.05 of the New York Penal Law also only compares the "desirability and urgency of avoiding such injury [the one the agent seeks to avoid]" with the "desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue," hence leading to the same result in *Boat* as the Model Penal Code does. Several other American jurisdictions have followed the Model Penal Code and the New York example in this respect.[204] As regards common law, one sometimes hears that "the evil inflicted must not be disproportionate to the evil avoided,"[205] but the term "infliction" is narrower than "but-for-causing" (that is, than "causing" something in the sense that it would not have happened but for one's own act) – one *inflicts* death by shooting someone dead, but not by merely not helping him, nor by shooting his surgeon (without whom he will die) in self-defense, let alone by taking something somebody else might otherwise have used to save him (unless, perhaps, one does these things *because* one wants him to die). As regards German law, it does not allow (according to majority opinion) weighing lives against lives anyway; so from the German legal perspective, strange as it may sound, eleven children drowning is no greater evil than three children drowning, which leads to Anna's clearly being justified in *Boat* under the German justifying emergency statute.[206]

What about *Lions* and *Clan*? Betty, to act justifiably, needs a necessity or choice of evils justification here – after all, she is about to throw a grenade in the direction of three children, risking (or even foreseeing) their death. (If you think collaterally killing three children to save eleven is disproportionate and therefore unjustified, you can modify the example accordingly.) She thereby is about to infringe laws against negligent homicide or manslaughter or even murder. Anna, on the other hand, depending on jurisdiction, might well have *both* a necessity and an other-defense justification to use force against Betty. (I will ignore here the fact that some jurisdictions and the Model Penal Code, clearly for purely pragmatic as opposed to principled reasons, allow a choice of evils justification only for acts that are not already covered by other justifications.) She could avail herself of the choice of evils justification of the Model Penal Code and the jurisdictions that follow it: the evil she seeks to avoid – the death of her three children at the hands of an attacker – is greater

than the evil that a law against killing Betty seeks to avoid (namely Betty's death). In addition, she also can have a self-defense justification if the jurisdiction in question does not demand that justifiable self-defense be directed against unlawful attacks but only at what the defender *reasonably believes* to be an unlawful attack. Many American jurisdictions do exactly that. Furthermore, one must consider not only written law and its statutes, but also its interpretation in case law. As George C. Christie notes: "If any of the parties would be free from tort liability, it would be the [innocent potential victim of an attack justified by a necessity or choice of evils justification]. I cannot conceive of any American court holding an innocent person liable in tort for shooting another person to prevent that other person from killing him."[207] But in the same vein, is it really (realistically) conceivable that an American criminal court would deny the justification of other-defense to Anna, who tries to defend her innocent children against an attacker? I doubt it. Anna, moreover, also has the common law defense of self- and other-defense. Again, while there cannot be justified self-defense against justified self-defense,[208] there is no evidence that common law prohibits self-defense against certain *other* kinds of justified acts.[209]

Thus, we see that both the moral and the legal situation as far as relevant domestic cases are concerned is more complex and complicated than suggested by Grotius's and McMahan's simple example and the simplistic conclusion drawn from it.

To avoid misunderstandings, however, let me clarify that I am certainly not arguing here that Anna may *directly kill* – whether intentionally or as a side-effect – Betty's children. For example, if Betty has a head start and is about to take the boat before Anna, and the only way Anna can prevent this from happening is by shooting all of Betty's children in the lake (thereby removing Betty's motive for taking the boat), Anna would most certainly not be allowed to do this. Thus, I merely argue that Anna may *prevent*, as a side-effect of her attempt to save her children, greater numbers of innocent people *from being saved* by Betty. Thus, one may probably not in *all* circumstances give special weight to the interests of oneself and those near and dear to one, and not in all circumstances where one may do so may one do so to the same degree. There is (all else being equal: there are exceptions) a difference between intentional killing and letting die and also between intentional killing and foreseeably preventing someone from being saved. The constraints on killing are much stronger, including the proportionality constraints.

Again, some people, in particular defenders of the inequality doctrines, might think that the proportionality constraints on foreseeably preventing someone from being saved are stronger than I make them out to be: they might simply not share my intuitions in *Boat, Lions,* and *Clan*. But many will. And while Grotius's and McMahan's examples, especially due to their abstraction from "collateral damage," are

not applicable to all wars which have a justified side – which, however, they would have to be in order to constitute positive arguments for the inequality doctrines – the *Bob and Juanita* example *is* applicable to at least *some* wars, which is, if Juanita is permitted to kill Bob, sufficient to refute the moral inequality doctrines (remember that I am not defending the moral equality doctrine: I reject *both* generalizations).

Bob and Juanita is, for instance, analogous to the following example of a war:

> *Resisted Intervention*: In state X, there are four different ethnic groups, the A, the B, the C, and the D. The national army is practically exclusively made up of members of A (the B and the C do not want to join ranks with the A, whom they deem racially inferior). The B hate the C, have their own very strong militia, and suddenly start a genocide against the C. The A refuse to intervene, since they do not want to risk their lives for the C (or perhaps even because they are not militarily strong enough – the B's militia might be stronger than the A's army). Y, another state, intervenes to save the C. Y could send its troops via two different routes to the location where the genocide takes place. On both routes it would face fierce resistance by B, but on the first route 50,000 civilian As would die as collateral damage and on the second route 60,000 civilian Ds. Y tries to take the first route. The As resist Y's army in order to save their own civilians. In the face of the combined resistance by the A and the B, Y decides to take the second route instead.

It seems that this war of the A against Y can be justified from an *ad bellum* perspective. This is so particularly since the A will hardly inflict any harms on the innocents of Y. After all, the conflict is taking place on the A's territory (that is, in X). Nevertheless, one might object that the duties and prerogatives of citizenship cannot be as weighty as one's duties towards one's family members and friends. One might suppose, for instance, that if a British person can either save 50,000 British people or 60,000 Germans, he should rather save the Germans. In reply, I doubt that this is the case if among the 50,000 British are members of his own family. Moreover, if 500 British people who all have family members among the 50,000 are to cooperate to either save the British or the Germans, I find it hard to accept that they are under a duty to save the Germans. The British rescuers will now have 1,000 or even 2,000 or more of their friends and relatives among the British who are in need of rescue, and this, it seems, should be quite able to tip the scales (just remember the Anna and Betty examples from above). In other words, the objection overlooks that Y's war will threaten *all* the A in the theater of war, and thereby the family and friends of a *large* number of soldiers (who might be friends with other soldiers willing and perhaps feeling

obliged to help them in their defense of their families). In other words, if 500 soldiers can either save a group of 60,000 containing none of their friends or relatives or a group of 50,000 containing 2,000 of their children or spouses, then they are justified in saving the latter group, just as a mother is justified in saving her own child instead of saving ten others.

A final objection might be that the doing/allowing distinction has some weight, and by attacking the soldiers of Y, the A are not only letting them die but they are actively killing them. Yet one should note that the soldiers of Y are not non-threatening people, but *attackers*; they are about to kill many innocent A collaterally. This should severely reduce the restraints against killing them.[210] After all, Anna in *Lions* seems to be clearly allowed to kill Betty.

Thus, the claim that the war of the A against Y can be justified from an *ad bellum* perspective is indeed plausible. However, we get to a war that would not be justified from an *ad bellum* perspective if we modify the example in such a way (call it *Resisted Intervention Revised*) that parts of ethnic group A itself started the genocide against the C. It would not be justified from an *ad bellum* perspective since A, as a collective, could simply stop the genocide – then Y would not attack and endanger A's civilians. However, those individual soldiers of group A who do not take part in the genocide themselves (and could not stop it) but instead fight to divert Y onto the second route can still be justified in participating in the war and in attacking Y's soldiers. They are analogous to Anna in *Clan*. The Clan, as a collective, was under an obligation not to fight Betty but to give her the stun gun instead; but Anna, in an attempt to save her children, is nevertheless justified in her individual participation in the unjustified collective use of force against Betty.

4.1.5.4 In Which Wars May Soldiers Participate?

The above analysis and further considerations to be provided suggest that the answer to the question as to when soldiers may justifiably participate and kill in war is more complex than assumed by either the *in bello* inequality doctrine or the *in bello* equality doctrine.

As already noted in Section 4.1.5.1, traditional just war theorists from Augustine to Elizabeth Anscombe have argued that it is impermissible to take part in a war one knows to be "unjust," that is, unjustified. It is clear, however, that this traditional view must be wrong. Consider, for example, John, who is drafted to serve in an unjust war of aggression (which, however, will without doubt be victorious). He knows that his participation in the war will make only a minuscule contribution to the war effort (in fact, he will see to that), but he also knows that his non-participation would have some terrible consequences: his country's dictator swore (and he is known to keep his oaths) that for every drafted citizen who refuses to participate he will kill 100 innocent civilians on

the other side. It seems that here John would actually *save* lives by his participation in an unjust war of aggression. It is therefore difficult to see how his participation could *not* be justified. He does not have an agent-relative necessity justification, but he actually seems to have a full-blown impartial lesser evil justification to participate in the unjustified war. Moreover, if Bob could only save large numbers of civilians from his dictator if he actually killed some enemy combatants (thereby demonstrating that he "seriously participates," as the dictator demands), he *still* seems to have a lesser evil justification to do so.[211] Of course, one might object that the situation described here is highly unlikely to occur. However, that does not change the theoretical point that in principle a soldier can have a lesser evil justification for his participation in an unjustified war. Nor does it undermine the fact that the argument is even strengthened by envisioning a situation in which the dictator threatens to kill family and friends of a soldier who does not participate.[212] Now the soldier might still have the impartial lesser evil justification, but in addition he has also an agent-relative necessity justification for participating in the war.

Remember in this context also the example from the beginning of Section 4.1. Evil A tries to murder innocent B. There is C, who cannot stop A alone but can instigate D, E, and F, who are known for their brutality, to stop A. C knows that if she does so instigate D, E, and F, A will become the victim of an impermissible collective act, namely of excessively brutal self- or other-defense. Nevertheless, if the damage done to A is still sufficiently less bad than B's death would have been, and C has no other means to interfere, then C is allowed to support D's, E's, and F's attack against A. She is also allowed to *join* them in their attack against A if this heightens the chances of the defensive collective (comprising D, E, F, and now also C) of succeeding in their rescue of B, and does so without making the collective action even more excessive.[213] (You can imagine, if you wish, a group of martial artists known for their excessive force in bar brawls willing to join C in her attempt to stop a muscular racist from beating his victim to death.) According to the same logic, and all else being equal, soldiers can be justified in joining a humanitarian intervention even if they know that the intervention will be unjustified since the force used will be somewhat excessive. At least as long as by joining the unjustified collective intervention the soldier helps, on the collective level, to avert a decisively greater evil than he helps to produce, and also personally averts decisively more evil than he personally produces, the soldier is justified in his participation. In short, individual participation in unjustified collective acts is not always unjustified, and this is also true for participation in unjustified wars.

The previous examples and the analysis above thus suggest the following more general and pleasantly commonsensical assertions: One may participate in an unjustified war if the moral costs of one's participation

are outweighed by the moral gains. (By "moral costs" I simply mean "whatever goes into the proportionality considerations on the negative side," and by "moral gains" I simply mean "whatever goes into the proportionality considerations on the positive side.") Moreover, this is the case not only when the weighing uses an *impartial* scale, but also when it is done with a scale that is in a morally proper way *adjusted to valid agent-relative considerations*. If, however, the moral costs are not outweighed by the moral gains on either of the two scales (that is: if participation is disproportionate both from an impartial and an agent-relative view), participation in an unjustified war appears to be impermissible.

This is a very general, but nevertheless meaningful principle with practical implications. For instance, while the British war waged against Germany from 1939 to 1945 was unjustified due to an often disproportionate and indiscriminate use of force (terror bombing),[214] a British soldier could nevertheless justifiably participate in this unjustified war.[215] On the other hand, German soldiers could not justifiably participate in the German invasion of Poland. Yet in my view they could, towards the end of the war, participate in the attempt to stave Soviet troops off as long as possible, given the behavior (such as widespread rape)[216] of these troops and the imperialist intentions of the Soviet Union.

To be sure, how exactly such proportionality considerations will have to proceed is a contentious issue, and even people who do agree on which considerations apply in theory (for example, is the relevant proportionality consideration one that an omniscient observer would subscribe to, or is the relevant perspective that of "the reasonable person," etc.) might still disagree on the empirical facts pertaining to a concrete case. However, my intention here was to show that there can in principle be circumstances where the participation in an unjustified war is justified. In some circumstances one might only be able to justify it under an appeal to agent-relative considerations, but this is still a justification. In other circumstances, however, one will even be able to justify it under an appeal to agent-neutral considerations and with the help of a genuine lesser evil justification.

In still other, probably in most, circumstances, however, one will *not* be able to justify one's participation in an unjustified war. Consider, for example, a variation of *Resisted Intervention*, namely *Counterproductively Resisted Intervention*. In this variation, the As resisting Y's army will lead to *more* A being killed, not less, and no overriding benefits (such as, for example, certain gains in freedom for the rest of the A) will be achieved to overcompensate these losses. Such a war would be unjustified, since it would be disproportionate even from an agent-relative perspective. If a soldier actually knows this, and does not have a necessity justification to participate in the war (like, for example, the justification that the dictator would kill his family if he would not participate), then he cannot be justified in participating in the war.[217]

Moreover, and obviously, agent-relative considerations work differently in different circumstances: they interact with other normative principles in different ways. For instance, while in cases where you foreseeably prevent someone from being saved, as in *Boat, Lions,* and *Clan,* you may give considerably more weight to your own interests and to the interests of those near and dear to you than to the interests of strangers, it seems that you are not allowed to do that in cases where you intentionally or foreseeably directly harm innocent and non-threatening people.[218] To wit, a mother must not kill the neighbor's child in order to harvest her organs for the benefit of her own child, nor must states invade other countries to harvest their resources for the benefit of their own country, let alone to harvest their citizens as slaves for their own population. Persons must not participate in such wars – unless, again, there are other factors in play that provide them with a countervailing and overriding necessity or lesser evil justification to participate anyway. That might sometimes be the case. More often, it clearly won't be.

While, as I showed, individual participation in unjustified collective acts is sometimes justified, the converse is also true: individual participation in *justified* collective acts can under certain circumstances be *un*justified. Consider Sartre's famous example of the son who is torn between his felt duties toward his mother and his felt duty to join the French Free Forces in their fight against Nazi Germany.[219] It is clearly possible that under certain circumstances, a person's duties toward his family and friends would make abandoning them to fight in a war that simply does not need him or her unjustified. In fact, a person might even serve the *wider* community better by serving as a scientist or doctor, for example, than by joining a justified war effort, and if his service to the wider community is of sufficient moral importance and he has promised and is relied upon to not simply abandon his post, as it were, then doing so anyway in order to join the war would be unjustified.

Finally, it should be noted that a soldier is not already justified in participating in a war if the objective justifying conditions are fulfilled. Rather, he has, as we saw above, to *know* that they are fulfilled (again: knowledge does not require *certainty*).[220] After all, there is a *presumption* against killing and maiming people, and it is the moral responsibility of the very individual who is about to engage in an activity where he or she is supposed to kill and maim people to make sure that the presumption is indeed overcome and the objective justifying conditions satisfied.[221] This is the reason for the *Dadson* principle, according to which "justified force requires belief in, or knowledge of, the presence of justificatory circumstances."[222] There is no reason to apply more lenient standards to soldiers. "They don't know what they are doing" is no excuse if they *should* know. And if they are about to kill people, they indeed should know.

Thus, the result remains: soldiers cannot just blindly stumble into a war and hope to be "accidentally" justified. Only if they are at least aware of there being an objective justification for their participation in the war can they be morally justified. This, in effect, is the "right intention" (or, more precisely: mental state) requirement as applied to soldiers.[223] Conversely, if the objective justifying conditions are *not* satisfied, then the soldier's participation in the war will be unjustified, however much the soldier *believes* it to be justified.

To conclude, *both* the traditional view (from Aquinas through Vitoria and Grotius to Anscombe and McMahan) and the "legalist" Walzerian view on the moral (in)equality of combatants are wrong. To recall, the traditional view states that there cannot be a (morally) just cause for war on both sides, and it also states that combatants participating in a justified war may kill their enemy combatants participating in an unjustified war – but *not* vice versa (at least not as long as the combatants on the justified side always abide by *jus in bello* requirements and the unjustified combatants know their war to be unjustified). The opposing Walzerian view, in contrast, claims that as long as the combatants on the unjustified side abide by the *jus in bello* requirements, they may kill the combatants on the justified side (and, of course, vice versa).

Thus, the reality is more complicated and differentiated. First, the justifiability of a collective actor A's war against B does not yet imply that B's war against A is unjustified. Moreover, whether an *individual* may justifiably participate in a war or not is likewise not already decided by the war's justifiability or unjustifiability; rather, the concrete circumstances of the individual have to be taken into account too.[224] Thus, a conscientious soldier might not only be one who deliberately serves in a justified war or deliberately refuses to serve in an unjustified war, but also one who deliberately refuses to serve in a justified war or who deliberately does serve in an unjustified one.

4.1.6 The Deceptive Allure of the "Revisionist" Inequality of Combatants Doctrine: On Imagined Innovations, Question-Begging Definitions, and Dogmatic Insistence

The previous sections show that the sweeping *jus in bello* inequality doctrine favored by "revisionists" is as mistaken as the sweeping *jus in bello* equality doctrine favored by Walzer and his followers. Yet I pointed out that the inequality thesis seems to have a considerable grip upon the imagination of younger just war theorists in particular, despite its severe shortcomings. One reason for this, I submit, is the rhetorical force of powerfully simplistic and misleading arguments like the mugger/police officer argument, which succeed – not philosophically, but psychologically – by abstracting away, and distracting from, the very reality of war – a reality that, even it were governed by the same moral

justifications that govern the ordinary use of force, is certainly not primarily governed by the asymmetrical self-defense justification "revisionists" give pride of place in order to prompt the sought-after conclusions.

Given the prominence of the "revisionist" inequality thesis and in order to further undermine its dubious appeal, it is worth highlighting just *how* unappealing the thesis and the way it is promoted *really* is – at least once one takes a closer look. We will take such a closer look in the next three sections, which demonstrate that the thesis is *not* revisionist or innovative (Section 4.1.6.1), that it is formulated in a conceptually confused and question-begging way (Section 4.1.6.2), and that its adherents sustain it to a significant degree by simply ignoring well-known counter-arguments (Section 4.1.6.3).

4.1.6.1 *The Moral Inequality Thesis in History: Imagined and Real Orthodoxies*

The "revisionist" inequality thesis is mistaken, as we saw. In addition, it is worth demonstrating that it also not particularly innovative. While McMahan originally presented the thesis of the moral equality of combatants as the traditional one and his own account as revisionist, he was mistaken about the just war tradition, and so are many other present-day just war theorists. In order to correct this unfortunately *still* widespread misperception, let us clarify the historical facts.

First of all, when McMahan started to criticize the "orthodox view," as he once called it, he never actually provided any textual evidence for his claim that the thesis of the moral equality of combatants is orthodox or traditional. To be sure, in those articles he (somewhat selectively) mentions a couple of 20th century writers,[225] but the question is precisely whether those authors really represent the tradition – which reaches *through* the centuries.

In fact, his main target has always been Michael Walzer's theory; after all, Walzer coined the phrase "the moral equality of combatants" to begin with.[226] The irony, however, is that Walzer himself explicitly stated (in a passage that seems to have been widely overlooked by those who take him to represent "the tradition") that his far-reaching thesis of the moral equality of combatants is not shared by traditional authors:

> Catholic writers have long argued that [men] ought not to volunteer, ought not to serve at all, if they know the war to be unjust.[227]

Indeed, these authors have claimed that under these circumstances it is a sin to join the fray – while Walzer with his moral equality thesis denies that it is morally impermissible.

Meanwhile McMahan has admitted that his previous reading of the tradition is mistaken and that Francisco de Vitoria and Francisco Suárez

have "beaten [him] into print" by "more than half a millennium."[228] On these pages and elsewhere in the book, he thus provides textual evidence to the effect that two central writers in the just war tradition *reject* the moral equality thesis, while he still does not offer quotes from any traditional authors who would actually *support* the moral equality thesis. Yet he simply continues to call the moral equality thesis the "traditional" one. Why?

Maybe he thinks that Suarez and Vitoria are the only older authors that have "beaten" him. But he is wrong. He has also been beaten by, for example, Domingo de Soto, Melchor Cano, Luis de Molina und Thomas Cajetan.[229] And, of course, by still a few centuries more, by Aquinas – whom Suarez and Vitoria, incidentally, interpret in precisely this way. To be sure, in STh II-II, q. 40 ("On War"), Aquinas does not address this issue clearly, but elsewhere he explicitly states that people "are bound not to obey ... the ungodly commands of tyrants."[230] That statement removes the excuse that Augustine once seems to have made available for certain combatants on the unjustified side and is thus hardly compatible with a general moral equality of combatants.

Finally, even Augustine himself, still a few centuries earlier, does not embrace a general equality of combatants. True, as just mentioned, he says in *Contra Faustum*, 22.75 that a soldier can innocently obey the command of an "ungodly king."[231] (Incidentally, this is not the same as saying "an ungodly command"; besides, Augustine arguably had an ungodly *Christian* king in mind). Yet one of the reasons why even this does not amount to an endorsement of a general moral equality of combatants is that some wars might not be waged under the command of kings (or of their equivalents) on both sides, ungodly or not. Certain civil wars or slave revolts are an example. (It should also be noted that actually none of the authors mentioned in the last paragraph, with the possible exception of Aquinas, took Augustine to believe that combatants are permitted to fight in a war they know to be unjustified.)

Thus, once people understand the actual tradition of just war theory, it becomes very difficult to call the moral equality thesis "orthodox" without appearing to engage in false labeling. Yet Helen Frowe, for example, echoing McMahan, insists on this terminology. Again: why? She does seem to have realized that going back to Suárez and still further beyond him will not work. So instead, she goes only back to Grotius and claims that the "idea that ordinary citizens – combatants or otherwise – might be morally responsible for their country's aggression was roundly rejected by Grotius," and that what she calls "the orthodox view of just war theory ... has been the dominant view of how we should understand the relationship between *jus ad bellum* and *jus in bello* since Grotius."[232] I do not know whence Frowe takes these ideas about Grotius.[233]

After all, Grotius says, completely in line with Suárez, Vitoria and the other older just war theorists already mentioned:

> But if [free people as well as slaves and subjects] have Order given them to take up Arms, as is usual, then if it plainly appears that the War is unlawful, it is their Duty not to meddle in it.[234]

Consequently, he also states:

> Neither can I admit ... that even those who have given just Cause to take up Arms against them, may lawfully [he refers here to natural law, that is, to part of morality] defend themselves; ... [for] no Man [has] a Right to oppose Force to a just Attack, no more than a Criminal can plea a Right of defending himself against the publick Officers of Justice, who would apprehend him, by Order of the Magistrate ...[235]

This is a clear argument for the moral inequality of combatants, no less clear than McMahan's malicious attacker/innocent defender or robber/police officer argument (quoted above), that nearly 400 years later "conclusively demonstrate[s] the moral *inequality* of combatants at the level of basic morality" according to him.[236]

Grotius makes even the same qualification that McMahan does,[237] and McMahan acknowledges this and quotes the pertinent statements from Grotius.[238] However, he does not provide the quote I just adduced, nor does he acknowledge that Grotius is a fervent partisan of the moral inequality of combatants. That is curious, for since McMahan says that Grotius is "arguably the greatest writer in the tradition of just war theory,"[239] one would think that McMahan would be eager to point out that he has him on his side. Of course, the downside might be that once you acknowledge that "arguably the greatest writer in the tradition of just war theory" embraces your allegedly unorthodox and revisionary moral inequality thesis, that thesis will no longer appear all that unorthodox and revisionary.

The traditional inequality thesis survived into the 20th century and was embraced, long before McMahan, by Elizabeth Anscombe. McMahan, however, claims that she is "inconsistent,"[240] pointing out that in one place she says that the non-innocent people that can rightfully be attacked are those "engaged in an objectively unjust proceeding," while in another place she says that they are those who are causing harm. Presumably the first idea would imply the moral inequality thesis while the second does not. In reply, first, let me point out that in light of the argument presented above, namely that combatants on the justified side are *also* engaged in an unjust proceeding (namely, of harming innocent

bystanders), the first statement of Anscombe's would not actually have the implication McMahan ascribes to it. Maybe it is because he is aware of this that he opts for charitably interpreting that first statement of Anscombe's as meaning "engaged in objectively *wrongful* action" (my emphasis). However, to be consistent himself, McMahan should then be equally charitable towards her second formulation, for example by reasonably interpreting "harming" as meaning "*unjustifiably* harming" here. (This is made all the more reasonable by the fact that Anscombe seems to be concerned here with the combatants on the German side in the Second World War, thus already assuming that these combatants are on an unjustified side. McMahan is, in my view, simply taking the quote out of context.)

Second, to take this isolated slip in terminology on Anscombe's part as indicating her "inconsistency" in the substantive matter is like taking the fact that McMahan sometimes says that liability to defensive attack lies in moral responsibility for an *unjustified* threat and sometimes that it lies in moral responsibility for an *unjust* threat as indicating *his* inconsistency in the substantive matter. This would be unfair and somewhat strange because McMahan explicitly embraces the moral inequality thesis. But so does Anscombe, unequivocally stating, completely in line with the tradition: "Nor, if we know that a war is wrong, may we take part in it without sin, however grievous it may seem to stand apart from our fellow countrymen."[241]

Third, McMahan also fails to mention that Anscombe says, just a few sentences after the quote about "harming" on which he hangs so much:

> Nor is there ground for trying them [the combatants on the German side, it is safe to assume] on a criminal charge; not indeed, because a man has no personal responsibility for fighting, but because they were not the subjects of the state whose prisoners they are.[242]

The statement after "not indeed" is nothing less than an endorsement of the quite traditional moral inequality thesis combined with Grotius's legal impunity thesis. Thus, the fact of the matter is that Anscombe is not more ambivalent about the moral inequality of combatants than is McMahan.

McMahan also claims that the moral equality thesis "informs the international law of war."[243] Again he provides no evidence for this claim.[244] So how does he know? After all, McMahan himself acknowledges that the "law of war does not assert the *moral* equality of combatants but ... the *legal* equality of combatants."[245] And in fact, he himself has argued that *for moral reasons* international law must not simply turn moral inequality into legal inequality.[246] So why is it not *this* idea that underlies the international law of war?

This question particularly suggests itself since Grotius was of the decided opinion, as McMahan indeed knows, that the law of nations has to differ from natural law and "is designed and accepted in order to serve certain purposes, including, in particular, moral purposes."[247] But since Grotius is not only "arguably the greatest writer in the tradition of just war theory" but also considered by many the founder of modern international law, it seems natural to assume that what actually underlies the modern laws of armed conflict is the Grotian combination of the moral inequality thesis with the legal impunity thesis. Thus, far from "revising" anything, McMahan is in essence repeating a view that Grotius already expressed 400 years ago and which seems to be embodied in modern international law.

Thus, the claim to being "revisionist" seems to originally stem from the mentioned misperception of Walzer's theory as a restatement of the tradition, that is, it stems from a misinterpretation of, or ignorance regarding, the actual tradition. Meanwhile, of course, quite a number of scholars have pointed out very clearly that the tradition *rejected* the moral equality thesis. Yet "revisionists" seem to be unwilling to let go of the term. Seth Lazar, for instance, has in all seriousness stated that they at least are revising Walzer and that one becomes a revisionist by revising something.[248] Yet by the same logic, Walzer would also be a revisionist (he revised quite a lot), and virtually all present-day just war theorists deviate from Walzer in one way or the other – not only self-proclaimed "revisionists," who, however, prefer to apply the label only to their own group. While this false labeling is understandable from a position of academic marketing, it is also quite unacceptable from the vantage point of historical fact and unnecessarily leads to the considerable confusion that I have already pointed out: the confusion of the moral equality thesis with the traditional stance. It is demonstrably *not* the traditional stance.

Finally, at times, authors have adopted a more modest sounding term, namely "neo-classical."[249] On at least one occasion McMahan has used this term himself.[250] This term, however, still suggests an innovation, as though the "neo"-classicists had discovered a classical truth that was lost in time. However, it is not alleged "revisionists" or "neo-classicists" like McMahan who should then be credited with "re"discovering this truth, but rather those who pointed this classic tradition out to them. According to McMahan's own admission, this was Gregory Reichberg[251] – who is certainly not a "revisionist." Moreover, in light of an unbroken tradition from Aquinas via Vitoria and Suárez (and many others) to Grotius, Anscombe (who died in the 21st century), Coady,[252] and Biggar[253] (who are both still alive in 2020), there was actually never a need to rediscover the inequality thesis. The idea that "revisionists" have revised the tradition or at least rediscovered a lost tradition is as mistaken as the inequality thesis itself.

4.1.6.2 *The Revisionist Formulation of the Inequality Thesis: Tautologies and Question-Begging*

McMahan once offered the following definitions:

> As I understand it, a just cause is an aim that satisfies two conditions: (1) that it may permissibly be pursued by means of war, and (2) that the reason why this is so is at least in part that those against whom the war is fought have made themselves morally *liable* to military attack. With this notion as background, we can now distinguish between "just combatants," who fight in a just war, and "unjust combatants," who fight in a war that lacks a just cause.[254]

I have argued elsewhere that given these stipulations, his thesis of the unequal liberty-rights of just and unjust combatants to kill each other or of their unequal liability to attack is not what many people take it to be, namely a synthetic moral truth (or an synthetic moral falsehood) but rather an analytically true sentence of no practical, substantive import.[255]

Meanwhile, however, McMahan has changed his definition of just cause. He now states that

> there is a just cause for war when those whom it is necessary to attack or kill as a means of achieving a war's aim or aims satisfy the agent-based conditions of liability to be attacked or killed, and thus will be actually and not merely potentially liable to be attacked or killed if the circumstance-based conditions of necessity [and] proportionality are satisfied as well.[256]

Unfortunately, this changed definition still makes the unequal liability thesis a tautology. For together with the claim that unjust combatants are those who fight in a war that *lacks* a just cause, the definition conceptually and logically *implies* that the "just" opponents of the "unjust" ones are *not* liable to attack (for if they were, their enemies *would* have a just cause), while the opponents of the just ones *are* (if they weren't, the "just combatants" would *not* have a just cause and thus actually not be just combatants in the first place). Moreover, while this definition makes the thesis that unjust and just combatants are not equally liable a tautology, the tautology is of course (not surprisingly, since it does not really say anything of substance) entirely compatible with the view that McMahan is intent on arguing against: namely that the individual combatants on the collectively unjustified side in war can, no less than the individual combatants on the collectively unjustified side, *all* be *just* combatants. Moreover, McMahan's definitions are not only compatible with this possibility, they make it inescapable if I am correct that

soldiers become liable to attack by participating in, or non-innocently contributing to, the killing of innocent civilians ("collateral damage" – something even noble, justified humanitarian interveners produce on a regular basis).[257] For then a warring party attacking another party in order to commit a genocide might well have a just cause on McMahan's very own definition of "just cause" – namely if, as is quite likely, it is necessary for them to kill the liable enemy opponents in order to achieve the goals of their genocidal war. This disqualifies McMahan's definition of just cause.[258]

To be sure, McMahan constantly claims that "justification defeats liability" or "exempts" from it,[259] and that therefore justified soldiers cannot be liable to attack. However, as far as the moral (in)equality of combatants is concerned, this is a question-begging argument, for it only "establishes" the inequality of combatants on the assumption that combatants on the unjustified (collective) side cannot, individually, justifiably participate in the war. However, that is not only far from obvious – individual participation in an unjustified collective act can clearly very often be justified, as we have already seen[260] – but it is also precisely the contested issue, an issue that certainly cannot be decided by simply once more invoking the "justification defeats liability" doctrine.

Thus, even if justification defeated liability, this would not be sufficient to undermine the thesis of the moral equality of combatants: it would be quite possible for *both* sides to be *non*-liable. Of course, this is the opposite of saying that both sides (as in Walzer's account) are liable, have an equal liberty-right to kill, but it is still clearly a form of the moral equality of combatants. Moreover, far from this moral equality necessarily leading to pacifism, it is compatible with *both* sides having an agent-relative necessity justification (instead of what McMahan calls a "liability-justification")[261] to kill enemy combatants. Thus, while there would, under these circumstances, be no equal liberty-right to kill each other, there could be an equal justification for overriding the enemy combatant's right not to be killed. Thus, we would not have an equal liberty-right to kill, but still an equal *justification* to kill. McMahan has nowhere provided an argument capable of showing that this is not possible (nor have other "revisionists"); in fact, he undertakes no effort to analyze agent-relative necessity justifications at all.[262]

In any case, the previous paragraphs should have made it obvious that the substantive debate cannot really be meaningfully conducted in McMahan's tautological terminology. Unfortunately, however, *all* revisionists (I am not aware of a single exception) simply adopt McMahan's talk about "just" and "unjust combatants" and, moreover, talk about "just causes" without ever providing their own independent analyses of what that might be. Given that the "revisionist" talk about "just" and "unjust combatants" is, for the reasons given, question-begging and misleading, it should be abandoned. Instead, one should talk about combatants on

the justified side (meaning the collective) and combatants on the unjustified side; or about combatants in a justified war and combatants in an unjustified war. And then one can ask, as we did above,[263] whether combatants on the unjustified side in a war can themselves justifiably participate in a war and also whether soldiers justifiably participating in a justifiable war might nevertheless be liable to counter-attack. Such questions cannot and certainly should not be decided by definitional fiat.

In sum, while the previous section showed that the inequality thesis is not particularly innovative but part of an unbroken tradition, the present section has shown that the tradition has beaten "revisionists" not only by providing an earlier and continuing formulation of the inequality thesis, but also by providing a considerably better one.

4.1.6.3 *The Inequality Thesis as Sustained by the "Justification Defeats Liability" Doctrine: On Ad Hoccery and Dogmatism*

McMahan's "justification defeats liability" doctrine, shared by most (but not all) "revisionists," is central to the sweeping "revisionist" moral inequality thesis. It is not, however, the aim of this section to philosophically refute this doctrine, for that has already been done in Section 4.1.5 and, as we will see, repeatedly, at length, and in detail elsewhere (in fact, that this has been done before is precisely the point of the present section). Yet a doctrine that survives, at least in some quarters, although really convincing arguments for it are lacking while good arguments against it abound, apparently cannot be deflated by good arguments alone. Instead it might be necessary to reveal the forces that sustain the doctrine *in spite* of the lack of sufficient philosophical support. In other words, it might be necessary to drop the subtlety and say loudly and clearly that the emperor is naked.

In order to do so, we first must retrace the path of the debate. Note that McMahan at the beginning claimed (after, that is, having given up his culpability account) that it is the moral responsibility for an *unjust* (that is, rights-infringing) threat that makes a person liable to attack.[264] I then pointed out that this account of liability does not at all yield the inequality thesis McMahan was and is so heavily invested in, but in fact undermines it, given that McMahan also believes, quite rightly, that killing innocent persons violates their rights and is thus unjust.[265] Here is how McMahan himself succinctly put the challenge:

> Moral responsibility for an unjust threat, or a threat of wrongful harm, is, I have argued, a basis of liability to attack in war. Uwe Steinhoff correctly observes that many acts of war by those who fight in a just war ("just combatants") threaten innocent people with wrongful harm. This, he claims, makes them morally liable to

> attack according to the criterion of liability I have defended. But if both just combatants and unjust combatants (those who fight without just cause) are morally liable to attack, so that each is permitted to attack the other, the doctrine of the moral equality of combatants, against which I argued in my earlier essay, is not only true but, embarrassingly, true on the basis of my own claims.[266]

In order to block the unwelcome conclusion of a far-reaching moral equality of combatants, McMahan invokes the "justification defeats liability" doctrine.[267] This move, however, appears to be entirely *ad hoc* and therefore rather unconvincing. McMahan denies that it is *ad hoc* by pointing to the fact that criminal liability is defeated by justification. Yet criminal liability is irrelevant because the issue was and is not liability to punishment, but liability to defensive killing, as he himself acknowledges (which makes it odd that he discusses criminal liability at all).[268]

He also mentions tort law and explains that strict liability is "the only kind of liability in either criminal or tort law that is not defeasible by a justification, and it governs only a very limited domain of the law of torts."[269] However, this statement is a tautology. Strict liability in tort law is *defined* as liability that is not defeasible by a justification or an excuse. The more interesting question to ask, therefore, is whether in tort law justification always defeats liability. The existence of strict liability shows that it does not – which proves my point.

Moreover, whether the domain of strict liability is "limited" or not, the fact remains that it is exactly the domain under discussion here. In fact, only a few lines before he banished strict liability to a very limited domain, McMahan discussed

> Joel Feinberg's case of the hiker in a snowstorm who, in order to avoid freezing to death, breaks into an unoccupied cabin and makes a fire by burning some furniture. He infringes the owner's rights and owes the owner compensation, but the owner would have no moral right of defense against the trespasser.[270]

Now, this example shows that justification (the hiker was justified according to McMahan) does not defeat tort liability, for the hiker will have to pay compensation.

McMahan, however, offers this example to undermine another objection: in the case where, for instance, "just" combatants bomb and kill innocent bystanders in the course of a proportionate attack on a military target, the "just" combatants would (from a moral point of view) *ex post* have to pay compensation to the victims of their attack, while the potential victims, if they harm the attackers through defensive action, would not have to pay compensation to *them*. This, I think, shows that there is a crucial difference between the two parties – there is certainly no symmetry.

Yet McMahan objects to this that "one cannot infer that a person is liable to defensive action ex ante from his being liable to pay compensation ex post."[271] That is correct; one cannot infer this without a further premise (and one does not have to). However, in tort law, the fact that A has to pay compensation to B means that A has *wronged* B. Thus, the fact – if it is a fact, and I think it is – that the innocent victims of the bombers can demand compensation for the mutilations and losses they have suffered from the bombers while the bombers cannot demand compensation for the losses and harms they have suffered due to the defensive action of the innocents, shows that a moral asymmetry is at play here. The bombers have wronged the innocents, and not vice versa, and that means that the bombers were *liable* to attack. That is only logical, for seeing that McMahan thinks that even differences of "comparatively slight moral significance" can make all the difference in who is liable to be killed,[272] it is unclear why this should not be the case here – especially since the difference is not slight at all.

In that context, let us revisit Feinberg's example. McMahan claims that the owner would have no moral right of defense against the trespasser. Well, leaving aside the moral question for a second: from a legal point of view it is actually not that clear that the owner does not have a right of defense against the trespasser.[273] Moreover, if the backpacker by his actions threatens the *life* of the owner (maybe the owner cannot survive without the furniture), the owner definitely has the legal and moral right to defend himself – with lethal violence, if need be. And the backpacker *would under those circumstances not be allowed to use lethal countermeasures in turn against the self-defense of the owner.* That is the legal situation at least in US law (which is the law McMahan refers to). I think it is also the correct stance from a moral point of view.

What we are dealing with here is a case of so-called private *necessity*, covered by a private necessity (or "choice of evils," or "lesser evil") justification. This is important since McMahan explicitly says that the justification of the tactical bomber is a *lesser evil justification* (and of course it is).[274] However, in law, the necessity or lesser evil justification definitely does *not* defeat liability.

In law, the defense of private necessity allows a person to damage or destroy or to trespass another's property in the course of self-help efforts that are reasonably necessary to save the actor's clearly more valuable property and/or his or her own life.[275] However, most US statutes do not allow this legal defense in cases where the self-helper threatens the *life* of another person. In such cases, the self-helper becomes liable to attack. Nevertheless, following the Model Penal Code, the statutes of some other US states seem to allow deliberately killing an innocent and non-threatening person in order to save many others. Still, this same Model Penal Code makes clear that this privilege "does not abolish or impair any remedy for such conduct that is available in any civil action,"[276]

which means, as the legal scholar George C. Christie points out, that a person killing another innocent person out of necessity "would be liable in tort for substantial damages in a wrongful death action brought by [the victim's] next of kin."[277] It seems, however, that if the potential victim killed the self-helper, such a wrongful death action could not, for good legal reasons, be brought against the potential victim.[278] As Christie further notes: "If any of the parties would be free from tort liability, it would be the [innocent potential victim of a "necessary" attack]. I cannot conceive of any American court holding an innocent person liable in tort for shooting another person to prevent that other person from killing him."[279]

Thus, American tort law takes it to be the case, and very reasonably so, that a person who kills another innocent person out of necessity *wrongs* this innocent person, while the innocent person killing the attacker does *not* wrong the attacker. But this then *means* that the first person must be legally liable to be killed, while the second is not.

This is the situation in US law as it concerns attacking an innocent person out of necessity: the attacker is liable, the innocent person is not. Thus, when it comes to the question whether US tort law and US self-defense and necessity statutes consider justification to defeat liability against self-defensive killing in cases of attempted homicide – and these are the cases we are talking about when the issue is war – US tort law and US self-defense and necessity statutes support my position.[280]

Moreover, McMahan has not only the law against him, but, it seems, his earlier self as well. It is revealing to see how little conviction McMahan initially showed in his defense of the "justification defeats liability" doctrine and that he made concessions that do not defeat liability but rather defeat the doctrine of its defeasibility. For example, he once stated:

> Of course, a moral asymmetry remains between the Innocent Threat or Attacker and the Innocent Victim: for an Innocent Threat or Attacker is, by definition, morally responsible for the threat he poses, and may also be at fault (though excused) for that threat. And these considerations are relevant to how the inevitable misfortune ought to be distributed as a matter of justice.[281]

Indeed, they are. Therefore, it is somewhat surprising that McMahan later suddenly says that in "a conflict between those who act at the behest of morality and those who are wholly innocent and act in self-preservation, justice is silent."[282]

One might be tempted to object here that there is nothing *ad hoc* or surprising about this. After all, in the indented quote McMahan talks about *innocent* attackers or threats while in the last quote he obviously refers to *justified* attackers. Yet the problem is that contrary to what McMahan suggests, only those who are *morally required* to attack "act

at the behest of morality" and not those who are merely *justified* in attacking. A combatant can be justified in engaging in a certain attack even if all things considered it would have been morally better to do something else (maybe dedicate the same amount of energy and money and resources to Oxfam). If even under those circumstances he attacks anyway, then however justified he might be, he is still morally responsible for the morally suboptimal choice of posing an unjust threat. The innocent bystander, however, is completely free of such responsibility. And these considerations, I think, are indeed relevant to how the inevitable misfortune ought to be distributed as a matter of justice. McMahan would appear to agree:

> If it is inevitable that someone will suffer a harm, those who are morally responsible for that fact are the ones who, as a matter of justice, should suffer it. It would be unjust to allow the harm to befall the innocent instead."[283]

Indeed. Moreover, even in the very same article the penultimate quote was taken from (the last quote is from a book chapter that appeared two years later) he actually comes close to admitting as much. He says:

> The claim that justification defeats liability may seem more compelling in the case of justified acts that are morally required. If so, and if acts of war by just combatants that kill innocent people as a side effect are optional rather than required, this would weaken the case for the claim that those who engage in such acts do not thereby become liable. ... I believe that there are wars that countries are morally required to fight ... And there may be others that, while morally optional, are nevertheless justified in the strong sense that they are not only permissible but also impartially better than any alternative – that is, there is no alternative act that would be morally better or even equally good.[284]

This, it seems, is nothing less than the admission that in all normal wars, even in normal "just" wars, the "case for the claim that those who engage in such acts do not thereby become liable" is "weakened." But with this admission, the case for the claim that McMahan's thesis of the inequality of combatants has great practical significance is also weakened, and very much so. How many wars are there that countries are morally *required* to fight? Is there any such *real* war? Maybe (though even that is not entirely clear, for a variety of reasons) Great Britain was required to fight *a* war against Germany, but it was certainly not required to wage the indiscriminate war it *actually* waged.[285] And that actual war, quite obviously, was also not "impartially better than any alternative." Besides, the issue here is not the war as a whole but the justification of the

individual, allegedly just combatants. Has there ever been *any* act by just combatants that has been impartially better than any alternative? How likely is that? More likely than the same happening on the other side? And how does one find out? If "just" soldiers are only then not liable to attack when all their acts of killing or contributing to killing innocents are "impartially better than any alternative," the "inequality of combatants" has for all intents and purposes gone overboard.

Thus, so far we have seen that the invocation of the "justification defeats liability" doctrine is an *ad hoc* maneuver to save McMahan's sweeping inequality thesis from the (for him) embarrassing implications of his very own initial formulation of the conditions for liability to attack. In order to diminish the appearance of *ad hoccery*, McMahan then invokes the authority of law as well – but apparently without actually consulting any legal literature on the issue. Finally, McMahan himself, as the quotes adduced above show, is (or was) actually well aware of how dubious and intuitively unconvincing the said doctrine is.

Meanwhile, however, "revisionists" like to present it as some kind of well-established and unchallengeable truth. They do this partly by ignoring challenges, to the extent of not even mentioning them in footnotes – lest, I suppose, some reader might get the idea to actually consult the critical literature and judge for herself how compelling the said doctrine is.

To fully appreciate the recent "revisionist" dogmatism on the issue, it is indispensable, however tedious, to briefly recapitulate the metadata, as it were, of the previous debate – after all, one needs to see that there actually *was* a debate and that there *are* unmet challenges (one certainly does not see that if one takes one's information exclusively from recent publications by "revisionists"). Thus, my first attack on the "justification defeats liability" doctrine and with it on the sweeping "revisionist" moral inequality of combatants thesis appeared in *On the Ethics of War and Terrorism*,[286] and I developed it further in a 2008 article for the *Journal of Political Philosophy*.[287] McMahan replied to my critique in the same issue,[288] and Frowe replied in her first book.[289] I responded to McMahan in the *Journal of Ethics* in 2012,[290] and to Frowe in the journal *Philosophia* in 2016 (posted online late 2015).[291] To the former article McMahan answered in a volume edited by Frowe and Lang (2014).[292] In contrast to McMahan, Frowe simply repeated her initial reply in the second edition of her book (2016), not even mentioning the second and third rounds of arguments between McMahan and me in a footnote. Nor has she mentioned them, or my reply to her, ever since in her published work. I, in turn, replied to McMahan in the journal *Ethical Theory and Moral Practice* (2016).[293] This reply has remained unanswered, just as my criticism of Tadros in the journal *Res Publica* (2014),[294] and my likewise pertinent article in *International Theory* (2016).[295] It should also be noted that Adam Hosein has provided two

further sustained critiques of the "justification defeats liability" doctrine, namely in 2014 in the same volume co-edited by Lang and Frowe in which McMahan's second response to me appeared, as well as in the journal *Res Publica* (2017).[296] While McMahan responds to Hosein's first contribution with parts of his own chapter in the same volume, other "revisionists" to the best of my knowledge do not even mention any of Hosein's two contributions (let alone engage his arguments).

This is the state of the debate. If "revisionists" had good counter-arguments against the latest rounds of objections against the "justification defeats liability" doctrine,[297] one would expect them to be eager to offer them. If, on the other hand, they do not have such arguments, it might be strategically wiser for them to not even mention said objections anymore. They have indeed adopted the latter strategy – they go out of their way to avoid mentioning important and, to quote McMahan again, "embarrassing" arguments that play a central role in the debate described in the last paragraph.

Let me demonstrate this with three particularly illustrative examples, namely Lazar, Bazargan-Forward, and Frowe. Let us start with Lazar. In his entry "War" in the Spring 2017 edition of the online *Stanford Encyclopedia of Philosophy*,[298] Lazar distorts the history of just war theory as well as the current debate in a variety of ways.[299] For present purposes, however, only his remarks on the moral (in)equality of combatants are of concern. So let us have a look at those. To begin with, Lazar claims that "[t]he simplest objection against Combatant Equality brings it into conflict with Proportionality. ... Proportionality is about weighing the evil inflicted against the evil averted... But the military success of unjust combatants does not avert evil, it is itself evil."[300] Actually, the military success of defensively shooting down justified bombers who in their justified attack would have collaterally killed innocent bystanders on their enemy's side, often including babies and toddlers, does avert an evil – the death of innocent people and babies and toddlers certainly counts as such, does it not? Sure, if the bomber's attack is justified in the first place, then it would have saved more lives than it would have destroyed. And that means that shooting them down prevents more people from being saved than it saves itself. However, again, that is *not* disproportionate. If a surgeon tries to kill me, then I am justified in shooting him in self-defense if this is necessary to save my life even if thereby I prevent him from saving two or even ten people tomorrow. The proportionality constraint of the legal and moral self-defense justification does *not* require a defender to forego self- and other-defense and sacrifice her life or the life of another attacked person for the greater good. It is not the simple consequentialist calculus Lazar seems to make it out to be. The self-defense justification does not compare all social harms threatened by the attack with all the social harms that the defense would produce, but seems to in fact merely compare the severity of the

attack with the severity of the counter-measures (where severity is measured on different dimensions). These points have been made in the debate before,[301] yet Lazar fails to mention them. Moreover, the necessity justification does not require agents to do an *impartial* weighing of the lives of all sides involved. The agent-relative necessity justification allows soldiers to give more weight to the lives of civilians on their side than to the lives of civilians on the other side – as had also already been pointed out.[302] Therefore, to think that one can rule out the moral equality of combatants with a simple appeal to proportionality only demonstrates a misconception of this constraint.

Lazar also ignores one of the most important arguments in the debate on the moral equality of combatants, namely the argument described again at the beginning of this section. To wit, Lazar claims, rather apodictically: "Walzer's case for Combatant Equality rests on showing that just combatants lose their rights to life. His critics have shown that his arguments to this end fail." Have they now? Why, exactly, should the argument fail? Lazar states: "Posing threats to others in the pursuit of a just aim, where those others are actively trying to thwart that just aim, cannot void or vitiate one's fundamental natural rights against being harmed by those very people."[303] Yet Lazar should know – and he surely does know – that many authors have argued that you become liable to attack, you forfeit your right not to be attacked if you violate – justifiably or not – the rights of other people. In fact, as we saw, this was McMahan's very own original formulation of the conditions for liability in war and to defensive attack. The argument, again, is that even soldiers on the justified side, pursuing "just aims," collaterally *kill innocent people*, or *participate in collective actions* (waging war certainly qualifies) *that collaterally kill innocent people*, and thereby they violate their rights. That collaterally killing innocent people does amount to a rights infringement is accepted by virtually every "revisionist" (and, as far as I can see, by Lazar himself). But if one forfeits one's right to life by posing an unjust (namely a rights-infringing) threat, then even *justified* soldiers become liable to attack – which would once more mean *equal liability* on both sides. Again, this is one of the most powerful arguments in this debate, and it has been discussed – but by no means refuted – by some revisionists themselves, as we saw above. That Lazar chooses not to even *mention* the argument might be a tribute to this fact – that is, that it has not been refuted.

The counter-argument employed by "revisionists" who address the argument at all – most ignore it, just as Lazar does – is, of course, that "justification defeats liability." Lazar does not explicitly invoke this doctrine, but he clearly presupposes it when arguing against Walzer – otherwise he could not make the bold claims I just quoted. Yet that does not keep him from dropping it when arguing against a claim of McMahan that he disfavors. To wit, Lazar – rightly, but not at all for the right

reasons – criticizes McMahan's recent assertion that, in Lazar's words, "unjust combatants' responsibility for just combatants' reasonable beliefs that they are liable may be enough to ground forfeiture of their rights."[304] Lazar claims that this assertion does not sit well with McMahan's strong inequality thesis, for it "would count in favour of moderate Combatant Equality, since most just combatants are also blamelessly responsible for unjust combatants' reasonable beliefs that they are liable to be killed." However, if justification defeats liability, then McMahan has an obvious answer: yes, most just combatants might be blamelessly responsible for unjust combatants' reasonable beliefs that they are liable to be killed, but they are not only blameless, but also *justified* in producing these beliefs, while the unjust combatants are not. And then, of course, Lazar's objection falls flat. So it would seem that Lazar relies on the justification-defeats-liability doctrine when it suits his argumentative purposes (endorsing the inequality thesis[305]) and drops it when it does not. Critiques of the doctrine, however, are never mentioned.

The same is true of Saba Bazargan-Forward. In a context where he seems to be worried that an argument of his might actually lead to the moral equality of combatants, he quickly and rather apodictically claims "that individuals in general cannot permissibly invoke a right of self-defense against justified aggression: there is no permissible defense against justified defense."[306]

First, since when? After all, elsewhere, when highlighting the advantages of his "hybrid account of justifiably killing minimally responsible threats" (MRTs), Bazargan had emphasized that it is a "welcomed ... implication of the claim that killing an MRT infringes her rights ... that MRTs are permitted to fight back in defense against the harm permissibly imposed on them by a third party or by her potential victim."[307] *Now* the implication is apparently not "welcomed" anymore. That does not mean it is wrong.

Second, Bazargan-Forward misrepresents the issue when he implicitly equates all "justified aggression" with "justified defense" – at least if with "justified defense" he means – and it would appear he does – acts and inflictions of harm that are justified by a self-defense justification. This equation is not surprising. Like other "revisionists" fond of the sweeping inequality thesis, he too likes to focus on the self-defense justification because, indeed, there is no self-defense justification for acts that resist acts that are also justified by a self-defense justification. Unfortunately for Bazargan-Forward and other "revisionists," however, the collateral damage justifiably – but unjustly – inflicted by combatants of the justified side is, like all harm inflicted on innocent and non-threatening bystanders, at best justified by a lesser evil or necessity justification. Accordingly, the claim that there is no self-defense justification for acts that resist acts that are justified by a self-defense justification themselves certainly does not imply his far stronger thesis "that individuals in

general cannot permissibly invoke a right of self-defense against justified aggression."[308] But instead of making an attempt to defend this latter thesis against objections, Bazargan-Forward – in a chapter written for a *handbook* on just war theory – ignores said objections and the entire literature vigorously disputing a claim that he presents as an uncontroversial truth.[309]

While Bazargan-Forward conveniently overlooks that one cannot uphold the inequality thesis simply by pointing out that the self-defense justification is asymmetrical and cannot simultaneously apply to two contrary actions, but would also have to demonstrate that there cannot be permissible counter-force against acts that are merely justified by a necessity or lesser-evil justification, Helen Frowe does address this latter point. Yet while she indeed correctly identifies the really relevant claim, namely the claim that defense against *lesser-evil* (not simply defensive) harms is impermissible,[310] she argues for this claim while almost entirely ignoring the relevant literature. The only author Frowe critically engages – and that on one minor issue – is Jeff McMahan, who largely agrees with her. In the context of trying to make an argument against the permissibility of self-defense against "lesser-evil harms" this amounts to carrying coals to Newcastle. Thus, anyone who does not already belong to the choir Frowe seems to be preaching to will rightly remain unconvinced. In any case, I have addressed Frowe's arguments in detail elsewhere.[311] Here I am only concerned with how she distorts the debate. To wit, she claims "that the most influential alternative accounts of a permission to kill innocent threats [are] those grounded in agent-relative reasons" (where the agent-relative reasons are supposed to justifiably override unforfeited rights.[312] I beg to differ.[313] The most influential account of killing innocent and indeed justified threats is precisely the liability account, according to which justified threateners, no less than culpable and unjustified ones, *forfeit* their rights against defensive measures and accordingly become liable to such measures because they infringe (or even violate) the rights of others. While justified, such attackers still pose an *unjust*, a rights-violating threat, and this grounds their own liability.[314] This account can be found in a famous passage in Nozick and has been prominently developed by Thomson.[315] Kamm also accepts it, as does Uniacke[316]; indeed, even some "revisionist" just war theorists accept this account, that is, they do not believe that "justification defeats liability" (another fact Frowe fails to mention).[317] Recently, as already pointed out above, Hosein and I have defended the said account repeatedly and in great detail.[318] Frowe should know this, for she thanks Hosein for his feedback and has criticized an early version of my approach elsewhere.[319] Yet she mentions neither Hosein's arguments, nor my reply to her earlier criticism, let alone the additional round of debates between McMahan and me on this issue. The objections to her view therefore remain unrefuted.

We can summarize this section as follows. McMahan's invocation of the "justification defeats liability" doctrine is an *ad hoc* maneuver to save his inequality thesis from being completely undermined by the implications of his very own initial formulation of the conditions for liability to attack. His claims that this doctrine is established in law are unwarranted, and he himself seems dubious about the intuitive appeal of the doctrine. Moreover, he has made no effort to address the latest rounds of objections directed against this dubious doctrine.

In addition, the "simplest objection against Combatant Equality" to which Lazar refers,[320] namely the objection from proportionality, is not so much simple as simple-minded, because it ignores how the proportionality constraint of the self-defense justification actually works: self-defense can be proportionate even if it does not avert, all things considered, more harm than evil – as indeed McMahan himself has admitted.[321] Moreover, there are also *agent-relative necessity justifications* that can provide an agent, for instance a combatant, with a justification to fight *even if* he does not thereby avert more harm than evil from an *impartial* point of view. This justification has been largely ignored by "revisionists."[322] This is not entirely surprising, for as we saw in Section 4.1.5, it has devastating consequences for their sweeping inequality thesis.

One "revisionist" author, however, who has not ignored agent-relative permissions is Bazargan-Forward.[323] Yet in order to avoid said devastating implications for the inequality thesis, he contradicts statements of his earlier self and now simply stipulates, implicitly invoking the "justification defeats liability" doctrine, "that individuals in general cannot permissibly invoke a right of self-defense against justified aggression." It is mere stipulation because he does not mention the powerful objections to this claim and the literature advancing them.[324] The same is true of Helen Frowe's most recent word on this issue, as we saw.

In short, once one really pays attention to the "ordinary morality of the use of force," the "justification defeats liability" doctrine and with it the sweeping "revisionist" claims about the moral inequality of combatants collapse. There simply is no sufficient rational support for the "revisionist" claims. In fact, given the remarkable and quite obstinate recent refusal of "revisionists" to even mention, let alone address, the strongest objections against their claims, all we are left with now is a mere dogma – a dogma we are well advised to reject.

4.1.7 The Doctrine of Double Effect (and Related Principles)

Another doctrine or doctrines rather dogmatically adopted by "revisionists" – but, unfortunately, not only by them – is the so-called doctrine of double effect or related doctrines. In just war theory, the doctrine of double effect is routinely employed to distinguish conventional warfare from terrorism and show that, all else being equal, the latter is worse

than the former. The doctrine basically claims that harming people intentionally is worse than harming them foreseeably. A related principle (or the same principle expressed in different words: this is somewhat open to interpretation) claims that harming someone when the harm is a means to some further end (or an end in itself) is worse than harming someone when the harm is simply a side-effect. Still another related principle posits a difference between "eliminative killing" and "opportunistic killing." Further related variations are possible.

The "revisionist" Cécile Fabre simply takes the doctrine of double effect "for granted,"[325] as does Rodin, basically relying on the word of McMahan and making no effort to address (or even mention – with the possible exception of Kamm) critics.[326] Lazar, who endorses the moral relevance of the distinction between "eliminative killing" and "opportunistic killing,"[327] does not provide a discernible argument either. Frowe fails to mention any critics but instead rests content with claiming that "the normative relevance between the worseness of harmfully using compared to harming as a foreseen side-effect is widely accepted amongst non-consequentialists."[328] She refers after this statement to two texts of Tadros, but neither do those texts *constitute* evidence for her claim nor does one find such evidence *in* those texts. For a counterpoint, consider McMahan's 2009 statement (has so much changed since then?) that "distinguished deontological and contractualist moral theorists have joined the attack" and "probably reduced Double Effect to a minority position among moral philosophers."[329] I have not conducted an opinion poll and therefore do not know how many philosophers accept the doctrine or, relatedly, "the means principle" or other related principles (nor does Frowe). I am sure it is wrong, though, for reasons I will explain in a moment.

It should be mentioned, however, that one "revisionist" (the only one, as far as I can see), Kai Draper, rejects the doctrine and related ones.[330] And Tadros and Walen at least try to offer rationales for the means principle or a related principle, respectively, that is, they try to explain whence derives the alleged moral force of said principles.[331] I have demonstrated elsewhere that these "rationales" are spurious, just as the rationales offered by other defenders of such doctrines,[332] and shall not go into this further here. After all, before one tries to offer rationales for a doctrine, one should perhaps first check whether the doctrine is plausible to begin with.

And indeed, some authors go beyond simply stipulating such doctrines, and seek instead to demonstrate their correctness. In the following, however, I will show that the methods used to demonstrate this are inadequate. Once one uses an adequate method, in contrast, any appeal these doctrines might have had on first sight (due to the pernicious and deceptive effects of the inadequate methodology) evaporates. They turn out to be *im*plausible, not plausible. This means, among other things,

that to the extent that there is a normatively relevant distinction between terrorism and conventional war, it must be grounded in some principle having little to do with the doctrine of double effect – or, indeed, it might be grounded in something that is simply absent in the domestic case and ordinary morality, for example in a specific *convention* regulating conduct *in war*. This is a question I will not further pursue here (although I shall return to the *general* importance of widely shared conventions in Section 4.2.1.4).[333] Instead I attempt to demonstrate now that the doctrine of double effect and related principles have no credibility as part of the ordinary morality of the use of force. Let us have a closer look.

4.1.7.1 *Preliminaries: A Non-Absolutist Formulation of the Doctrine of Double Effect and First Doubts about Its Credibility*

According to the doctrine of double effect (DDE), it is more difficult to justify inflicting a harm (or more precisely: an evil[334]) on a person when the harm is intended (one *wants* to harm the person, which does not mean that one cannot on some level regret the harm as a necessary evil) than when it is merely a foreseen side-effect of the pursuit of one's goals. A related principle (that in fact is sometimes used to "explain" the DDE[335]) is that it is more difficult to justify harming people such that the harm befalling them is a means for achieving one's goals than to justify harming them when the harm is no such means (nor an end in itself). There are different formulations of the DDE, and sometimes philosophers propose "revisions" or alternatives, which, however, usually retain a certain structural or functional similarity with the DDE or the means principle and can therefore be considered as related principles.

"More difficult" is relative. In fact, some things might be more difficult to justify because they cannot be justified at all. Traditionally, the DDE was understood as an *absolutist* doctrine: producing an evil can *only* be justified if it satisfies all of the DDE's criteria. Here is a classic formulation:

> A person may licitly perform an action that he foresees will produce a good effect and a bad effect provided that four conditions are verified at one and the same time: 1) that the action in itself from its very object be good or at least indifferent; 2) that the good effect and not the evil effect be intended; 3) that the good effect be not produced by means of the evil effect; 4) that there be a proportionately grave reason for permitting the evil effect.[336]

What is implied here is, of course, that *otherwise* the action would not be licit. Most modern ethicists, however, are so-called threshold

deontologists; that is, they think that almost anything can be justified if the stakes are high enough. For example, if it were necessary to make sure that a certain innocent person is dead to secure the survival of a sufficiently large number of other innocent people, then intending his death might well be justified. Traditional formulations of the DDE are of no use when it comes to expressing this *non*-absolutist and comparative idea that the infliction of intended harm, while more *difficult* to justify, can nevertheless still be justified if particularly demanding proportionality constraints are met. They are of no use for this purpose because they list proportionality as one of the justifying conditions of the non-intended infliction of harm, rather than describing the different strengths of the proportionality constraints in the case of intended harm on the one hand and of non-intended harm on the other as something that these conditions explain. The comparative idea can be expressed as follows, however:

> If a person performs an action that produces a good effect and a bad effect, then this act is easier to justify – namely because it has to satisfy less demanding proportionality constraints – if three conditions are fulfilled at one and the same time: 1) the action is not evil in itself; 2) the good effect and not the evil effect is intended; 3) the good effect is not produced by means of the evil effect.

Why should anybody believe that this is true? Why should one believe that the intended infliction of harm is more difficult to justify than the "merely" foreseen infliction of harm? Those authors in particular who think that the means principle underlies the DDE emphasize the allegedly "acknowledged intuitive appeal of the very idea that using someone is wrong."[337] Yet this idea has no intuitive appeal at all, since asking someone for the time and then getting the requested information *is* using that person, but it is not wrong. Of course, the "Kantian rationale" is more precisely expressed in terms of using people *merely* as means.[338] But then again, the idea that treating people as mere refuse is wrong also has considerable intuitive appeal. In other words, the fact that it is intuitively normally wrong to harm people in such a way that the harm serves one's purposes certainly does not show that it is *more* wrong than harming people in such a way that the harm does not even serve one's purposes.[339]

Thus, the alleged intuitive appeal of slogans like "using people as means is wrong" will not suffice. More promising, in contrast, is the approach taken by most defenders of the mere means principle, the DDE, or of related principles, who "attempt to justify the mere means principle using coherence with moral intuitions, moral concepts and moral principles, as in a Rawlsian reflective equilibrium."[340] This is allegedly a

"powerful approach,"[341] but one should note that it is only as powerful as its execution. It does not suffice, for instance, to point out that the mere means principle is related to notions like respect, intrinsic value, dignity, basic rights, propertarian libertarianism, or the difference between doing and allowing (among other things).[342] After all, the no-harm principle (which as such does not distinguish between means and side-effects) *also* relates to these notions. To be sure, the former principle relates to some notions the latter does not relate to – but that might well be an advantage of the no-harm principle, not of the means principle or the DDE.

Accordingly, an appeal to abstract "notions" will not suffice, either. And indeed, the preferred method employed by defenders of the DDE and of related principles is to compare concrete pairs of cases with regard to which our intuitions differ and to then argue that the difference in intuitions between the first case and the second can only be explained by the DDE or related principles.

I put the last sentence exactly the way I did for a reason. To wit, it is an entirely *flawed* methodology to selectively compare concrete cases toward which our intuitions differ. Rather, one must compare cases in which *all else is equal*, that is, where the *only* difference (apart from the differences that logically or conceptually follow from this difference – it makes little sense to use logically or conceptually impossible examples) is that in one case the harm is intended while in the other case it is merely foreseen – and *then* one has to *look to see* whether common intuitions really do differ with regard to these two cases or not.

This is not the methodology defenders of the DDE and of related principles use. In the following, I will discuss how they actually proceed, focusing on their two preferred pairs of examples (Sections 4.1.7.2 and 4.1.7.3). I argue that while these examples might have rhetorical force and will be met with an appreciative nod by those who are already convinced of the DDE and of related principles, they are nevertheless philosophically and methodologically useless (since they do not keep all else equal), and therefore they prove nothing. As a corrective, I shall offer examples that do keep all else equal. These examples, being methodologically appropriate, prove something – they *undermine* the DDE and related principles. Finally, in Section 4.1.7.4, I argue that while the *Loop* case and the "closeness" problem in the context of Jonathan Bennett's *Sophisticated Bomber* example might once have been an embarrassment of sorts for defenders of the DDE, their endless discussion has already for some time now *de facto* served as a convenient distraction from the many absolutely *clear* and far more powerful examples – some of which are to be found below – disproving the DDE and related principles. In short, there simply is no intuitive support for the DDE or related principles. Instead, the flawed methodology and the evasive maneuvers employed by defenders of the DDE and of related principles merely

make it *appear* that there is. Appropriate examples and an appropriate methodology, in contrast, show that the emperor is naked, and has been all along.

4.1.7.2 *A Rigged Comparison: The Terror Bomber/Tactical Bomber Example*

Imagine I would in all seriousness – instead just as an illustration of a point I want to make – offer the following pair of examples in support of an alleged ethical principle "BWTB," according to which, all else being equal, it is more difficult to justify when black people inflict harm than when white people do:

> *Neutral White Bomber:* A white bomber (fighting a just war) drops a bomb on an enemy munitions factory, intending to destroy the factory and thereby damage the enemy's fighting ability, foreseeing that the fallout from the resulting explosion will cause the death of a number of innocent civilians living near the factory, but not intending these deaths.
>
> *Terrible Black Bomber:* A black bomber (fighting a just war) drops a bomb on an enemy munitions factory, intending the resulting explosion-fallout-caused deaths of a number of innocent civilians living near the factory as a means of terrorizing the rest of the enemy population into giving up the war effort.

People would probably call me a racist, but this is neither here nor there, for if the principle is true, it is not racist (at least it would not be the expression of a racist prejudice but rather the expression of a racist truth). More to the point, philosophers would probably point out that the *labeling* ("neutral" vs. "terrible") I use here is already an expression of sheer bias. Instead of allowing the reader to actually test his or her own intuitions, I make very clear from the start what intuitions he or she is supposed to have. The labeling betrays the fact that the aim here is not the unbiased pursuit of truth, but rather the confirmation of prejudice. Furthermore, philosophers acquainted with thought experiments would probably also point out that taking these two examples as supporting BWTB is – *even if* we set the biased labeling aside and *even if* we intuitively deemed the second act more difficult to justify than the first one – an expression of methodological incompetence, for in order to prove that all else being equal the BWTB does any normative work, you have to actually keep all else equal. Yet it is obvious that things are *not* equal in the two examples.

Interestingly, however, quite a number of philosophers have absolutely no problem offering in all seriousness the following two examples in support of an alleged principle "DDE," the Doctrine of Double Effect,

and related principles, according to which, all else being equal, it is more difficult to justify the *intentional* infliction of harm (where the harm is either intended as an end in itself or as a means) than the merely foreseen infliction of harm, or more difficult to justify *causally involving* (whether intentionally or not) people as a means to an end than to harm them as a mere causal side-effect of one's pursuing the end.

> *Strategic Bomber* (often also called *Tactical Bomber*): A bomber (fighting a just war) drops a bomb on an enemy munitions factory, intending to destroy the factory and thereby damage the enemy's fighting ability, foreseeing that the fallout from the resulting explosion will cause the death of a number of innocent civilians living near the factory, but not intending these deaths.
>
> *Terror Bomber*: A bomber (fighting a just war) drops a bomb on an enemy munitions factory, intending the resulting explosion-fallout-caused deaths of a number of innocent civilians living near the factory as a means of terrorizing the rest of the enemy population into giving up the war effort.[343]

Unfortunately, offering this pair of examples in support of the DDE or related principles is methodologically almost as inadequate and unreasonable[344] as offering the previous set of examples in support of the BWTB, and for the same reasons.

First, it certainly does not attest to an unbiased approach if defenders of the DDE use an inflammatory label for one example ("terror") and a sanitized one for the other ("strategic"). One could, after all, have used neutral terms like "intentional" and "foreseeing," or two *equally* inflammatory terms, like "terror bomber" and "collateral bloodbath bomber."[345]

It is, incidentally, quite telling that I have received an objection to this diagnosis of bias that precisely serves to confirm it. To wit, I have encountered the objection that it would be

> uncharitable in the extreme to suggest that use of these labels reveals prejudice, rather than unbiased pursuit of the truth. The cases are labeled for mnemonic purposes, or for the purposes of entertaining the reader, with the mutual understanding that the cases are labeled as they are as a reflection of the unbiased intuitions previously elicited from those who refer to them.[346]

First, it clearly is not "uncharitable to the extreme" in my two examples of the "Neutral White Bomber" and the "Terrible Black Bomber" – so why should the "Strategic/Terror" comparison suddenly be "unbiased" although it *likewise* uses a terminology that already *rhetorically suggests* the very result one wants to "elicit"? Moreover, if the terminology

is *rhetorically suggestive*, then the intuitions "previously elicited" by *the very same examples* can hardly count as unbiased. If, on the other hand, the intuitions have been elicited by *other, neutrally* formulated examples (which defenders of the DDE apparently keep secret) – what are *those* and why not use *them*? Second, it is difficult to see what is so "entertaining" about calling the bombers "strategic" and "terror" – it would certainly be far more entertaining to call them "toopsi" and "shnoopsi." Third, "foreseeing" and "intentional" are clearly *far superior* – in fact the only adequate – "mnemonic devices" seeing as these terms have the considerable advantage of reminding the reader of the very distinction the examples are actually supposed to be about. If, instead, one reminds the reader of *other* things, then that seems to be not so much mnemonic as distractive. Fourth, a "mutual understanding" that is merely *presupposed* is anything but mutual. Unless defenders of the DDE only want to preach to the choir, they will also use their examples in the hope that readers *share* their intuitions; they want to precisely elicit their own intuitions about the DDE in the reader as well. But then – if the "unbiased pursuit of the truth" really is the goal – they must abstain from using examples that are rhetorically rigged to elicit intuitions that otherwise might well be entirely lacking. In fact, the objector *admits* that "[t]he labels are there to help the reader remember which cases are relatively disfavored and which are not." This admission displays a patronizing attitude toward the reader, not one looking for "mutual understanding" in the course of an "unbiased pursuit of the truth." If the latter were the aim, the reader would not need to be pre-emptively made to "remember" what is "relatively disfavored" (by whom, exactly, if not simply the author?), but to be enabled to *find out* what does and what does not actually *deserve* to be disfavored. It is not a valid reply to claim that authors using such examples "are not conducting X-phi [experimental philosophy] on their readers." What they are conducting – or better, what they *should* be conducting if they are really interested in an unbiased pursuit of truth and mutual understanding – is, precisely, an attempt to elicit *non-biased judgments* in the reader, not prejudicial ones. And here too the objector actually admits that "perhaps" "the existence of non-neutral labels lead readers of articles written by DDE-proponents to make biased judgments." Allegedly, however, this is "unlikely" because "[r]eaders of articles in professional philosophy journals are well aware of the norms involved in the use of non-neutral labels, and are unlikely to be swayed by their use." Given, however, that evidently not even *authors* of articles in professional philosophy journals are well aware of said norms – after all, the biased comparisons I am criticizing here stem from the pages of professional philosophy journals – it is unclear why one should expect more of readers. It is also, additionally, beside the point to claim that "[r]eaders can be trusted to respond to pairs of cases with their own intuitions, regardless of the labels." Yes, sure, whose

intuitions would they respond with? However, readers are certainly *not* to be trusted (nor are authors) to respond to rhetorically *prejudicial* examples with the same intuitions with which they would respond to rhetorically *neutral* ones – and that certainly is not "regardless of the labels." Moreover, given that neutrally formulated pairs of examples are easily generated, using non-neutral ones anyway is and remains biased and methodologically inept.[347] Thus, my criticism stands.

The second reason why the *Strategic Bomber/Terror Bomber* pair of examples is inadequate as support for the DDE is that things – just as in the set of examples in support of the BWTB – are not equal at all.[348] (This is also true of the three other standard pairs of examples, to which I will come in due course.) One difference is that the two bombers do not both drop the bombs on what they intend to destroy; only the first bomber does.[349] (As we will see below, one can easily equalize both cases along this dimension by having both bombers drop their bomb on a neutral mark X.) Imagine, however, the first bomber dropped his bombs not on the munitions factory but (still intending to destroy the munitions factory) on the civilians (just as, according to the example, the second bomber drops the bomb on the munitions factory intending to kill the civilians). It would seem that this might change our moral assessment of the "tactical" bomber. It certainly would change the legal assessment under International Humanitarian Law, for now his act has arguably become a war crime. At the very least, we cannot *a priori* exclude the possibility that it is not only morally relevant what the bomber *intends to destroy* but also what he *targets*, and these things can come apart.[350]

At this point, I have to report still another peculiar objection that, again, just confirms my diagnosis. The objection is that the change of our moral assessment just mentioned "doesn't show that a new pair of cases, in which both the tactical bomber and the terror bomber target civilians, fails to support the DDE (or works against the DDE)" because there might be "a moral principle that speaks against the intended targeting of innocents, in addition to, or as a corollary of, the DDE. ... If it's an additional principle, then the change in one's moral appraisal doesn't speak against the DDE ..., because the presence of one morally relevant factor (i.e., targeting innocents) that accounts for similar judgments in two cases doesn't entail the moral irrelevance of the other factor (i.e., intention to harm or destroy innocents)."[351] Note that this cuts both ways, however, which has been precisely my point all along: when there is a non-DDE-factor that accounts for similar judgments in two cases to those entailed by the DDE, then, conversely, the judgments in those cases do *not* entail the moral *relevance* of the DDE. To rely, as the critic does, on one edge of the double-edged sword while continuously downplaying or ignoring the other is, indeed, biased. Moreover, I have

in no way proposed the changed judgment mentioned above as an indication that the DDE is wrong but merely as an indication that targeting is relevant and that thus examples that do not keep factors like these and others equal are *useless*. The objection of the critic seems to confirm that, which makes it self-defeating.

Talking about other factors: A further obvious difference is that in "Tactical Bomber" the military advantage lies directly in the destruction of the military facility, while in "Terror Bomber" the advantage is indirectly achieved: the advantage is not directly the destruction of the innocent persons, but the indirectly achieved (via the destruction of those persons) *terrorization* of the population. The presence of *terror* in one example and its absence in the other certainly looks like a relevant difference.[352]

Thus, if defenders of the DDE (and of related principles, for that matter) want to discuss the plausibility of the DDE (or of related principles) in a methodologically adequate and competent way, they should choose examples that indeed abide by the *ceteris paribus* clause, that is, that indeed keep all else equal that can be kept equal without undermining the descriptive distinction between intending and merely foreseeing and without defying logic. By not defying logic I mean, as already mentioned, that of course it is logically impossible that the two examples *only* differ in the dimension of intending and merely foreseeing – they will and must also differ in what *logically or conceptually follows* from this difference. To wit, if one stipulates that both bombers intend to contribute to the war effort and that neither of them intends the destruction of the ammunitions factory or of the civilians as an end in itself but only as a means to the end of contributing to the war effort, then one cannot keep the causal beliefs identical.[353] If, for example, both believed that bombing the ammunitions factory would *not* contribute to the war effort, then, for obvious logical and conceptual reasons, it cannot be true that the strategic bomber intends to destroy it *as a means* to advance the war effort. Conversely, if they both believed that *both* courses of action *equally* and independently contribute to the war effort, then one can *only* (if at all) ascribe to the "terror bomber" the intention to contribute to the war effort by means of killing the civilians but not by means of destroying the factory if he would not go through with the attack *if* instead he believed that the civilians would not be killed: but this, of course, is incompatible with the stipulation that he does not consider the killing of the civilians as an end in itself – after all, unless killing the civilians is not only a means for him but also a motivating end in itself, he would be happy to destroy the ammunitions factory without killing the civilians.[354] (If he is motivated to destroy *both*, as he is *per exemplo*, then, given the causal beliefs just stipulated, the only explanation for the fact that he is not motivated to destroy only one is that destroying the other is

also a motivating end in itself for him). Thus, an adequate methodology cannot, *literally*, keep all else equal apart from the distinction one is interested in; rather it must keep those things equal whose inequality does not logically follow from the crucial difference. The strategic bomber/tactical bomber comparison does *not* abide by this methodological requirement. The following two examples, in contrast, do:

> *Foreseen Homicide*: Holy Spider A sits on Hermit A's head. If the spider is killed, the enemy population will be demoralized and give up the war effort. A bomber (fighting a just war) drops his bomb on a mark X in front of the spider and the hermit, intending that the explosion kill the former and foreseeing that the explosion will also kill the latter.
>
> *Intended Homicide*: Spider A sits on Holy Hermit A's head. If the hermit is killed, the enemy population will be demoralized and give up the war effort. A bomber (fighting a just war) drops his bomb on a mark X in front of the spider and the hermit, intending that the explosion kill the latter and foreseeing that the explosion will also kill the former.

Is there a moral difference between these two cases? I discern none. But even if one thinks that the two cases are morally different, my point is that it is *such* examples, which do indeed keep all else equal, that must be discussed if one wants to ascertain the plausibility of the DDE, and not examples that are beside the point, like "Terror Bombing" and "Tactical Bombing."

Yet defenders of the DDE seem to be entirely unwilling to do that. To wit, even when they realize (or are made to realize) that the "Terror Bomber"/"Tactical Bomber" pair of examples does *not* abide by the methodological requirement of keeping all else equal, they are not prepared to let go of it. Instead of discussing pertinent examples, they continue to endlessly discuss the bomber examples – probably because the really relevant examples, like *Foreseen Homicide* and *Intended Homicide*, fail to make the DDE look good.[355]

For instance, Neil Francis Delaney, a staunch defender of the DDE, acknowledges what seems to have escaped the attention of other enthusiasts of the "Terror Bomber"/"Tactical Bomber" examples, namely that *targeting* is normatively relevant. Indeed, he even *admits* that "there is no morally significant difference between SB [Strategic Bomber] and TB [Terror Bomber]" in cases where the "only way to hit the target [the munitions cache] is to drop the bombs on the school itself" (because the cache is below the school).[356] Yet in order not to have this concession undermine the *Terror Bomber/Tactical Bomber* example and its supposed evidentiary worth for the normative relevance of the intending/foreseeing distinction, let alone have his very own school/munitions

cache example suggest that intention is not the operative factor after all, he assures the reader that:

> The relation between the civilians and the (primary) target makes it the case that an intention to destroy the munitions cache either just is a proper part of an intention to: [destroy the cache and kill civilians] or (as we are now speaking) carries with it an intention to kill them.[357]

Yet this is simply wrong. It is quite possible to *target* something with lethal weapons without *intending* to destroy or kill it. To wit, if Greedy Greg is offered 1000 dollars by Villain if Greg targets an innocent person's head and pulls the trigger (having the head in the cross-hairs) *and* misses him anyway, then Greg, if he wants the money, would actually have to be *irrational* to *intend to kill* the innocent person. Targeting with lethal force and intending to kill are simply not the same.

Other authors, in turn, acknowledge that in *Tactical Bomber*, as I noted above, the military advantage lies directly in the destruction of the military facility, while in *Terror Bomber* the advantage is not directly the destruction of the innocent persons, but the indirectly achieved (via the destruction of those persons) terrorization of the population. To wit, Thomas Scanlon, a critic of the DDE, has suggested that in war harming non-combatants can only be allowed if it is done in the course of achieving a "military advantage," where "military advantage" is used in a narrow technical sense, so that "[t]he death of noncombatants is not rendered a 'military advantage' by the fact that it would shorten the war by undermining public morale,"[358] but only if it comes in the course of "destroying enemy combatants or warmaking materials."[359] In any case, killing and terrorizing people are certainly two *distinct* ways of harming or wronging people,[360] and therefore the presence of terror in the "Terror Bomber" case and its absence in the "Tactical Bomber" case make the two examples unequal beyond the mere difference between intention and foresight.

Yet even defenders of the DDE who – finally – acknowledge that there is this difference between the two examples are not thereby led into giving up on them. Instead, they try to show – *without* considering examples where everything else is indeed equal – that this difference does not really have normative relevance.[361] Notice that the *only* way this strategy would not be entirely flawed methodologically is if there were no examples available in which all other things *are* equal. But of course such examples are available, as the above *Foreseen Homicide/Intended Homicide* hypotheticals show. I say "entirely flawed" for a reason: the strategy is flawed *both* as a defense of the DDE *and* as an independent evaluation of the moral significance of the distinction between "military advantage bombing" (in the narrow sense of military advantage)

and "terrorization of the population bombing." After all, the appropriate way of testing whether these distinctions have normative relevance or not is precisely to consider examples where everything else is kept equal. Yet the *Foreseen Homicide/Intended Homicide* example strongly suggests (if not even proves) that the intending/foreseeing distinction is *not* normatively relevant. But if *Terror Bomber* is worse than *Tactical Bomber*, as defenders of the DDE maintain, then this, in turn, suggests – all assurances to the contrary notwithstanding – that something else is doing the work – like, for instance, the distinction between "military advantage bombing" and "terrorization of the population bombing."

In fact, it is almost painfully *obvious* that this distinction does make a real difference. After all, terror is an *additional* harm inflicted on people. But harms inflicted in war, especially (but not only) if they are inflicted on the wider population, would certainly have to go into the proportionality consideration – and proportionality affects permissibility.

Here it might be noted that if all else is to be kept equal then we must assume that the tactical bomber also terrorizes the population (although he does not intend to). However, if that is the case, we should not have to assume that; rather, those who offer the *Tactical Bomber/ Terror Bomber* examples would have to make this explicit in their hypotheticals. Yet terrorization is only mentioned in one of the examples, not in the other, and for reasons already stated, it is downright absurd to think that this will not influence intuitive reactions and therefore make the examples useless as supposed evidence for the alleged relevance of the intending/foreseeing distinction.

In any case, if defenders of the DDE think that the difference between "military advantage bombing" and "terrorization" is irrelevant – why then not keep military advantage and terrorization simply out of the examples? In fact, why not keep war out altogether, for as sometimes even defenders of the DDE admit, war is a special case to which special rules might apply, so that intuitions with regard to war might not be generalizable over other cases.[362] Thus, duly keeping out unnecessary distractions like terror, military advantage, and war, we arrive at the following pair of examples:

> *Pedestrian I*: A private person (pursuing a just cause) throws his hand grenade on a mark X in front of a pedestrian, intending that the pedestrian will die.
>
> *Pedestrian II*: A private person (pursuing a just cause) throws his hand grenade on a mark X in front of a pedestrian, foreseeing that the pedestrian will die.

Any difference in justifiability between (1) and (2)? I discern none.[363]

Yet I have come across the objection here that avoiding special contexts and the role responsibilities of doctors and soldiers might create

problems of its own – to wit, according to the objection, a private person does not have a justification to use lethal force at all, and this would allegedly explain why the two cases are equally unjustified. However, first, it is entirely implausible to claim that private persons can *never* have a lesser evil justification (let alone a self-defense justification) to use lethal force. If the stakes are high enough (and that might well be the case in the two examples), they do. Second, I left the special context of war and the role responsibilities of soldiers untouched in *Foreseen Homicide* and *Intended Homicide* – but there still wasn't any difference.

To be sure, defenders of the DDE might see a difference between these cases and between *Pedestrian I* and *Pedestrian II*. But then again, some people might also feel the intuitive pull of the racist BWTB above. The fact that you find *some* people who might endorse an alleged ethical principle is hardly sufficient support for the claim that the principle is correct. Moreover, given that there are so many philosophical detractors of the DDE and related principles, its defenders should perhaps hesitate before making confident claims about how "intuitive" the moral difference between examples like *Pedestrian I* and *Pedestrian II* or even between *Terror Bomber* and *Tactical Bomber* is. They show no such hesitation. They claim, instead, that the intuition that the act of the *Tactical Bomber* is more easily justifiable than the act of the *Terror Bomber* is a "typical first reaction,"[364] that "[m]any" (how many is that?)[365] or even "[m]ost people"[366] share it, and that it expresses "common moral intuitions."[367] Not surprisingly, they provide no evidence whatsoever in support of these claims.[368] Sometimes they even contradict themselves. For instance, McMahan, a defender of the DDE, mentions (shortly before introducing the inevitable terror bomber and his noble twin) "the intuition that while terrorism is generally impermissible and abhorrent, war can sometimes .... be ... permissible"[369]; but then later recognizes the existence of "popularly supported state terrorism" in the form of "British bombing raids on German cities" and "the American destruction of Tokyo, Hiroshima, and Nagasaki."[370] Thus, it would seem that the intuition to which McMahan appeals is not "so widely shared"[371] as he makes it out to be.[372] On the contrary, the one empirical study of the *Terror Bomber/Tactical Bomber* case that I have encountered demonstrates that *most* people do *not* have the intuition that *Terror Bomber*'s act is worse than *Tactical Bomber*'s.[373] In other words, the "common moral intuitions" to which defenders of the DDE and related principles appeal are not *common* at all but in fact idiosyncratic. The wrongness of the DDE might explain this empirical fact.

Let me note one final objection here, namely one directed at *Homicide* and *Pedestrian*. Allegedly, these examples do not manage to do the work I think they can. The *Homicide* cases "are bizarre" and, so the objection goes, "bizarreness is a potential confound when eliciting intuitions. (Imagine that the description of Tactical Bomber started as

follows: 'A bomber with pigeon droppings on his hat and a banana in his pocket....')."[374] First, if DDE defenders really believe that, they should then perhaps heed their own advice and not use examples in which trolleys are stopped by throwing fat men from bridges. Second, what, exactly, is actually supposed to happen when we begin the description in this way? I must say that in my case nothing happens: I think that killing people while having pigeon droppings on one's hat and a banana in one's pocket isn't worse than doing so while not having pigeon droppings on one's hat and a banana in one's pocket, and I would be seriously surprised if other people – including the reviewer – would not reliably share this intuition. Thus, bizarreness itself is *not* a problem – having examples where all else is unequal, however, obviously is. The objection continues that the causal presuppositions are unbelievable, since it is not believable that the enemy will be demoralized by the death of a holy spider or a holy hermit. Yet I simply need not believe that the causal presuppositions will ever be satisfied in the real world (that is why it is called a hypothetical) in order to have clear intuitions about what *would* be permissible if they *were* satisfied. Moreover, if one complains about the unrealistic causal connections of *Homicide* but is evidently not in the least disturbed by the causal presuppositions of *Terror Bomber*, where the death of "a number of innocent civilians" will "terrorize the rest of the enemy population into giving up the war effort" (even quite high numbers of civilian deaths have not achieved this goal in Germany and other places), then this is again rather one-sided.[375]

Moreover, there is nothing particularly bizarre about the *Pedestrian* cases. But here the critic has an objection too. It is that:

> The cases are now so underdescribed that it is impossible to elicit any reliable intuitions about them. How important is the just cause that the private person is pursuing? What is the causal connection between throwing the hand grenade, the location of the X, the death of the pedestrian, and the achievement of the just cause (in either case)?

Actually, first, the intuitions seem to be very clear – there is no difference between the two cases – and second, the description of these cases are only a little thinner than the descriptions of the Bomber cases (there we are also not told anything about the importance of the just cause and only little about the causal relations). And far from this thinness being a problem, it is an advantage, because it does not distract with additional factors. If the critic begs to differ, it is not enough to make a mere claim: the critic should herself provide a *thick* description of two cases where *all else is equal* but we nevertheless think (on basis of the thickness now, it appears) that the DDE explains our differing intuitions. That no such example is being offered is revealing.

Thus, so far I have pointed out four problems with offering the *Terror Bomber/Tactical Bomber* examples as alleged support for the DDE and related principles. First, the *labels* used are already biased and can hence unduly influence intuitions; second, the examples are philosophically useless (although, perhaps, propagandistically effective) since they do not keep everything else equal; and third, the intuitions defenders invoke with regard to these examples are *not* commonly shared. Fourth, and as flip side of the second point, by constantly using methodologically inadequate examples like *Terror Bomber/Tactical Bomber*, defenders of the DDE seem to systematically avoid discussing relevant ones – which is not surprising, since relevant examples, as we saw, do not support the conclusions defenders of the DDE and related principles would like to draw.

4.1.7.3 *The Equally Rigged Trolley Examples – and a Universal Counter-Example*

The other standard examples of defenders of the DDE and related principles do not fare any better. These pairs of examples are *Hysterectomy/Craniotomy, Direction of Resources/Guinea Pig,* and *Trolley/Large (Falling) Man.* I will only deal with the latter pair of examples here, which is by far the most popular one among DDE defenders.[376]

> *Trolley*: A runaway trolley is hurtling down a main track towards five innocent people who are trapped on the main track. A bystander happening by sees that she can save the five by pulling a lever and thereby shunting the trolley onto a side track, where one innocent person happens to be trapped. The bystander pulls the lever as a means of saving the five, foreseeing but not intending the death of the one on the side track.
>
> *Large Man*: A runaway trolley is hurtling down a main track towards five innocent people who are trapped on the main track. A bystander happening by sees that she can stop the trolley by pushing a large man standing beside her into its path. The bystander pushes the large man into the path of the trolley as a means of saving the five, intending the impact that leads to the large man's death.[377]

Again one can only be astounded that this pair of examples is in all seriousness offered as support for the DDE or the means principle. To wit, almost nothing is equal here. The one man on the side track is run over by the trolley. That is not good, but that is all that happens there. The large man, in contrast, is non-consensually touched (which can already constitute assault by itself), *kinetic force* is applied to him,[378] he is *moved against his will, towards a trolley* (probably a stressful experience, since the pushed person will realize that things are not going

to end well for him), and only *then* is he finally run over by the train. The first four factors alone already make a difference, and they make an even bigger difference in combination. To be sure, defenders of the DDE and the means principle often realize that all else is not equal in these pairs of examples, but unfortunately that does not bring them to use examples in which *all* else *is* equal. Let us correct this mistake and not compare *Large Man* with *Trolley* but rather with:

> *Trolley II*: A runaway trolley is hurtling down a main track towards five innocent people who are trapped on the main track. A bystander happening by sees that she can save the five by immediately making a certain pushing motion in a particular direction (where, unfortunately, a large man is standing), thereby, thanks to the train's sensory system, shunting the trolley onto a side track. The bystander makes the pushing motion as a means of saving the five, foreseeing but not intending the impact that leads to the death of the large man she just pushed in front of the train.

The bystander intends neither to push the man, nor to use him as a means for anything. The bystander's *movements* are the means for diverting the trolley; the fat man simply happens to be in the wrong place at the wrong time – just like the man on the side track in *Trolley*.[379] Yet intuitively *Trolley II* seems to be as difficult to justify as *Large Man* – which suggests that using as a means or intending to harm has nothing to do with it. (One could also imagine a robot being activated by pulling the lever, so that as a side-effect of pulling the lever the robot pushes the fat man in the way of the diverted trolley. That still seems intuitively as difficult to justify as *Large Man*.)

Here is another interesting variation that keeps all else equal, this time not by *adding* factors to *Trolley II* that are also present in *Large Man*, but by removing factors like touching, moving, and kinetic energy:

> *Ray Gun*: A runaway trolley is hurtling down a track towards five innocent people who are trapped on the track. The trolley is equipped with a sensor system (evidently programmed by a racist madman) and connected to satellites. It constantly monitors all Native American people on the planet and a panel of buttons. The buttons trigger vaporization rays from one of many deadly satellites, which are equipped with randomizers. The trolley will stop when it registers either one of the following things: a) there is now one Apache less than there was 5 seconds ago (one can randomly vaporize an Apache by pressing button 1), b) button 2 is pressed (which, unfortunately, will trigger the vaporization of a random Sioux), c)

a random Cherokee is vaporized, d) a vaporization ray is fired randomly at one of the many mysterious C-Boxes around the world (unfortunately, if a C-Box is fired at, it in turn fires its own vaporization ray at a random Comanche), e) a vaporization ray is fired in the direction of a Navajo who has no cover. A bystander sees that she can save the five by pushing one of five buttons, which correspond to options (a) to (e), respectively.

The pressing of which button is "easiest to justify"? At the very moment of asking this question, one already wants to bite one's tongue, because in the light of the example the question seems so very absurd. "What's the difference?" one might wonder. "Vaporized is vaporized." Nevertheless, let us dwell on it for a moment, as painful as it might be. After all, people who think that there are significant moral differences between intended harm and foreseen harm, between harming a person in the course of using him as a means and harming a person without using him as a means, between upstream causation and downstream causation, etc., must think that it does make a significant difference here whom the bystander is going to vaporize. The first two distinctions have already been explained. Let me briefly explain the third. According to a downstream theory, harming a person is more difficult to justify if the good that is done is causally downstream from an evil event. Typically, this means that the evil causes the good.[380]

However, these different principles do not all exactly agree on the assessment of the different options in *Ray Gun*. If the bystander pushes Button 1 and thus vaporizes an Apache, the trolley's computer will stop the train. It is not a case of "opportunistic killing," that is, of a killing that profits from the presence of the Apache (if the Apache had vanished into thin air before the bystander had pushed the button, the train would have stopped already), but a case of "eliminative killing."[381] It is also a case of intended vaporization. Does the bystander use the Apache as a means? Well, he stops the train *by* vaporizing the Apache, but most defenders of the means principle will probably understand "using as a means" in such a way that it is incompatible with elimination. Other interpretations are, of course, possible, but we need not speculate on them here. Finally, pressing Button 1 is a killing where the good that is done is causally downstream from an evil event.[382] What about the case of the Cherokee (killed by pushing Button 3)? The computer will stop the trolley if it registers the vaporization of the Cherokee, and it cannot register the Cherokee's vaporization without the Cherokee being there to be vaporized in the first place.[383] Thus, the Cherokee would be used as a means, opportunistically killed, and his vaporization would be intended.[384] (And the good achieved would again be causally downstream from the evil.) If, in contrast,

one vaporizes the Sioux (pushing Button 2), he (unlike the Cherokee) is not used as a means or opportunistically killed. After all, the ray need never actually be fired, only the button has to be pushed. His death or vaporization is meaningless for the computer and thus plays absolutely no causal role in stopping the trolley, quite unlike the vaporization of the Apache and the Cherokee. His vaporization therefore need not be intended but is only foreseen, and the good achieved is not causally downstream from the evil. If one pushes Button 4, the evil, not the good, of the resulting vaporization of the Comanche is causally downstream, it is only foreseen, not intended, the Comanche is not used as a means, he is not killed opportunistically. If, finally, one pushed Button 5 and thereby vaporized a random Navajo, he is at least not used as a means in the sense that something is done with or to his body which then causes the train to stop. After all, the ray need never touch the Navajo; it need only be fired *in his direction*. Yet in order for the ray to be fired in his direction, the Navajo would actually have to be there, and thus he is opportunistically killed (and in *that* sense he might also be used as a means). Nevertheless, just as in the case of the Comanche, the Navajo's death or vaporization is meaningless for the computer and thus plays absolutely no causal role in stopping the trolley, quite unlike the vaporization of the Apache and the Cherokee. His vaporization therefore need not be intended but is only foreseen.

This brief – and probably quite confusing – overview makes the previously asked question only more pressing: what moral difference are these distinctions supposed to make? The answer that suggests itself is: none. It does not matter that one person would be randomly vaporized as a side-effect and the other as a means, that the vaporization of one of them would be intended and the random vaporization of the other merely foreseen, or that one is "opportunistically" vaporized and the other "eliminatively," etc. What matters is that each of them would be *vaporized*. *That* is intuitively quite a significant fact. In contrast, if the above-mentioned distinctions did make a difference, then this would imply that if one increased the numbers of persons to be saved, there must be some number x so that randomly vaporizing n innocent members of one tribe to save the x people on the track would be impermissible while randomly vaporizing *more* than n members of the other tribe would be permissible. This strikes me as morally absurd.[385]

Thus, if we do keep all else equal, it seems to be the DDE itself, along with related principles, that gets vaporized. And it is *such* pairs of examples, where all else remains equal, that must be discussed, not examples where the decks are conveniently stacked. Thus, in order to find out whether our intuitions reflect the DDE or a related principle, said intuitions must be tested not by comparing *Tactical Bomber* with *Terror Bomber* but by comparing *Foreseen Homicide* with *Intended Homicide* or *Pedestrian I* with *Pedestrian II*. Likewise, it is useless to compare

Hysterectomy with *Craniotomy,* as useless as comparing *Guinea Pig* with *Direction of Resources.* And one must not compare *Trolley* with *Large Man,* but rather compare the different killings in *Ray Gun* or compare *Trolley* with *Trolley II.*

4.1.7.4 A Convenient Distraction: The "Sophisticated Bomber"

Again, defenders of the DDE and related principles do not do this. Yet where methodological rigor and objectivity will philosophically hurt, the pretense to both might propagandistically help. Enter the *Loop* case and the *Sophisticated Bomber.*[386] Since discussions of the latter are far more popular in the context of the ethics of war than discussions of the former, I set *Loop* aside here and focus on the *Sophisticated Bomber.*[387]

This bomber is simply a rather curious take on the terror bomber. To wit, Jonathan Bennett famously, or perhaps infamously, claims that all that the terror bomber "intended was that the people's bodies should be inoperative for long enough to cause a general belief that they were dead."[388] Thus the terror bomber, according to Bennett, does not really intend that the civilians die. Bennett comes to this conclusion, which he himself deems to be "absurd,"[389] through an investigation of how one can determine a person's intentions, and since he deems his investigation to be correct, he feels that the result, absurd as it might seem, is inescapable.[390]

I need not go into the considerable intricacies of the debate. Rather, I want to point out that the "closeness problem" as it has been formulated by Philippa Foot is not quite the same as Bennett's challenge (although both are discussed under the heading of "closeness" in the literature). Foot laments that it might not be easy to draw a clear line between intentional and side-effect killing.[391] Bennett, however, seems to suggest that he provides a clear line, although one that people might not like. He does not say that it is *unclear* what the "terror bomber" intends; rather, he states that from his analysis it follows that the bomber intends to make the victims' bodies inoperative. He says that this is the "truth" of the matter and what is "[r]eally" the case.[392] This seems also how Quinn interprets Bennett's "disturbing objection": "under a strict enough interpretation the doctrine fails to rule against many or most of the choices commonly taken to illustrate its negative force."[393] It is not that the doctrine is rendered *arbitrary* – on the contrary. Its *strict* (and thus non-arbitrary) application would classify certain acts, which according to defenders of the DDE should be as difficult to justify as the original *Terror Bomber* (provided that, *pace* Bennett, he intends the deaths of his victims), as no more difficult to justify than the *Tactical Bomber.* In other words, it would lead to counter-intuitive results (at least as far as the intuitions of defenders of the DDE are concerned).[394]

The manifestation of this uncanny transformation of the *Terror Bomber* in a potential counter-example to the DDE is the:

> *Sophisticated Bomber*: A bombardier is fighting a just war and intends only that ten civilians should appear dead in order to frighten the enemy into surrendering. The bombardier foresees that the civilians will certainly die as an unintended side effect.[395]

This is the distraction I was talking about. Yes, it is true that defenders of the DDE do consider the closeness problem to be an annoyance. But note how much more satisfying, nevertheless, it must be for a defender of the DDE to discuss the *Sophisticated Bomber* instead of *Intended Homicide* or *Pedestrian II*. First, even Bennett himself deemed his results absurd, but if an analysis leads to an absurdity, one can always reasonably suspect that something must have gone wrong in the course of the analysis, so that the *Terror Bomber* really does intend to kill the civilians after all, instead of merely being an unfairly maligned *Sophisticated Bomber*. Second, even if it should turn out that the *Sophisticated Bomber* does not, strictly speaking, intend the death of the civilians, it might still be possible to "revise" the DDE in such a way that one gets him back on the hook for some other intention. This is Quinn's own solution (and others followed him in "revising" the doctrine in their own ways[396]). He thinks that according to his

> new and better formulation of the doctrine ... we should say that it distinguishes between agency in which harm comes to some victims, at least in part, from the agent's deliberately involving them in something in order to further his purpose precisely by way of their being so involved (agency in which they figure as *intentional objects*) and harmful agency in which either nothing is in that way intended for the victims or what is so intended does not contribute to their harm.[397]

I put aside the question of whether this alleged solution actually works.[398] However, by focusing attention on the comparison between *Terror Bomber* and *Sophisticated Bomber* and trying to show that a "revised" DDE can still condemn the latter as much as the former, these authors divert our attention away from the fundamental issue, namely from the question whether it is really true that each (or one) of them is actually worse than *Tactical Bomber* and hence whether the revised DDE captures anything of moral relevance. It is therefore not surprising that it never occurs to defenders of the DDE to compare the *Sophisticated Bomber* who intends that civilians appear dead with a *Sophisticated Bomber II* who intends that the munitions factory appears to be

completely and utterly destroyed (and perhaps radioactive so that nobody gets the idea to use it and its ammunition). Of course, in the end, this is not much of a loss since, as we know, one needs to keep all else equal in order to get useful results. So what really needs to be done in this context is to compare two sophisticated agents in two examples that do keep everything else equal. Let us base these examples on *Foreseen Homicide* and *Intended Homicide*, as follows:

> *Sophisticated Homicide with Apparently (and Really) Dead Spider*: Holy Spider A sits on Hermit A's head. If the spider appears to be dead, the enemy population will be demoralized and give up the war effort. A bomber (fighting a just war) drops his bomb on a mark X in front of the spider and the hermit, intending that the explosion make the spider appear dead and foreseeing that the explosion will kill both the spider and the hermit.
>
> *Sophisticated Homicide with Apparently (and Really) Dead Hermit*: Spider A sits on Holy Hermit A's head. If the hermit appears to be dead, the enemy population will be demoralized and give up the war effort. A bomber (fighting a just war) drops his bomb on a mark X in front of the spider and the hermit, intending that the explosion make the hermit appear dead and foreseeing that the explosion will kill both the spider and the hermit.

According to Quinn's principle, the second case is supposedly more difficult to justify than the first one. Is that intuitive? Is there any moral difference? Again, I discern none.[399]

4.1.7.5 Conclusion

The methodology used by defenders of the DDE or related principles is driven by bias and is deeply flawed.[400] Once an adequate methodology is used, the intuitions on which defenders of the DDE or of related principles base their endorsement of such principles evaporate.[401] Accordingly, there is no sufficient evidence to support the DDE and related principles. Quite the opposite. But this, then, is perhaps the mark of the *Sophisticated DDE Defender*: he does not choose examples that could actually *reveal* the truth about his principle. Instead, he prefers to choose examples that offer some chance to make it *appear* right.

DDE defenders will probably be offended by this charge, and many analytical philosophers will at least cringe. They might believe that such *ad hominem* charges are unnecessary. That belief, however, is entirely naïve. Not the whole, but a main point of the present section is that the pro-DDE debate sustained itself for decades *in spite of* the lack of convincing arguments and evidence in support of the DDE. But to then

expect that it can be undermined by good arguments alone is ingenuous, and such an expectation only plays into the hands of defenders of the DDE. A baseless but discursively nevertheless very successful ideology cannot be undermined by good arguments alone; rather, it requires *Ideologiekritik* – one needs to expose the deeper forces sustaining it. Of course, defenders of the DDE might claim that the phenomena I described – the biased framing, the inapt methodology and rigged examples, the empirically unwarranted claims about how widely shared certain intuitions are, and the avoidance of the strongest counterexamples – can be explained other than by systematic bias. Then, however, it is incumbent upon defenders of the DDE to indeed provide such an explanation, and it is not only fair, but philosophically absolutely necessary to *demand* that they indeed do provide such an explanation. I cannot wait to hear it.

Finally, and more generally speaking, every morality and ethics demands playing the blame game. That is also true for the professional ethics of a philosopher – philosophers must be called out for a violation of professional standards, and using an entirely inadequate methodology certainly is such a violation. Calling people out for this violation, in contrast, is not – which, in my experience, seems to be remarkably difficult to understand. I suggest that we all be less concerned about tone and more about methodology.

4.2 War, Law, and Reciprocity: Devising the Moral Rules of War

While the previous first part of the discussion of *jus in bello* was dedicated to correcting certain severe, in particular "revisionist" misperceptions about the ordinary peacetime morality of the use of force that also negatively affect thinking about the ethics of war, this second part will change gear by correcting a deeper misunderstanding. To wit, while the first part accepted, for the sake of argument, the idea – which I call "moral fundamentalism" – that the same moral rules that apply to the use of force in peacetime also apply to the use of force in war, the second part rejects this assumption. This rejection does not amount to claiming that there is a special "war justification" *sui generis* (and it is hence compatible with *one* kind of "reductive individualism," see Section 4.2.1.2). I will proceed by first criticizing two very different but nevertheless paradigmatic examples of moral fundamentalism, namely the accounts of Jeff McMahan and Adil Ahmad Haque (Sections 4.2.1.1 and 4.2.1.3, respectively). None of these positions, I will argue, paint an accurate picture of the relation between war and morality. McMahan's account is simply incoherent by claiming that in certain cases of conflict between law and morality one "should" rather follow the law. This does

not make sense, and arguments intended to show otherwise fail. Haque's account, due to its objectivism, shares this problem, but suffers from still others. He proposes a "service view" of the law of war, according to which "the law of war should aim to help combatants better conform to their moral obligations."[402] I argue that the mechanisms through which the law fulfills this function according to Haque do not work. Moreover, far from deriving the law from morality, at crucial junctures of his argument Haque presupposes the moral validity of legal distinctions, which makes his argument circular. Finally, his attempt at providing a service-based argument for civilian immunity fails.

I will then lay out an alternative approach. To wit, I shall explain how moral mechanisms based on a principle of *reciprocity* cause widely accepted laws and conventions to be *partly constitutive* of the *moral* rules that apply in a conflict (Section 4.2.1.4). I will apply this to the variable moral scopes and limits of necessity and proportionality in war (Section 4.2.1.5), to the moral equality of combatants (Section 4.2.1.6), and to the principle of distinction (Section 4.2.1.7). (Moreover, in Section 4.2.1.8 I will note an additional reason why moral fundamentalism is mistaken, namely because of the moral significance of publicly authorized functions and roles.) This moral force of widely accepted laws and conventions means that we are not enslaved (as "revisionists" think) to a "deep morality" of war but have the moral power – precisely *through* the customs and laws of war – to at least *partially* devise the morality of war.

Finally, in Section 4.2.1.8, I explain how the account presented here differs from a similar-sounding account recently offered by Yitzhak Benbaji and Daniel Statman. While moral fundamentalism in just war theory must certainly be rejected, Benbaji's and Statman's state-centric and supposedly "contractarian" account cannot offer a viable alternative, as I will show. The reciprocity-based and individualist account defended here, in contrast, can.

4.2.1 Moral Fundamentalism vs. Constitutivism: The Relation between Widely Accepted Laws and the Ethics of War

In this section, I am going to ask and answer two questions: Are the moral rules that apply to the use of force in peacetime – in particular on the basis of the self-defense, choice of evils, and perhaps the public authority justifications – the same as those that apply to the use of force in war? My answer to this first question is "no." The second question is: what is the relation between the morality of war and the customs and laws of war? This question relates to the first, for the fact that certain legal norms apply to certain contexts might also have an effect on the

moral norms that apply in that context. Indeed, I am going to argue that, and explain why, they do have a *significant* effect: the existing laws of war are *partly constitutive* of the morality of war, and are so on a "deep" level, not only on grounds of "pragmatic" or "epistemic" considerations.

In the following, I will first more clearly distinguish the account proposed here from the opposing account, which I call "moral fundamentalism." My paradigmatic example for a morally fundamentalist view regarding the relation between the morality and the laws of war is the position taken by Jeff McMahan and some of his followers.[403] I will clarify that adamantly opposing the view that the moral rules governing the use of force in war are the same as the moral rules governing the use of force in peacetime, as I do, is quite compatible with a rejection of the idea that there is a "war justification" *sui generis* (contrary to "revisionist" just war theorists, who tend to conflate these issues). Thus, I do not deny that the same *kind of justifications* (like self-defense, lesser evil, or public authority) that apply to the use of force in peacetime also apply to the use of force in war. Rather, I deny that these justifications have the same *scopes and limits* in war that they do in peacetime. I also deny, for the same reasons, that they have the same scopes and limits in different *other* contexts, for example in different societies. In this sense, at least, war is *not* special, or at least not more special than different domestic contexts.

I will then argue in detail for the approach proposed here. I shall demonstrate that, and explain why, namely on the basis of a principle of *reciprocity*, widely accepted laws and conventions of war are partly constitutive of the *moral* rules that apply in a conflict. These are not the same rules in every conflict, nor, again, are they the same rules that apply in the domestic context. Thus, contrary to authors like McMahan, who claim that "[t]he morality of war is not a product of our devising," we actually do have the moral power – precisely *through* the customs and laws of war – to at least *partially* devise and thus also to *improve* the morality of war. This is good news, since it helps to provide not only morally more accurate, but also practically clearer and more effective action-guidance for conduct in war.

4.2.1.1 Moral Fundamentalism and McMahan's Incoherent Account of the Relation between the "Deep Morality" and the Laws of War

McMahan suggests "that we distinguish sharply and explicitly between the morality of war and the law of war. The morality of war is not a product of our devising. It is not manipulable; it is what it is."[404] More precisely, he "assumes that war is morally continuous with lesser forms of violent conflict and that the morality of individual action in war is therefore governed by *the same* principles that govern individual self- and

other-defence."[405] He thus believes that as far as morality is concerned, the "conditions of war change nothing at all; they simply make it more difficult to ascertain relevant facts." He adds, however:

> This is not to say that the principles and laws that do or should govern the activity of war are identical to those governing relations among individuals. ... The rules of war have to accommodate our epistemic limitations and to be formulated with a regard for the ways in which their announcement is likely to affect people's behavior. But they should otherwise reflect as closely as possible the same principles of justice and liability that govern conduct outside of war.[406]

A first thing to note is that as far as *moral* principles are concerned, to say that "conditions of war change nothing at all" actually *is* to say that the moral principles that do or should govern the activity of war are identical with those governing relations among individuals – at least if one thinks, as McMahan seems to do, that relations between collectives or organizations are reducible to relations between individuals. Even if one does not believe this, however, the alleged fact that there is no change of moral rules from war to peace would still mean that the irreducibly collectivist principles (just like individualist ones) that apply outside of war also apply in war.

A second thing to note is that for simple logical reasons there can only be one answer to the question as to which rules an individual should follow in case the moral and legal rules diverge – if, as one would expect in the context of moral philosophy, the "should" is a *moral* should, he or she of course should follow the moral rules, not the legal ones. Yet McMahan claims – without argument – that one always "ought to obey the prohibition" in case the morality of war permits an act that the laws of war prohibit or in case the morality of war prohibits an act that the laws permit.[407] But again, if the "ought" is supposed to be a *moral* ought, then this is not only wrong, but logically and conceptually incoherent.[408] The same is true if it is a legal "ought." So what kind of "ought" is it then? McMahan does not say, nor does he say why we should care about this mysterious "ought."[409] (Incidentally, a further thing he does not explain is why in case of a conflict between morality and law we should follow the international law applying to war – after all, there are also domestic laws and regulations that apply to war, for example a national army's rules of engagement.)

One critic somewhat grudgingly admits that McMahan's statement "that one 'should' obey the prohibition when one of morality and the law forbids what the other permits is indeed puzzling."[410] Yes, it is. He thinks, however, that by making said statement McMahan is actually committing a mistake in light of his very own endorsement of a

"two-tiered morality of war."[411] Accordingly, says the critic, McMahan "shouldn't" make said statement but instead

> deny that there's a single moral 'ought' here and therefore deny that there's any conflict. More specifically, he should say that if the non-conventional morality[412] of war forbids an act and international law permits it, then the act is, simply, objectively morally wrong. But someone who does the act because he consults the law and that tells him the act is permitted is deciding how to act in the correct way: he's following the correct decision-procedure even if he's violating the objective moral criterion. There are just two different questions: what's objectively wrong, and how should one decide how to act?

The critic admits that this is not what McMahan actually says. Therefore, my criticism stands. Moreover, the critic's suggestion to McMahan does not remove the contradiction but merely iterates it. For now the question arises: is the "should" in the question as to "how should one decide to act" an objective "should"? That would immediately lead to a contradiction again, for if, objectively, Billy should not kill his enemy combatants or his little sister, then objectively, he definitely should *not* use a decision procedure that will make him kill his enemy combatants or his little sister. If on the other hand the "should" in the quoted question is not an objective "should" but, say, a social-democratic or national-socialist or rule-utilitarian or epistemic one, then the question arises as to which sense of "should" is the *morally decisive* one: is it the objective one or the other one? If it is the objective one anyway, the contradiction I just exposed two sentences ago stays. If it is the other one – why then care about objective justification in the first place? If what we have morally decisive reason to do is to follow the decision procedure, that is, in this case, the law, then the *law* is the relevant morality of war. What we have morally decisive reason to do *is* what we *really* (whether you call that "objectively" or not) *should* do from a moral perspective. But if we *really shouldn't* follow "objective morality," then the so-called "objective morality" would appear to be neither objective nor morality.[413] Thus, the critic's suggestion only adds confusion to contradiction.

Let us return to McMahan. A motivation for McMahan's attempt to use an appeal to legal prohibitions to preclude a combatant's acting on his moral permissions might be McMahan's argument that the principle of non-combatant immunity is invalid from a moral perspective – on his account, at least some non-combatants are morally liable to attack.[414] Many, however, will find a view with such implications unattractive. So if we were somehow able to say that one "ought not" to attack civilians although it is morally permissible to do so, this might be seen as a way to release some of the pressure threatening the account in question. However, given that the "ought not" that McMahan uses in this context has

no discernible meaning, as we saw, and thus no moral force, this strategy remains unconvincing.

Moreover, while it is far more common to criticize views like McMahan's for their often counter-intuitive implications for the ethics of war, one can also turn the direction of criticism around. To wit, if McMahan is right that unjust combatants can be killed in their sleep, that is, even if they are not currently attacking, then of course the military chaplain can massacre his whole unit of unjust combatants in their sleep too, despite the fact that he is not at war with them.[415] (And if killing sleeping soldiers is necessary and proportionate if done by the enemy soldiers, it is unclear why, barring special circumstances, it should not also be necessary and proportionate if done by the chaplain). After all, according to McMahan, the justifications for the use of force that apply to war also apply to peace. Note that it is not a valid counter-argument to claim that the chaplain has special responsibilities or associative duties towards his flock: if one of the members of his flock were to attack a visiting war correspondent, the chaplain, his special responsibilities or associative duties notwithstanding, would have an other-defense justification to kill the attacking soldier if this is necessary and proportionate (in fact, he would even have this justification if the attacking soldier happened to be his son). Note also that my objection does not presuppose that it could never be justified for a chaplain to kill the "unjust combatants" he attends to; rather, my objection to McMahan is that on his account military chaplains will be justified in killing their own soldiers whenever the enemy soldiers are so justified, and that seems difficult to accept (and difficult to teach at military academies and seminaries).[416]

Thus, McMahan's view that the moral rules applying to war are the same as those applying to peace seems to have rather unattractive implications; and his views on the relation between war and morality are either incoherent (if the "should" he talks about is a moral or a legal "should") or else unintelligible.

Finally, it should also be noted that McMahan has never provided any argument for his claim. To be sure, he says that "[t]here is really only one morality,"[417] but so what? There is also only one Diego Maradona, but that hardly implies that Maradona's nose must have the same properties as his feet. Likewise, that there is only one morality certainly does not imply that there cannot be different moral domains: for example, business ethics, medical ethics, bioethics, environmental ethics, the ethics of personal self-defense, policing ethics, and the ethics of war. (Incidentally, the latter three areas all involve killing – and one cannot simply assume that rules governing killing in one area automatically apply to the other. In fact, we will see briefly in a moment and in more detail later that the rules governing the use of force by police officers or soldiers are indeed obviously not the same as those governing the use of force by private citizens.) To claim that exactly *the same* moral principles apply

to these very *different* domains is a very strange claim indeed. Just how strange it is can also be seen by recalling that, first, valid moral rules for the use of force differ *between* societies, and second, that even *within* the domestic context of one society there are differences regarding the rules of the use of force. As regards the first point: if in one society, horses are practically worthless and quickly recovered when stolen and in another society horses are necessary for survival and practically never recovered, specific moral rules about the proportionality of killing attempted horse thieves must differ (horse thieves in the latter society would, after all, knowingly cause the deaths of their victims), even if some more fundamental rule about proportionality in general should remain the same.

Before moving to the second point, let me briefly reply to an objection that this horse example is "weak":

> The fact that in one society horses are essential for survival creates a factual difference, not a moral difference. In that society killing horse thieves could be justified as a form of (preventive) self-defense, while in other societies, perhaps not. But this does not mean that different morality applies between the two societies.[418]

This statement is incoherent. While the first sentence denies that there is a moral difference, the second sentence affirms a difference that is clearly a moral one (created by a rather mundane fact, which was precisely my point): in one society, the moral norm not to prevent the theft of horses with lethal force is valid, in the other it is not. Which means that the valid ethics of killing of the first society contains rules not to be found in the valid ethics of killing of the second society. Moreover, I do not claim that McMahan (like, apparently, the critic) does not understand that facts can have a moral effect. Rather, my point is that given that even such a mundane fact as the value of horses can influence which moral norms are valid in a certain society or sphere of action, McMahan's claim that the somewhat less mundane transition from peace to war changes "nothing at all" as far as morality is concerned is entirely unrealistic. This, of course, is also the essence of Walzer's critique of McMahan:

> What Jeff McMahan means to provide ... is a careful and precise account of individual responsibility in time of war. What he actually provides, I think, is a careful and precise account of what individual responsibility in war would be like if war were a peacetime activity.[419]

As regards the second point: while a police officer may stop a driver she reasonably suspects to be drunk, arrest him if he refuses to identify himself and submit to a breath test, and then use force if the driver

should resist, private citizens usually may not do this. Yes, in *exceptional* circumstances, a private citizen may have a lesser evil justification for such a course of action if she has reason to believe that the driver is *so* drunk that letting him drive away will come with an unacceptably high risk that he will seriously injure someone, but the point is precisely that the *officer* does not need to cross the high threshold of a lesser evil justification since she can rely on a public authority justification[420] not available to the citizen. And the point here is that this legal difference also produces a *moral* difference: intuitively, a private citizen arrogating to himself the powers of a police officer, stopping suspected inebriated drivers at night, is acting *immorally*, not only illegally. Consequently, it would also be morally justifiable to forcibly resist such an arrogant civilian if he endeavors to bring you in hand-cuffs to the next police station, while this would not be justifiable in case of a lawful arrest by a police officer.[421] Thus, given that the rules for the use of force are not even the same *within* the domestic context but differ depending, for instance, on whether the confrontation happens between civilians alone or between a civilian and an officer, it is not credible to assume that the rules for the use of force are not in the least dependent on whether the confrontation in question happens between armed civilians in peace or armed soldiers in war.[422]

Yet McMahan indeed claims that "the morality of individual action in war is ... governed by *the same* principles that govern individual self- and other-defence."[423] There is a big difference between claiming that *some* (general or fundamental) principles are the same in different domains and claiming that "the principles," including very specific ones, are *the same*, period. Unfortunately, it is this latter claim McMahan is making, and this claim is, for the reasons given, clearly wrong.[424]

Let me conclude this section with a quote of McMahan's that is particularly useful to further clarify the difference between McMahan's account and the approach presented here. McMahan states:

> There is no special morality that supplants ordinary morality whenever conditions of war obtain. War is, moreover, continuous with other areas of human activity. It differs from other conflicts, including individual self- and other-defence, only in scale and complexity. The morality of killing in war is therefore asymmetrical, just as killing in individual self-defense is. Since the law of *jus in bello* is fully symmetrical, or neutral between just and unjust combatants, the law diverges from morality.[425]

This admirably succinct statement of McMahan's ironically serves my goal of further clarification precisely through its less admirable lack of realism and logical coherence. To wit, I already noted that McMahan will surely be aware (who isn't?) that the facts of a context can partly

determine which norms are applicable and valid in it. But if he is aware of this, then the statement just quoted implies that he must be of the view that the *dramatic factual increase* in the "scale and complexity" of the use of force that occurs with the shift from peace to war is nevertheless *normatively insignificant enough* as to not disrupt the continuity he invokes. It is this view that makes him claim that in spite of the massive changes of empirical circumstances war is nevertheless "governed by *the same* principles that govern individual self- and other-defence."[426] This, I said, is unrealistic: if even the value of a horse can change what norms apply in a given context (and it can), surely the massive changes in scale and complexity that we talk about when we talk about war must also have such an effect.

However, in the following, I will focus on the transformative moral effects of *another* change that comes about with war, a change beyond scale and complexity. In the quote, McMahan mentions this additional change himself, and yet he fails to see it. To wit, while he claims that war differs from other conflicts "only in scale and complexity," he affirms that the "law of *jus in bello* is fully symmetrical." Since this is, as he also states, not the case in peacetime, [427] his claim that war differs from other conflicts only in scale and complexity does not cohere with his acknowledgement of this additional social fact. This additional fact *is* a further difference. Accordingly, in order to uphold his continuity and inequality claims, McMahan would have to demonstrate that this difference, too, is morally insignificant enough as to not disrupt continuity and inequality. Yet he does not even address this issue since, as noted, he mentions but nevertheless incoherently fails to *recognize* its existence. The approach presented here, in contrast, does recognize its existence and its normative significance and accordingly *reverses* the direction of the argument. McMahan relies on domestic morality and his claim that increases in scale and complexity have insufficient transformative moral force in order to reach the conclusion that the legal *jus in bello* diverges from the morality of war. The account presented here, in contrast, relies on the observable fact that the widely accepted legal *jus in bello* diverges from the domestic law of the use of force and on the normative claim that widely accepted laws and customs have moral force in order to reach the conclusion that domestic morality diverges from the morality of war. These are two exactly contrary arguments. In Section 4.2.1.4, I will demonstrate that and why it is the latter argument that wins the day.

4.2.1.2 Two Kinds of "Reductivism"

Before we go into detail, however, a preliminary clarification needs to be made. The claim that the principles governing war, including very

specific ones, are the same as those governing peacetime conflicts needs to be distinguished from a different one. "Revisionists" tend to lump them together. To wit, Helen Frowe endorses the first claim, stating that "the rules that govern harming in war are the rules that govern harming between individuals" in peacetime or, as she puts is, in "ordinary life."[428] But then she goes on to say: "Defensive war is not, on this view, *another* exception to our prohibition on the use of force, in addition to the exception that permits individual defence. Rather, war is the *very same* exception as individual defence."[429] Yet while the "on this view" equates the two claims, it is *one* thing to say that harming in war and harming in peace are governed by the same *rules* and *another* thing to say that both harming in war and peace are justified by the same "exception," that is, by the same *justification* – and to thereby say that there is no independent "war justification" in addition to the self-defense justification (and other justifications applying in the domestic context). The reason why these are two different claims is that it is quite possible that both harming in war and harming in peace are justified by the *same justifications*, like self-defense, lesser evil, and public authority, so that there is no "war justification" *sui generis*, but that nevertheless the *limiting conditions* that are part of these justifications, for instance of proportionality or necessity, are *different* in war and in peace, for example more stringent in one context than in the other. To be sure, one could try to avoid this possibility by stating that then the self-defense justification applying to war is *not* the same as the one applying to peace. I do not think that such a verbal proliferation of justifications is helpful (one would then also have to say that the Russian legal self-defense justification is a *different* legal justification than the Californian self-defense justification, which, unlike stating that they have simply different scopes and limits, only invites confusion). But even if one were to adopt this odd terminology, we would still have to distinguish between the claim that *the same moral rules* that apply to harming in peace also apply to harming in war and the claim that the same *kinds* of justifications that apply to peace also apply to war and that hence there is no separate "war justification."

It is perhaps worthwhile noting that the second claim – that the same kinds of justifications that apply to the use of force in peace also apply to the use of force in war – is hardly innovative or "revisionist." While Frowe juxtaposes "traditional just war theory" – an allegedly "very state-based, collectivist approach to war" – to the "revisionist position known as reductive individualism"[430] (mentioning McMahan as the paradigmatic defender of the latter position[431]), she does not provide any textual evidence for her claim that the tradition is state-based and non-reductivist.[432] In fact, of course, the tradition can hardly be "very state-based" given that for the most part of the history of the tradition

there simply were no states. Perhaps, however, she means that the tradition is "community-based," and if that is supposed to mean that the tradition emphasized the common good, this statement would certainly be correct. If, however, it is supposed to mean that the tradition rejects "reductivism" in the sense of the second claim, it is wrong. An emphasis on the common good is, after all, perfectly compatible with reductivism. To wit, Aquinas states:

> ... because it is not licit to kill a human being except by public authority acting for the common good ..., it is not licit for a man to intend killing another in self-defense, save for one who has public authority, and who, while intending to kill another in self-defense, refers this to the public good. So it is clearly, for example, in the case of a soldier fighting against the foe, and in the case of a minister of justice fighting against robbers ...[433]

Thus for Aquinas, the legitimately authorized intentional killing in pursuit of the public good in the case of an internal disturber of the peace is "the very same exception," to use Frowe's words, as the legitimately authorized intentional killing in pursuit of the public good in the case of an external disturber of the peace. Of course, Aquinas here states that self-defensive intentional killing is only justified *to the extent* that it is justified by the public authority/common good justification, that is, as an act of authorized law enforcement against a wrongdoer. (Such law enforcement, to be justified, has to enforce natural law or positive law that is compatible with natural law.) Later just war theorists, although often more lenient towards private self-defense than Aquinas, followed him in his emphasis on law enforcement and conceived of justified war not so much in terms of self-defense but in terms of punishment and the administration of justice.[434] And just like Aquinas, none of them considered this latter justification to be two different ones: one for the internal case and another for the external case. Rather, they regarded it as one and the same justification, and thus were "reductivists." In other words, there is more than one way of being a "reductivist," and hence one can be a "reductivist" without focusing on self-defense.[435]

Thus, I can clarify the position defended here as follows. I *accept* the claim that the same kinds of moral justifications that apply to the use of force in peacetime – self-defense, choice of evils, and perhaps public authority – also apply to the use of force in wartime. However, I *reject* the claim that *exactly the same rules* that apply to peacetime also apply to wartime. The reason for my rejection of this claim is that I think that the *limiting conditions* – such as proportionality and necessity – that are part of the mentioned justifications are *not* exactly the same in peacetime as in wartime (nor do I think that they are necessarily the same from one peacetime society to another peacetime society).

In Section 4.1.2.4, I will explain why not.[436] First, however, it is worth having a look at still another example of moral fundamentalism.

4.2.1.3 *On Haque's "Service View" of the Laws of War – A Brief Critique*

A very sophisticated example has recently been offered by Adil Ahmad Haque. According to Haque,

> the law of war should aim to help combatants better conform to their moral obligations. The law of war achieves its aim to the extent that just combatants are more likely to avoid acting wrongfully if they obey the law and unjust combatants will act less wrongfully if they obey the law.

He calls this account "*the service view*."[437]

Before further elaborating on the details of this view, we can already note here that Haque's reliance on "likelihoods" is from the very start undermined by his simultaneous endorsement of objectivism about moral justification and permissibility. He states that "[a]n act is *objectively* permissible if and only if it is permissible, given the morally relevant facts"[438] and that "[a]s moral agents, our ultimate aim is to act permissibly in the *objective* or fact-relative sense, that is, to conform to the moral reasons that objectively apply to us given all the morally relevant facts."[439] As already demonstrated above, from a fact-relative point of view waging war cannot be justified.[440] But then what a law of war that aims to help people abide by their moral obligations ought to do is to prohibit *all* targeting with lethal force, not only targeting civilians. Given that the law of war does not do this, it is not serving its purpose very well – certainly not from a fact-relative point of view.[441] From a fact-relative point of view, neither civilians *nor* combatants, including "unjust combatants," can ever be justifiably *killed*.

Furthermore, Haque states that "individuals always have decisive reason to *do* what is objectively morally required but sometimes have decisive reason not to *try* to do what is objectively morally required. In some cases, if they try to do what is objectively morally required, then they are likely to fail, but if they try to follow a rule, then they are more likely to succeed in doing what is objectively morally required."[442] In "some cases"? It is worth being a little more specific: from the fact-relative point of view, that is, from the allegedly "decisive" point of view, you have decisive reason to *try* to do what is objectively morally required in *all* and *only* those cases where your trying actually means your succeeding. The same is true for following a rule. You have decisive moral reason to follow the rule in all and only *those* instances where your following the rule leads you to do what is objectively morally required. In all those

circumstances, however, where your *not* following the rule will *not* lead you to do something that is objectively morally prohibited, you have *no* decisive reason to follow the rule (that is, you are permitted not to follow it). Conversely, in all those circumstances where your *following* the rule will lead you to do something that is objectively morally *prohibited*, you have decisive reason *not* to follow the rule. The same is true for the rules contained in the law of war. "Likelihoods" are irrelevant. Even if it is extraordinarily *likely* (whether in an epistemic or frequentist sense of likelihood) that by following the rule in case *x* you will do the objectively right thing and extraordinarily *un*likely that you will do so if you follow your own judgment – if it is nevertheless *true* that by following your own judgment in this case you will do what is objectively morally required, then, on a fact-relative account of morality, you do have decisive reason to follow your own judgment. In fact, a real judgment is not even required. If following your own entirely idiotic thought processes, whims, and crazy urges means that you will accidentally do the right thing – then you should give in to idiocy and craziness on that occasion. It is *that* which objective morality requires – to do the right thing. Rules of likelihood and probability, in contrast, have, on such an account, no moral force whatsoever.

Accordingly, given Haque's objectivist starting point, it is unclear what *normative status* the law of war is supposed to have in his view. Haque introduces his "service account" in reference to Joseph Raz, who "famously argues that law necessarily claims legitimate authority, that is, that those subject to the law morally ought to follow the law rather than their own moral judgment."[443] He further elaborates, still referring to Raz, that "law's claim to legitimate authority is vindicated by the service that it provides those subject to the law by helping them conform to the reasons that apply to them independently of the law."[444] Yet although Haque describes Raz's view correctly, he fails to pay due attention to a rather significant difference between his account and Raz's. To wit, Raz is not an objectivist, and therefore Raz can indeed consistently say that subjects *morally ought* to follow a legitimate law rather than their own moral judgment *even* in cases (setting cases of *clear* mistakes aside)[445] where the reasons that apply to them independently would require a different kind of action. In contrast, Haque, as an objectivist, *cannot* consistently say that the service that the law of war provides those subject to it by helping them conform to objective morality makes it the case that they *morally ought* to follow the law *even* in cases where the objective reasons require a different kind of action. The reasons for this were already given in the last paragraph. Thus, on Haque's objectivist account, it is simply wrong that soldiers *morally* ought to follow the law of war. But if the "ought" in question is some other "ought" – why should one care from the moral point of view that Haque himself avows, namely from the point of view of objective morality, which, according to

Haque, is the only view that provides decisive reasons to act? In short, Haque's views on the relation between law and objective morality fall prey to the same incongruities as McMahan's, and for the same reason.

But let us set aside the problems that arise for Haque's account from his endorsement of objectivism. Even then the account fails to convince. Let us have a closer look. Again, on Haque's service view, "the law of war should aim to help combatants better conform to their moral obligations. The law of war achieves its aim to the extent that just combatants are more likely to avoid acting wrongfully if they obey the law and unjust combatants will act less wrongfully if they obey the law."[446] How is this supposed to work? He explains that in some cases

> we are more likely to fulfill our moral obligations if we defer to the moral judgment of another person who is better informed, more perceptive, more logical, or more virtuous. Similarly, sometimes we are more likely to fulfill our moral obligations if we follow a rule that directs the morally correct action more often than will a series of case-by-case judgments.[447]

Note that this is an *epistemic* argument. The expert is more likely to *know* what the facts are, because she is more perceptive of the evidence and processes it better. But then the "similarly" in the quote actually seems odd. To wit, rules, just like stones and refrigerators, have neither a brain nor a character. Accordingly, they are not only not *better* informed than a given human being, they are not informed, perceptive, virtuous, or capable of logical thinking *at all*. Therefore, there is nothing relevantly similar between deferring to the judgment of a person and deferring to the dictum of a rule. To wit, one of the reasons for deferring to the judgment of another person about a certain case, for instance for the resident doctor to defer to the judgment of the far more experienced chief cardiologist regarding the proper treatment of a patient, is that the chief cardiologist will have taken into account the same evidence available to the resident doctor, and if not, the latter can alert the former to it. This is why the judgment of the chief cardiologist might provide the resident doctor with an "exclusionary reason,"[448] namely with a reason not to weigh his *own* assessment of the evidence against the chief cardiologist's judgment of the evidence. After all, given the vast experience of the chief cardiologist, the presumption is, and probably should be, that his assessment of the evidence is simply *better* than the resident's assessment of the evidence and should therefore carry the day, unless the chief cardiologist makes a *clear* mistake ("I think we really should inject the patient with 2mg of ricin").

But, one might object, do rules really need a brain to fulfill the same function as the chief cardiologist fulfills here? Isn't all that is needed that the rule yields correct verdicts more often than case-by-case judgments

would, and can't the rule have this property precisely because it was formulated by people who were better informed? This reply misses the point of the example: the people who formulated the rule are most certainly *not* better informed *about this particular case*; in fact, they did not know about it, and they are not present to judge it now. The rule is merely their shadow, as it were. The chief cardiologist, in contrast, is present, he can assess the evidence available in this particular situation, and he is far better able to judge whether a certain rule x actually does apply here, or which rule is more likely to apply, than the resident doctor. After all, rules do not apply themselves. Whether the conditions of application are fulfilled requires *judgment*, which a rule, lacking a brain, cannot offer. The chief cardiologist can.

Thus, while I am actually skeptical about the existence of "exclusionary reasons," in the doctor case, the idea does admittedly make some intuitive sense, precisely because it involves the *judgment* of a more experienced *person* who can be *alerted to the particular evidence in the particular case*. It makes no sense, however, in the case of the *rule* if it is, as in Haque's account, considered as something such that conforming to it will merely make it more *likely* that one will abide by one's obligations. The likelihood can only mean frequentist probability here,[449] that is, something of the form (let us stick to the medical analogy for the moment): "In 90 out of 100 cases in which the patient shows symptoms x one should give him medicine m (because that will heal him)." Let us suppose that because of this likelihood, the following is one of the hospital's written rules (it is clearly a very special hospital): "In cases in which the patient shows symptoms x, give him medicine m." Let us also suppose that "in cases in which the patient shows symptoms y, give him medicine m^1" is not part of the hospital's rules but that it is nevertheless true that in 94 out of 100 cases in which a patient shows symptoms y giving him medicine m^1 will heal him, and doctors know that. Now, Haque, just like Raz, acknowledges that in cases of *clear mistakes* (recall the ricin example above) one may disobey the authority or the law/rule.[450] However, a case of administering m instead of m^1 in the presence of both x and y is *not* a case of a "clear mistake" (in fact, following the first rule might actually have the right result); it is (all else being equal) merely a case where there is a *slight preponderance of evidence* in favor of acting on the second rule.

The same would be true for the laws of war. For example, Haque rather vigorously defends the rule of non-combatant immunity (although, again, he allows for rare exceptions) because he thinks that it is unlikely that non-combatants can be justifiably killed.[451] How unlikely? Let us say, parallel to the above examples, that it is 90% unlikely. Yet he also thinks people (apparently 100% of them) "who threaten to kill or seriously injure innocent people – directly, indirectly, or jointly – are not wronged if they are killed to avert the threats they pose."[452] But why

then should an agent who is aware of these likelihoods not act on the second rule *each and every time* the first rule collides with the second?[453] Yet if an agent is allowed to do that, then the alleged authoritativeness of the rule of non-combatant immunity goes overboard. Instead of the agent deferring to the rule of non-combatant immunity and foregoing a case-by-case judgment, as Haque officially demands[454] at least in unclear cases,[455] the "likelihood-approach" – as we may call it – would actually allow the agent to indeed make her very own judgment in such unclear cases in the light of the different rules that are applicable to the situation and that proffer different probability estimates. There is simply nothing in Haque's epistemic and "service view" approach that could exclude this[456] – which is a good reason to consider actually existing legal rules like non-combatant immunity as partly *constitutive* of the morality of war, instead of attempting to make it appear as though such rules are statistical devices helping one to comply with an entirely pre-conventional "deep morality" of war.

That the latter attempt is wrong-headed, while there might something to be said for the former, is also confirmed by a close look at certain details of Haque's argument for the claim that non-combatants are only in rare cases morally liable to be killed (so that by following the legal non-combatant immunity rule one will by and large be on the right track). To wit, far from basing his support for the legal rule on his moral argument, he actually begs the question by implicitly *presupposing* the legal rule in his moral inquiry and by applying double standards. I already quoted him as saying that people "who threaten to kill or seriously injure innocent people – directly, indirectly, or jointly – are not wronged if they are killed to avert the threats they pose."[457] His example for joint killing is a case where "A restrains V while B stabs V to death, each performing coordinated roles in a common plan." He makes clear that "A and B together kill V even if B's participation was counterfactually unnecessary..."[458] So he clearly thinks that in the domestic case civilians can jointly kill other people. Yet he seems to think that this can hardly ever happen in war. While he explicitly gives several examples of civilians "contributing" to or "enabling" killings, as far as I can see he provides only a single *explicit* example of civilians killing in war jointly with others (civilians or not).[459]

Nonetheless, he does give examples of this, although he refuses to recognize them as such. For instance, he admits that "in rare cases [like a civilian scientist designing nuclear weapons], the design and production of weapons can make a difference to how many people – or at least to which people – will be killed."[460] Yet he decides not to classify such civilians as ones who kill jointly with others but instead suggests that they are merely "enabling civilians" who "contribute to the general military capacity of their armed forces but do not perform an integral part in a coordinate military operation..."[461] But how does this make them

immune? After all, first, Haque very well knows that one might deem such persons liable even if they are only to be considered as "enabling." In reply he claims that "enabling civilians are not liable to defensive killing because the duty not to enable others to kill is both different from and less stringent than the duty not to kill."[462] However, this reply contains an obvious non-sequitur, for the proposition before the "because" does not follow from the proposition after the "because." The duty not to cut off people's arms is also "both different from and less stringent than the duty not to kill," but that hardly implies that one must not kill people trying to cut off one's arms.[463] Second, what does it matter that the civilians' acts are not "an integral part in a coordinated *military* operation" (my emphasis)? Why should it not be sufficient that they are an integral part in a coordinated *lethal* operation, not least since Haque deemed that sufficient in the case of A's and B's killing of V? If Haque suggests here that in order to be liable to attack in the context of war your contribution to a threat of harm must be part of a coordinated military operation, not part of a coordinated non-military operation or a coordinated combined military-industrial cooperation, then he is evidently already presupposing that the combatant/civilian distinction makes a difference for liability, not demonstrating it.

To this one might now reply that in the case of A's and B's killing of V, A and B were *ex exemplo* "performing coordinated roles in a common plan" and surmise that this is not the case with the civilians under consideration. But this is entirely arbitrary. Obviously, the scientists developing nuclear weapons might very well perform coordinated roles in a common plan to kill large numbers of enemy civilians and combatants with nuclear weapons (it seems the scientists of the *Manhattan Project* did). Moreover, while Haque invokes the importance of coordinated roles when trying to philosophically protect civilians from attack,[464] he significantly relaxes his standards for identifying "coordinated roles in a common plan" when trying to repel potential philosophical attacks on his restrictive account of liability. To wit, he considers Helen Frowe's example of a terrorist who successfully forces a driver at gun-point to drive a car in a drive-by shooting in which the terrorist kills an innocent victim. He interprets Frowe as thereby intending to argue for the liability of contributing civilians.[465] Haque finds the brevity of Frowe's argument "striking," but so is Haque's reply, for while accepting the driver's liability he now declares that the driver does not merely contribute but actually "jointly kills Victim with Terrorist, performing an integral role in a common plan."[466] Yet absolutely nothing in Frowe's example suggests a *common* plan of the terrorist and the driver to kill the victim. Rather, the terrorist has the plan to kill the victim, while the driver only has the plan to avoid being killed himself. He can do that, *ex exemplo*, by simply driving the car past the victim, and hence he need not intend the victim's death. What the driver does do, however, is to knowingly perform an

integral role in the *terrorist's* plan to kill the victim, but if that is sufficient for liability to attack (and it seems it is given that Haque's reply fails to convince), then not only the nuclear scientists are liable to attack, but also other civilians Haque tries to exempt from liability to attack.

He claims, for example, that "civilians who design or manufacture weapons" that "make no difference to the unjust threats posed by their armed forces" since "[i]n their absence, their armed forces would simply use other weapons to inflict the same harm on the same people" are not liable to attack. But why then is the driver liable to attack? In his absence, the terrorist would also simply use another driver to inflict the same harm on the same people. Of course, in the driver example the terrorist uses the driver himself and in the civilian example the armed forces use the weapons. However, if the weapons have not already been produced before the war began, then the armed forces will also use the civilians, namely to produce the weapons (in most serious wars the industrial production of weapons will certainly not be carried out independently of the military's strategy and tactics).

Moreover, Haque also admits – and this is Haque's one example of a civilian killing victims jointly with others – that "a civilian may play an integral part in a coordinated military operation—for example, by identifying targets or providing coordinates for bombardment—which in turn causes harm without further intervening agency."[467] We already saw that for Haque playing an integral part in such coordinated military operations generates liability to lethal counter-attack. Yet first, there certainly is intervening action here: providing coordinates of a target produces no harm if no one engages in the intervening agency of actually bombing the target. Second, obviously someone else could have provided the coordinates, so if the civilian is nevertheless liable to attack, then so are the civilians providing the bombs. It simply makes no sense to claim that civilians providing the coordinates for bombing a target become liable to attack while civilians providing the bombs for bombing a target do not. Thus, Haque's attempts to base the legal rule of non-combatant immunity on some kind of pre-conventional morality of war fail, as did so many attempts before his.[468] We need to make room for the possibility that law, including the law of armed conflict, is more than the "servant" of a pre-ordained immutable morality. Indeed, in the following section, we will see that widely accepted laws and customs are in fact partly *constitutive* of the morality of war.

4.2.1.4 *Examples against Moral Fundamentalism: Reciprocity and the Morally Constitutive Force of Widely Accepted Conventions*

Let me begin with an example. Suppose you live in a village where due to something in the water people quite regularly and innocently suffer

from psychotic episodes and start insulting and even attacking other persons. The attacks are never lethal, but they do lead to injuries if successful. You have so far always used only strictly necessary force in defense against attacks by the psychotics, trying to inflict as little harm on them as possible. But after again and again seeing that others are not that scrupulous and obtaining proof that they also act towards you with excessive force during your own psychotic episodes, you decide to adapt to their standards. It seems that this is justifiable partially on grounds of reciprocity: If they knock you out cold during your psychotic episodes instead of trying available and equally safe (for them) milder means, they can hardly complain if you treat them as they treat you and likewise knock them out during *their* psychotic episodes.

I said "partially" because the mere negative fact that someone has no standing to complain, has forfeited his right that a certain harm not be imposed on him, does not yet *justify* harming him in this way.[469] The fact, however, *removes* an obstacle for a justification relying on *positive* moral reasons to inflict the harm in question. And there are certainly a number of positive reasons you can avail yourself of here: fairness, retribution, and deterrence, for starters. Moreover, in the lethal conflict cases we will discuss later there is a *particularly* strong reason for you not to treat others better than they will treat you – to wit: it dramatically, but fairly, increases your chances of survival. All these potentially justifying reasons for inflicting harm face little if any obstacle for becoming operative and decisive if the target of the harm has no standing to complain in case the harm is inflicted.

The idea that people have no right against x being inflicted upon them if they have no valid *complaint* against x being inflicted upon them is in fact even endorsed by some "revisionists," like Helen Frowe and even McMahan himself.[470] Yet, curiously, McMahan *also* claims (unlike Frowe) that necessity is *internal* to liability, so that one cannot be liable to unnecessary harm. The above example and the argument from valid complaint show otherwise, however. It should also be noted that McMahan provides no argument for his rather counter-intuitive internalism; he merely claims (without providing an argument for that claim either) that "no one can be liable to gratuitous harm."[471] But if "gratuitous" also means "unnecessary,"[472] then McMahan's claim is simply begging the question. If, on the other hand, "gratuitous" does not also mean "unnecessary" – so that unnecessary harm might actually be *non*-gratuitous – then McMahan's claim is irrelevant. And indeed, in the village example, the "excessive" harm is certainly *not* gratuitous in the sense that there is no *reason* for inflicting it – there is very good reason, namely reciprocity. In addition, even if the harm inflicted will be unnecessary on many individual occasions, your adapting to the other villagers' strategy will heighten your own survival chances in the long run, and that is of course a valid concern, not a frivolous one. Finally,

even "frivolous" concerns are concerns. To wit, if you draw a specific satisfaction from taking the same harsh defensive measures against others that they tend to take against you, then taking these measures is both instrumental and necessary for a purpose, namely for your getting this satisfaction. McMahan might object that this is still gratuitous in his sense (although he does not actually explain what exactly he means by "gratuitous"), but this would again just confirm that he is begging the question, not providing an argument.[473]

Still another "revisionist" endorsing reciprocity is David Rodin, who rightly states that "on a plausible understanding of rights, one only has the right to life so long as one respects the right to life of others."[474] This, however, applies not only to the right to life, but to rights generally. As another commentator, David Miller, puts it succinctly: "[R]ights are forfeited by virtue of a failure reciprocally to recognize the other's rights."[475] Miller cautions, however, that "[w]e rightly hesitate to remove rights from people on the basis of expressed intentions alone, because we owe them the opportunity to reflect further and hold back when the moment comes to turn their thoughts into deeds."[476] This caution is misplaced, for on grounds of the very same reciprocity we do *not* owe them said opportunity if they are unwilling to extend the *same* courtesy to us. (However, we rightly hesitate to remove rights from people on the basis of their mere *failure* to express or have the intention to respect our rights. I mention this here in brackets instead of in a footnote because I have heard the curious objection more than once that the account of reciprocity presented here somehow deprives babies of their rights not to be killed – because they do not express their intention not to kill people. Yet on my account babies would only forfeit their rights not to be killed if they ran around killing people or endorsing rules calling for the killing of people. Babies rarely do that. Thus, when Miller talks about a "failure to recognize" he surely means a failure that expresses itself in some positive phenomenon or act, not in the mere lack thereof. Likewise, when I talk about non-recognition in this section, I mean to refer to some positive acts or dispositions reflecting an active misrecognition or "disrecognition," as it were.)

In any case, the idea of reciprocity is intuitive and has a reputable philosophical pedigree.[477] In fact, *all* revisionists see its merits: none of them deny that one can forfeit rights due to one's own violation of rights, that is, on grounds of reciprocity. The dispute, even among "revisionists," is only on whether one can forfeit rights to *unnecessary* force. I argued that the claim that one can't is, once reciprocity is accepted in principle, unwarranted and arbitrary.[478]

So let us then pursue the idea of reciprocity further and take the village example up a notch. To wit, assume, first, that many who drink the water turn blue in the face, and second, that the psychotics become positively homicidal, and for long periods, without losing their instrumental

rationality – instead they put their instrumental rationality at the service of their crazed toxin-induced goal to kill other blue people.[479] Assume also that *all* homicidal psychotics are blue in the face – a further effect of the toxin – but, conversely, not everyone who turns blue also turns psychotically homicidal – only 50% do. It is understandable that under these circumstances, blue people will be extremely apprehensive if they happen upon another blue person. In fact, let us assume that 95% of all non-psychotic blue villagers will shoot a blue person on sight – safe is safe. Consider a concrete situation. While gathering food in the forest, blue but not yet psychotic Joe happens upon the sleeping blue Lou, who has his machine pistol lying next to his hand. Joe is afraid of just sneaking away amidst all the dry twigs on the ground since the slightest sound could wake up Lou and draw deadly fire on Joe. Thus, fearing for his life, Joe shoots Lou dead.

There are a number of different possibilities to consider now. First, suppose Lou was non-psychotic, but if the situation had been reversed and he had stumbled upon a sleeping Joe, he would have killed Joe too. Under these circumstances, it is difficult to see what complaint Lou could have against Joe if Joe merely does to him what he would have done to Joe. In fact, if Lou had woken up, he *would* have killed Joe. Second, suppose Lou was already psychotically homicidal. This does not even seem to make a difference given the first point's assumption about Lou's disposition while non-psychotic, for again, if the roles had been reversed and it had been Lou who had non-psychotically stumbled upon a psychotic Joe, Lou would have killed Joe – and this is exactly what Joe now does to Lou.

The third possibility is the most interesting. Suppose Lou was non-psychotic and would *not* have killed Joe if the roles had been reversed. Does Lou now have a valid complaint against Joe's killing him? That is at least dubious. Imagine a conversation in the afterlife in which Lou raises the said complaint. In response, Joe could point out two things. First, he did not demand of Lou anything he would not have granted to him. In particular, given his, Joe's, maxim to kill blue people on sight, he claims no right not to be killed on sight in turn too. Thus, he did not act unfairly. Second, he could actually object to Lou imposing an unfair demand upon *him*. Why? Well, not in asking of Joe what Joe, in turn, would not also have granted to Lou, for just like Joe fairly accepts the forfeiture of his own right to life if the situation had been reversed, Lou (as we want to assume) fairly accepts that Joe would have kept his right to life if the situation had been reversed. Neither Joe nor Lou reject the demands of reciprocity between the two of them.

However, they are not alone. We assumed that 95% of the non-psychotic blue villagers would shoot blue people on sight (and all psychotic blue ones try to kill blue people on sight). But to then demand of

Joe not to act likewise, and thus often preventively, but instead to refrain until confronted with an ongoing or imminent attack, is to demand of Joe that he put himself at a disadvantage with regard to 95% of the other villagers and to thereby grant them an *unfair advantage* over him, an unfair advantage that dramatically increases their survival chances at the expense of his. This demand is itself unfair. Joe, in turn, makes no such unfair demands upon Lou. And this asymmetry explains why Lou's willingness to act on his own more restrictive maxim does not generate a claim-right against Joe that he not act on his more permissive one.

Moreover, even if it did: all else being equal, killing a person when there is only a 5% chance that this person has no right to life seems to be at least morally *worse* than killing a person when there is a 95% chance that the person has no right to life.[480] Moreover, given these likelihoods, the risk of *getting* killed by a liable attacker might well *outweigh* the risk of killing a non-liable attacker oneself, and it may thus even provide a choice of evils *justification* for killing a non-liable person. This can be so on grounds of permissible self-preference as well as, in case we are really talking about war and different groups of combatants, on grounds of special responsibilities toward one's fellow combatants and fellow civilians.[481]

Thus, the numbers are definitely important here. To wit, assume an alternative more restrained village, where 95% of the non-psychotic blue villagers do abide by Lou's more restrictive maxim and thus do not shoot blue people on sight but instead wait until faced with an ongoing or imminent attack. Assume further that abiding by such a convention of restraint (which, incidentally, need not be based on any contract or on consent but simply on the motivational force of expectations regarding how others behave and should behave) would actually *increase* the survival chances of villagers, *even* in the face of the remaining 5% of defectors. Under these circumstances, the demand to abide by the more restrictive rule or convention would *not* be unfair, since *ex hypothesi* the convention benefits everyone and can count on wide social, reciprocal support while, in contrast, the few defectors would be unfair free-riders who violate reciprocity by exploitatively, at the expense of others, breaking a widely accepted convention that benefits them only because others follow it. Of course, by abiding by the more restrictive maxim, Lou would put himself at a disadvantage toward the 5% defectors, but even taking into account that agents may give more weight to their own interests than to those of others, this seems to be outweighed by the fact that otherwise he himself would impose an unfair disadvantage upon a 19-times larger number of rule-abiding people. We cannot allow people to defect in the face of such odds from socially widely beneficial conventions without inviting civilizational collapse. Thus, given that a vast majority of 95% of the villagers are willing to put up with the disadvantage

vis-à-vis the defectors, Joe ought to reciprocate and cannot justifiably opt out of the convention simply by appealing to a small number of defectors.

4.2.1.5 *Lessons for War, Part I: The Variable Moral Scopes and Limits of Necessity and Proportionality in War*

Thus our village example so far. What lessons can we learn from it for the ethics of war? To begin with, note that the so-called necessity condition of justified self-defense basically requires that the defender use the mildest means of self-defense among equally effective and safe means. In other words, if you can stop the aggressor just as effectively by non-lethally tasering him as by shooting him dead, you must not shoot him dead. Some authors apply this understanding of self-defense to the ethics of war, arguing that killing soldiers would be unjustified or even a rights violation whenever killing them is unnecessary in this strict sense; and they then measure and criticize the existing much more permissive laws of armed conflicts against this moral standard.[482] Our considerations in the context of the village example, in contrast, allow us to make exactly the opposite move: if the more permissive rule of the laws of armed conflicts is widely recognized and acted upon by soldiers of opposing sides, then not only do these soldiers forfeit their right against the use of (in the strict sense) unnecessary force, but the cause for complaint of those few soldiers who do not recognize the rule is significantly weakened too, if not void. In other words, the fact that a certain legal rule or social convention is widely recognized and enacted by the very people whose behavior it is supposed to regulate – *not* the mere fact that state leaders have signed a treaty[483] – affects the *morality* of war. If soldiers recognize that killing enemy combatants (who are not *hors de combat*) is the acceptable default form of engaging the enemy even where less harmful means would have been equally effective, then they can hardly complain when said opponents play by exactly the same rules.[484]

Similar considerations apply to the proportionality requirement. If soldiers recognize a rule according to which it is permissible to kill for the defense of one's territory, for instance, they have no moral standing to complain if their opponents accept the very same rule and act accordingly.[485] Moreover, this line of reasoning applies not only to the killing of soldiers but also to the killing of civilians. Civilians can recognize rules too; and they can recognize rights and certain weights of those rights – or fail to do so. Consider, for example, a society where it is widely recognized that turning a trolley from five innocent persons to one innocent person is a justified rights violation.[486] Given that the one person on the side-track recognizes (as we want to assume) that such killing on the basis of a lesser evil justification is a rights *violation*,

he does have a valid complaint against precisely this violation. Given, however, that he also endorses the view that such violations are *justified*, he cannot justifiably complain that turning the trolley towards him is *disproportionate* (because that would make it *un*justified). The situation is different in a society where it is widely recognized that turning a trolley to one innocent bystander is only justified if thereby at least twenty people are saved. Someone who lives in such a society and endorses this rule certainly *can* justifiably deny the proportionality of killing him to merely save five.

In this context, a clarification is in order. Above I approvingly quoted Miller saying: "[R]ights are forfeited by virtue of a failure reciprocally to recognize the other's rights."[487] However, as the previous paragraph shows, it is important to distinguish the positive non-recognition (that is, the denial that the other has the right in question – remember my remarks on babies above) or insufficient recognition, that is (in the terminology I choose for this purpose), the *disrespect* of a right from its *violation*; and once this distinction is made it is equally important to acknowledge that non-recognition or disrespect may not be the only way to forfeit a right – violation might be another. Nor is there any reason to assume that the extent and duration of forfeiture triggered by justified violation is the same as that triggered by downright non-recognition. To wit, the agent who endorses and abides by said rule of the first society might turn the trolley from five to one but would refrain from turning it from four to one. By turning the trolley from five to one he still *violates* the right of the one, but he also *recognizes* that the one *has* this right and that this right has a certain *weight*, for he recognizes that this right and its weight make it impermissible to turn the trolley towards the one merely to save four. Accordingly, while the agent forfeits the right against lethal self-defense by the one on the side-track whom he is attacking by turning the trolley,[488] he can nonetheless validly complain that his right is being *disrespected* if later on others turn a trolley upon him merely to save four.

This analysis of these trolley cases has obvious implications for the proportionality of the collateral killing of civilians in war. If it is widely accepted among the civilians on one side that collaterally killing n innocent civilians on the other side is a proportionate side-effect for a military attack that saves n^* innocent civilians on one's own side, then they can hardly complain if conversely the other side applies the same standard. In other words, the more permissive the standard for proportionate collateral killing in war that civilians use, the less weight they can justifiably demand that others accord to their own right to life. Conversely, however, by using a stringent standard themselves (consistently, not simply strategically, that is, on a specific occasion where this serves their purposes best), they can justifiably demand that the same "courtesy" be afforded to them.

A note of caution is in order here, however. To wit, even though the fact that opposing civilians endorse a permissive standard of proportionality means that one can apply this very same standard to them without disrespecting *them*, that is, *their* rights, this does not yet mean that there are no other reasons militating against collaterally killing them on the basis of those standards. For starters, one's community might have different, more restrictive standards, and soldiers may well have an obligation toward their community to abide by these standards (especially if they have sworn to do so). Moreover, they then also appear to have an obligation towards soldiers and the political leadership on the other side if these soldiers and the leadership, in an attempt to protect their civilians against retaliations, apply more stringent standards of proportionality than their civilians themselves endorse. Furthermore, and independent of the last two points, espousing and abiding by stricter standards might help to move the other side (and others in general) in this less destructive direction too – although, realistically, this strategy of "education" might fail to work if egregious violations of this standard are not at least sometimes retaliated against in kind. But it is in fact precisely the idea of reciprocity that makes such retaliation permissible in the first place and thereby allows for a mechanism for upholding certain rules and norms. Thus, an appeal to reciprocity does not at all automatically lead to a "race to the bottom" but instead provides the moral means to stave it off.[489]

The upshot of all this is that the criteria for proportionality in war, just like those for necessity (which in some contexts might even be void), are not the same as in the domestic context.[490] On the contrary, it seems obvious that if the same stringent moral criteria for proportionate side-effect killing that reign in the domestic context were also applied to the case of war,[491] there would remain virtually no other possibility than to endorse contingent pacifism.[492] After all, few would deem it proportionate if the police took out a dangerous armed gang with a hand grenade full well knowing that innocent bystanders will be killed too. In fact, the police officers might face murder charges. Proportionality assessments in the context of war, in contrast, seem to be routinely more permissive – and that by a very, very wide margin. Moreover, what those margins are cannot be determined from the armchair merely by philosophically introspecting one's own intuitions. Rather, it is dependent on real-life social and reciprocal relations. While McMahan, as we saw, claims that "[t]he morality of war is not a product of our devising[;] [i]t is not manipulable; it is what it is,"[493] proportionality (and hence morality) partly *is* a product of our "devising," and this is so in peace, from one society to the other,[494] as much as in war, within and between different societies. The idea that there is a one-size-fits-all proportionality of self-defense entirely independent of the preferences and reciprocal relations of human beings is simply dogmatic (in the literal sense that no argument has

been provided for it). The same is true with regard to proportionality in war. It can change, as *argued* above, on grounds of reciprocity. It is *this* fact that is not "manipulable," at least not within a liberal framework. It is what it is.

This dependence of moral proportionality on reciprocity and on socially accepted norms also explains why it is so much easier to determine what is proportionate, for instance, proportionate self-defense, within a given peaceful domestic society than what is proportionate or disproportionate in times of war. Within a given peaceful domestic society, it is far clearer what counts as proportionate and what does not because there is a body of largely consistent law and case law speaking to the issue, and more often than not these laws and their interpretation in case law find enough social support to be morally binding.

Yet it should be noted that even within societies some standards of proportionality are far clearer than others. To wit, while proportionality in self-defense seems to be reasonably clearly regulated within societies (but can – legitimately[495] – differ from one society to another), proportionality with regard to lesser evil justifications is far more vague. Some societies, as already pointed out, do not have a legal lesser evil justification for homicide at all. Some other societies do have such a justification, but there is a dearth of case law (in the case of homicide). Accordingly, there is a complete lack of clarity on where the thresholds lie. There is clear indication, however, that people think that for there to be a lesser evil justification for homicide at all, the stakes have to be very high – at least when we are not talking about the diversion of already existing threats (as in the trolley case) but about the creation of new ones (as in the case of the police using hand grenades that also kill bystanders).[496]

The reason why there is a lack of case law pertaining to lesser evil justifications for homicide is that even in those jurisdictions that in theory accept such a justification there are few defendants that in practice try to avail themselves of it. In other words, there is a lack of case law because of a lack of cases. In war, in contrast, cases – in the form of "collateral damage" – abound, but here the lack of case *law* derives from jurisdictional problems and the apparent tendency to consider side-effect killing in war not so much as an *offense*, as a *prima facie* wrong in need of a justification but, on the contrary, as something that is *prima facie* permissible in times of war, unless the collateral damage crosses a very significant threshold. In other words, the direction of justification, as it were, is reversed: while in the domestic case the assumption is that side-effect killing is wrong unless it can be shown that it is proportionate, in the case of war the assumption (at least of those in power) seems to be that side-effect killing is permissible unless it can be shown that it is clearly *dis*proportionate.

Things are further exacerbated in the case of war as compared to the domestic case in that often completely *different* societies with completely

damage," and that can only be justified by an agent-relative necessity justification or by an impartial lesser evil justification. Such justifications, however, are *not* asymmetrical: Force that is justified by an impartial lesser evil or an agent-relative necessity justification can itself be justifiably resisted on grounds of a self- or other-defense justification as well as on grounds of an agent-relative necessity justification.[501] Indeed, McMahan himself has (once) admitted that it is counter-intuitive to claim that the potential civilian victims of a justified bomber may not defend themselves against him,[502] or be defended against him by their soldiers.[503] The revisionist counter-move against this argument is to claim that "justification defeats (or 'excludes' or 'exempts from') liability," so that the bomber in question cannot be liable to attack.[504] Yet this suggestion is no less counter-intuitive and is rejected even by some revisionists themselves.[505] Attempts to back it up with convincing arguments have failed.[506] We already addressed this issue above; my point here is only that the inequality thesis can hardly be taken for granted in an attempt to refute the argument advanced here.

Let me now come to a third reply, in the form of another example. Imagine there is a society that shares a certain culture according to which an adult male son has to defend the honor of his family by killing an adult son of a family which his father denounces as having insulted the first family's honor. Such honor feuds are publicly declared and settled by two adult sons being designated fighters and donning their feud robes. While "declarations of insult" made in bad faith are seen as egregious violations, it is nevertheless widely accepted among members of this society, including adult sons, that fighters have no right not to be killed by the opposing family's fighter once both have assumed their role and donned their robes. It is, I submit, difficult to see whence a robe-wearing son who tries to kill his robe-wearing opponent on grounds that by wearing the robe one forfeits his right not to be killed in a feud should get the moral standing to complain about a rights violation if his opponent, endorsing the very same rule, kills him first. So here we have an example for an equal liberty-right to kill each other that has been produced by a widely accepted convention. The moral rules applying to these inter-family feuds are not the same as the moral rules applying to intra-family domestic violence. Is that really surprising?

Perhaps McMahan might object to this example in a similar way as he objects to the idea that a soldier's consent to participate in battle amounts to waiving his right not to be killed. He says: "Suppose, for example, that in 1800 a villain who has already wronged a man wants to harm and humiliate him further. He therefore makes a false accusation and challenges the man he has wronged to a duel. The wronged man accepts the challenge from a sense of honor, refuses to fire his weapon, and is killed by the villain. His consenting to the duel may make this killing morally different from murder, but it does not *justify* it or make

it permissible."[507] However, first, soldiers typically do not shoot in the air while an enemy soldier is pointing a gun at them. Second, McMahan, as already noted, tends to confuse liability and justification.[508] Yet liability by itself does not justify anything: the mere fact that someone has no right to life does not proffer a justification, a morally sufficient reason, to kill him. The intuitive impermissibility of the villain's killing his victim therefore does not show that the victim is wronged, that is, that the villain does not have the liberty-right to kill him. Finally, third, while a person's liability to be killed does not yet justify killing him, it makes such a justification easier, for example on agent-relative grounds. To wit, it would appear that soldiers are permitted (not least on grounds of reciprocity: the other side will do the same) to give more weight to their own lives and to the lives of their own civilians (their family and friends among them) than to the lives of other civilians.[509] This then can justify *both* sides in killing enemy soldiers.

The example also helps to explain a further idea that "traditional" just war theorists subscribe to. Rousseau wrote the following famous passage: "War is then not a relationship between one man and another but a relationship between one State and another, in which individuals are enemies only by accident, not as men, nor even as citizens, but as soldiers."[510] Walzer echoes this, stating that the opposing soldier "isn't *my* enemy in any specific sense; the war itself isn't a relation between persons but between political entities and their human instruments."[511] While it is quite an exaggeration to say that there is no inimical relationship between two soldiers trying to kill each other, there is nevertheless an important truth hidden under the rhetoric. To illustrate this with yet another example: if my father promises you to never send me over to you again to ask you for sugar, and he then sends me over anyway to ask you for sugar, then my asking you for sugar is a consequence, or perhaps even a part, of *my father's* violation of your promise-based right against *him* that he not send me over to ask you for sugar. However, *I* haven't violated any right of yours. *I* didn't promise you not to follow my father's request to ask you for sugar, so you did not have a right against *me* that I do not do so. Let us apply this to our example of the honor culture. I said that "declarations of insult" made in bad faith are seen as egregious violations in this culture. Thus, if the head of a family makes such a declaration in bad faith, *he* violates rights of the other family, including the right of their designated fighter not to be goaded in bad faith into a feud that might well cost him his life. In the light of such severe consequences, this right must be considered to be of very considerable weight.

Distinguishing the rights violation committed by the father in the form of entering and continuing the feud from rights violations (or their absence) in the form of those acts of the son that constitute the feud opens the way for an elegant answer to the following alleged conundrum for "traditional" just war theory. To wit, McMahan claims that "if the

different rules are pitted against each other. Already in the domestic case within one society, it is anything but easy, as just pointed out, to determine what is and what is not proportionate killing on grounds of a lesser evil justification. This is also shown by the fact that philosophers writing on the trolley problem routinely clarify that the numbers involved (often 1:5) are only given for purposes of illustration. No one really wants to commit to a certain number as the one true threshold. (Moreover, again, turning trolleys is one thing, dropping bombs on people another.) Of course, these philosophers might think that there nevertheless *is* a universal truth to the matter – that killing one to save five either is or is not proportionate, where this truth is dictated by the "one non-manipulable morality" for every imaginable society. I have already argued against this view, explaining that on grounds of reciprocity socially accepted practices have normative force, which means that what is proportionate (not only *believed* to be proportionate, but actually proportionate) in one group or society need not be proportionate in another. Thus, it can be true that p is the morally valid proportionality standard in society x while it is true that p^* is the morally valid proportionality standard in society y.[497]

However, I now want to add an additional observation I was slowly getting at with the last paragraphs: if there *isn't* a recognizable widely accepted proportionality standard for lesser evil homicides within a given population, then it will be *indeterminate* in many cases whether they are proportionate or disproportionate. Of course, there might be reciprocal overlap between proportionality standards at the *margins*, so that certain acts will go so vastly beyond or stay so definitely below certain thresholds that they will be deemed clearly proportionate or clearly disproportionate. However, there will be a large number of cases that, to emphasize this once more, are *indeterminate*. They are indeterminate in the sense of three-valued logic and quantum mechanics: it is not that we do not *know* whether the act is proportionate or not, rather it is *neither* proportionate *nor* disproportionate since a valid constitutive standard to decide the issue is missing.

Some philosophers will be quick to reject such a claim. Yet German legal scholars, precisely in an effort to come to grips with homicide in potential lesser evil situations, have posited the construct of a *rechtsfreier Raum*, a law-less space.[498] They can rightly point out that the idea behind this concept, namely that sometimes law does not give a clear answer, or indeed any answer, as to whether something is allowed or not, has obvious phenomenological credentials.[499] After all, if there were a clear answer, one would not need to endlessly and rather antagonistically ponder what it consists in. The idea can even draw on the most advanced theories in modern physics. To wit, if things can be indeterminate in nature, as quantum mechanics suggests, why should they not also be indeterminate in law – or, indeed, in morality? In any case,

philosophers who foot-stompingly insist that there just must be a determinate answer to what is and what is not proportionate can certainly be expected to then explain why they do not spell out these determinate answers. Why do they so often avoid giving clear ratios, ratios that are not chosen only for "illustrative purposes" but also for the purpose of giving the actually correct answer – after all, correct answers would be illustrative too?

The account defended here, in contrast, *can* explain why there is *not* always a determinate answer. Given that this account identifies the causes of the problem, it can also point to a viable *solution*. The solution lies not in more philosophical introspection, in trying to uncover the true, "immutable" contours of "deep morality," but rather in social practice: in trying to get onto the same page with regard to one's practices and standards[500] – and the best way of doing so lies in the creation of a commonly accepted and sufficiently precise *law*.

4.2.1.6 *Lessons for War, Part II: Reciprocity, Conventions, and the Moral Equality of Combatants*

Let me briefly consider an objection that in particular "revisionists" are likely to make. They might claim that my village example above does nothing to support the idea of the moral equality of combatants. Given, they might continue, that the moral equality of combatants (in the sense of an equal liberty to kill each other) indeed seems to be a cornerstone of the mutual understanding of combatants in war (at least, it would appear, of combatants in conventional wars between states), it cannot be true that this reciprocal understanding has constitutive moral force if there actually is no such moral equality.

In reply, let me note, first, that I have not used the village example to establish moral equality, but simply to show that not all restrictions that apply to the use of defensive or preventive force in one context also apply to another. The example showed that the necessity condition that normally applies to the use of justified defensive force can be relaxed (or even suspended) on the basis of reciprocal expectations and a shared practice, that is, on grounds of a convention. The same holds for restrictions imposed on the use of preventive force. Thus, this example refutes the revisionist "same rules everywhere" thesis.

Second, the hypothetical revisionist objection of the first paragraph rests on the premise that even in such conventional wars there is no equal liberty of combatants to kill each other. There is, however, no good reason to accept this premise. Revisionists assimilate the situation of opposing "just" and "unjust" combatants to the confrontation of a police officer who defends himself or others against a criminal, and then argue that the self-defense justification is asymmetrical. This assimilation is misleading because in conventional war soldiers also produce "collateral

unjust side's war is inevitably disproportionate, it seems that many or most of the acts of war that together constitute that war must also be disproportionate. ... Yet traditional just war theory denies this. It maintains instead that it is possible for every act of war by combatants on the unjust side to satisfy the *in bello* proportionality constraint, even though their war itself is disproportionate."[512] Yes, indeed, that is possible. It is possible because a state's or people's or family's unjust *jus ad bellum* decision to enter or continue a war or a feud makes this war or feud a (multiple) rights violation, while on grounds of reciprocity the individual acts of the combatants participating in the war might not be, at least not against each other – and this means that *in bello* proportionality does not constitute *ad bellum* proportionality. "Traditional" just war theory, therefore, is quite right in not conflating *jus ad bellum* and *jus in bello*.

4.2.1.7 Lessons for War, Part III: The Principle of Distinction

Many combatants in war personally kill or mutilate innocent people (whether "collaterally" or not), or impose upon them a significant risk of being killed or mutilated. They thereby engage in serious rights violations, which makes them liable to attack, even under the constraints of ordinary peacetime morality.

Many other combatants (and civilians), however, do not *themselves* kill or mutilate innocent people or impose significant risks on those people. They only *participate* in or *contribute* to so doing. At least three types of participation or contribution need to be distinguished: a) actual *participation* in an unjust (collective) attack, where certain unjust (collective) impositions of risk constitute attacks themselves[513]; b) non-participatory non-innocent contribution (it is non-innocent because it is rights-violating, not necessarily because it is blameworthy[514]); and c) non-participatory innocent contribution.

Let me first give one example outside of the war context for each type. The Jackal wants to kill an innocent person. Alex has marked the target in some way, full well knowing that this is supposed to enable the Jackal to murder the innocent person. This is participation or assistance, and is also called such in most Western jurisdictions. Incidentally, it does not matter whether this marking was actually necessary for the Jackal's plan to succeed or not; that is, it does not matter whether Alex *causally* contributed.

Bob has sold the Jackal the rifle he needed for the task, full well knowing that the Jackal will try to murder an innocent person with it. This is non-participatory culpable contribution, in most Western jurisdictions also called aiding and abetting.[515]

Cecilia, a cook in a restaurant, has served the Jackal a meal, full well knowing that the Jackal will soon kill an innocent person (she has no means to call the police or to stop the Jackal in another way, but she

would have been able to deny the Jackal the meal), and Cecilia's son has sold the Jackal ammunition, not knowing that his customer will use it to kill an innocent person. These two cases are non-participatory innocent contribution. By law, Cecilia and her son are considered innocent bystanders.

Under (most Western) domestic law, Alex and Bob can be held liable for the Jackal's attempt to murder the innocent person; Cecilia and her son, however, cannot.

Let me now give examples from the context of war. "Just" army A invades country B and kills "collaterally" many innocent people. Many soldiers do not themselves shoot or drop bombs on innocent people, but they help other soldiers in doing so, for example by maintaining the weaponry, supplying ammunition and marking targets during the war. They *participate* in collective actions (whether they actually *causally contribute* to any killing and mutilation or not) that, justified or not, are nevertheless *unjust* since they kill, mutilate or unjustly endanger innocent people. The participating soldiers are thus liable to attack. (Note, however, that I am not claiming here that *all* soldiers of army A participate in unjust collective acts. In fact, I think that many soldiers, on *both* the justified and the unjustified side, might *not* be liable to attack if one applied ordinary peacetime morality and ignored rules of reciprocity in war.)

Entrepreneur E has delivered weaponry to army A before the war started (but not since then), full well knowing that it would be used for the unjust collective actions of the war. Judged from the perspective of ordinary peacetime morality, he might well be liable to attack (and attacking him would be justified under a defensive emergency justification if attacking him would help to diminish the danger, which is of course highly unlikely).

Farmer F delivers foodstuff to the army. Judged, again, from the perspective of ordinary peacetime morality, he is a non-participatory innocent contributor and not liable to attack.[516] The same holds for the foreign entrepreneur EF, who before the war had delivered screws to the country of army A which are now used by that army in some of its weaponry.

This account of drawing distinctions between those who are liable to be attacked or can be attacked justifiably, or even targeted justifiably, and those who are not and cannot corresponds, I submit, rather well to case law and common sense morality (which do not necessarily make these distinctions *in these terms* but make them nonetheless); and they can also be applied to war. However, while the concrete domestic and military examples I just gave might well correspond to *our* present-day sensibilities in modern Western societies, there is no reason to assume that there is some deep metaphysical truth to be found here that would prohibit drawing the lines between participation and non-participation,

and in particular between non-innocent contribution and innocent contribution, in a different way – different both from society to society, and from specific domestic contexts to specific contexts of war.

An instructive example here is the course that the discussion and case law on *Beihilfe*, aiding and abetting (what I call here non-innocent contribution), has taken in German legal scholarship and law. While at some point knowingly selling wine to a brothel was interpreted as aiding and abetting prostitution, later discussions emphasized the "social adequacy" of certain "neutral" acts – like a drink retailer's selling wine and a baker's selling buns to anyone (adult) who is willing to buy.[517] This is perhaps partly due to the insight that by casting the nets of criminal liability for aiding and abetting too widely, modern industrialized society will come to a grinding halt. Moreover, and of particular importance for the present section, *reciprocity* again plays a clear role. For example, if a law permitting the manufacture and sales of weapons is widely accepted within a society, then at the very least those accepting it will have no standing to complain to the manufacturer if one of his legally produced weapons is used to shoot them – unless, of course, the manufacturer does the shooting himself. The converse, however, is also true: if a society prohibits, through law or other social norms, the manufacture of weapons, then a victim of gun violence does have a legitimate complaint against the gun manufacturer.

This also applies to the case of war. If civilians and combatants on both sides in a conflict endorse a rule that exempts workers in ammunition factories (though not the factories themselves) from liability to attack (so that you may target the factories but not the workers' living quarters), then such a convention creates or maintains a legitimate expectation and indeed a *moral* right on the side of the ammunitions workers not to be targeted – where, again, *respect* of such a right is nevertheless compatible with *overriding* it in extreme circumstances. Conversely, if civilians and combatants on both sides of a conflict *deny* that ammunition workers (or more generally: people with a certain degree of "proximity" to the war effort) have a right not to be targeted, they can hardly complain if they are indeed targeted, and thus they do not have a moral right not to be targeted. Thus, one cannot draw the lines between who is and is not liable to attack by simply expanding ordinary peacetime morality to war; rather, one needs to pay attention to which rules and conventions are in fact widely endorsed by the parties to a conflict. Likewise, if there is no widespread agreement, or if there is widespread disagreement between the two sides, as to how the lines are to be drawn, then this will create a moral indeterminacy that cannot be overcome by simply trying to intuit universal rules, but rather by actually creating common and shared understandings. Conversely, one should desist from undermining such shared understandings and hard lines by unilaterally ignoring widely accepted legal norms and instead bringing one's moral fundamentalism

to bear – unless one's fundamentalism advises more restrained and less destructive methods of warfare that might inspire one's enemy to follow suit. Moral fundamentalism rarely does.

4.2.1.8 *A Further Reason Why Moral Fundamentalism Is Mistaken: The Moral Significance of Publicly Authorized Functions and Roles*

The discussion of the last section also relates to yet another reason – beyond reciprocity – why the moral rules for the use of force in war are not the same as the moral rules for the use of force in peace. The reason is simply that in times of war there are groups with *specially assigned roles*, called "combatants," that do not exist in times of peace. This changes the ethics of war. Take a (not "the") domestic analogy. If police special forces surround a building in which a criminal has taken hostages, then the police sniper is permitted – and I mean: also *morally* permitted – to take out the hostage taker if the police in light of their informed assessment of the situation decide that this is the proper course of action under the circumstances. Private citizens, in contrast, are not permitted to gather on the surrounding roof tops with their own sniper rifles. If they do so, they will get arrested, and, it would appear (unless you have watched too many Charles Bronson movies) permissibly so. If one of them, moreover, should be able to get off a shot and kill the sniper, he might well – and again, permissibly so – be charged with manslaughter (if not even murder), and certainly with interference with police business. Thus, not only are private citizens not permitted to "participate in the hostilities" by turning up heavily armed in the "theatre of operations," to use expressions from war; *their* actual killing of the target also has to shoulder much higher burdens of justification than the killing by an authorized sniper.

A critic raised the objection here that it is not possible to

> deduce that there is a separate morality when using force in war versus in other circumstances, from the fact that in domestic settings, policemen can use coercion/force and private individuals cannot. ... From the point of view of the ethics of killing, the citizen sniper ... would have not acted wrongfully per se for killing the hostage taker, but perhaps acted wrongful all things considered because he/she undermined the legal regime. But this does not amount to a wrongful killing.[518]

This statement borders on the unintelligible, and to the extent that it is intelligible, it is certainly confused. To wit, the statement distinguishes "wrongful per se," "wrongful all things considered," and "wrongful." What does all that mean? And how can an act that is "wrongful all

things considered" possibly fail to be *wrongful*? One way of trying to make (some) sense of this statement (the only way that comes to my mind) is to use a well-known distinction between two (not three) possible interpretations of "wrongful." In one sense, "wrongful" means "rights-violating/infringing," in another sense it means "unjustified/impermissible." And of course it is possible that an act wrongs someone, that is, infringes his right, and yet is justified: it can be justified "all things considered," namely on the basis of a lesser evil justification. The opposite is also possible: the act does not constitute a rights violation, but is unjustified for other reasons. And maybe the critic wants to say that the citizen sniper's act is not a rights violation or -infringement although it is nevertheless unjustified given that it "undermined the legal regime."[519] But here is the rub: if this act of killing is unjustified, "wrongful all things considered," then it *is*, indeed, unjustified. Given that it is certainly part of the task of the ethics of killing to make verdicts on whether a certain act of killing is justified or not, the verdict that the citizen sniper's act of killing the hostage taker is unjustified is part of the ethics of killing, just like its verdict that the police sniper's killing of the hostage taker is justified. Thus, to borrow the phrase from the critic, "from the point of view of the ethics of killing," the citizen sniper would have acted unjustifiably and the police sniper not. Hence, from the point of view of the ethics of killing, the rules that apply to police snipers are not the same as those that apply to private citizens.

To apply this to war: just as in times of peace private citizens are not subject to exactly the same rules regarding the use of force as police officers, police officers and private citizens are not subject to the same rules regarding the use of force as soldiers in times of war.[520] If "revisionists" did not obsess so much about cases of private self-defense and did not completely ignore, on the rare occasions that their examples do involve police officers, that these are not subject to the same rules as private citizens, they might be able to realize that the ethics of war and the ethics of force in peacetime cannot be the same – already for this reason alone.[521] As we saw, there are further reasons.

4.2.1.9 Conclusions

So let me draw this discussion to a conclusion. Above I criticized McMahan for his morally fundamentalist outlook with regard to the laws of war. He sees the relation between morality and law as a one-way street: Morality dictates what the law of war has to be, while, conversely, widely accepted laws of war cannot influence what the morality of war is, let alone partly constitute this morality. Yet McMahan rightly feels that directly deriving action-guidance from an independently existing morality of war is impractical, to say the least.[522] Accordingly, he turns to the laws of war.[523] However, I demonstrated above that McMahan's

views on the relation between war and morality are either incoherent or else unintelligible and thus cannot provide *any* action-guidance.[524]

This backdrop highlights the advantages of the alternative account presented here. By appealing to already widely accepted conventions instead of an idiosyncratic "deep morality," [525] one can kill two birds with one stone, that is, one can to a large extent combine practical effectiveness with moral validity.[526] Such conventions connect with the intuitions and the motivational structure of more individuals rather than fewer, and they do so more forcefully, thus being more effective in their practical regulative power. Moreover, if such conventions are reciprocally accepted they have *moral force*. Widely accepted legal rules or social customs are, precisely *because* of their wide acceptance, *partly constitutive* of the valid moral code – they are not a mere "heuristics" to better follow *other*, allegedly pre-existing moral norms.

Partly constitutive, I said, not fully. The mechanisms described above by which wide acceptance affects the moral validity of certain norms are rather specific and restrained and hence entirely incapable of automatically turning all socially accepted norms within a society into valid moral norms.[527] Moreover, many legal rules might for pragmatic reasons be formulated in absolutist terms, although this absolutism may not be reciprocally endorsed by those supposedly bound by these rules. Thus, the account presented here does not entail that the existing customs or laws of armed conflict fully converge with the morality of armed conflicts. To use the example of non-combatant immunity again: in international humanitarian law the intentional targeting of civilians is absolutely prohibited, yet it seems possible to sometimes morally justify it on the basis of a lesser-evil justification. In fact, examples can be given where the intentional killing of civilians is morally preferable to the foreseen, "collateral" killing of civilians because the latter course of action would achieve the military goal at a much higher cost of civilian lives than the former. Yet that this might not only be justifiable but indeed preferable does not mean that it would be obligatory. Accordingly, opting for the second option would still be a *both* morally and legally permissible course of action. In other words, by and large a soldier will be on the much safer moral side abiding by widely shared conventions than trying to tap into the sources of "deep morality" – and this fact can best, and probably only, be explained by the morally constitutive force of reciprocal conventions.

It should be noted, however, that two sides may also *not* reciprocally share certain conventions. In fact, one side might categorically *reject* certain otherwise widely accepted conventions. This, however, itself has normative consequences, which an appeal to reciprocity can explain. Be that as it may, international humanitarian law *is* in fact widely recognized as binding. Therefore, if one wants to offer both morally valid and practically effective moral action-guidance regarding conduct in war,

appealing to the laws, customs, and conventions of war is indispensable. Nevertheless, these laws are amenable to changes. Not to radical changes according to the blueprint of an alleged immutable "deep morality," but to respectful changes in piecemeal fashion.[528] They are also amenable to far greater determinacy.[529] Through the customs and laws of war, therefore, "the" morality of war *is* devisable and, indeed, improvable.

4.2.2 *Against Benbaji's and Statman's "Contractarianism"*

I am not alone in rejecting moral fundamentalism. Two other authors who reject the "revisionist" (not quite realizing that it is also a traditional) claim that "the justice of wars and the morality of killing in them are independent of the laws of war" are Yitzhak Benbaji and Daniel Statman.[530] They call their account "contractarian." I prefer to call my account, if labels are needed, conventionalist or constitutivist. I will use this section to explain how the two accounts differ.

In the previous section, I argued that widely accepted customs and laws have moral force themselves and are therefore partially constitutive for the morality of war. The moral mechanism on which I based this assessment is reciprocity, but building on this mechanism, wider considerations of fairness also play a role. If, for instance, it is known to you that on grounds of reciprocity most people attacking you will have lost their right against unnecessary force, then even the few who would not use unnecessary force themselves cannot reasonably expect you to exercise the same restraint, for that would mean requiring you to grant a large number of others an unfair advantage that will lead to your demise. Moreover, they would be non-reciprocally asking much more of you than you ask of them by simply recognizing the more permissive rule.

How, in turn, do Benbaji and Statman proceed? They state: "If a set of social rules is fair and mutually beneficial, then by actually accepting it, ... individuals waive the rights that they would enjoy vis-à-vis others in the state of nature."[531] They further explain:

> *Mutual Benefit* is not an *ex post* but an *ex ante* condition. The right question to ask is not whether the social rules benefit all parties in all possible circumstances, but whether, given the evidence available when the parties agree on these rules, the expected benefit to them is higher than other feasible arrangements (or, at least, high enough) ...[532]

Like me, they also seem to think that *wide* acceptance is normatively important, for they explain that "[a] social arrangement is morally effective only if it enjoys a *high level* of habitual obedience."[533] They also approvingly quote Hart's reference to "patterns of conduct regularly

followed *by most* members of the group."[534] They then apply this basic idea, namely that social and legal rules become morally effective on the basis of the three conditions of "*Mutual Benefit, Fairness,* and *Actuality*,"[535] to different norms or doctrines they want to defend, for instance to the moral equality of combatants. "By enlisting in the military," they contend, "combatants commit themselves to these rules [among them the legal equality of combatants[536]] – a commitment that is morally effective if the agreement that constitutes soldiery is almost universally accepted, and also mutually beneficial and fair."[537] Benbaji and Statman claim that the agreement indeed satisfies all three conditions.[538]

There are a number of differences between Benbaji's and Statman's account of the moral effectiveness of law and the one defended here. First, on my account reciprocity plays the decisive role, not mutual benefit (which does not mean that mutual benefit is entirely irrelevant[539]). My examples of the blue villagers and the honor feuds show that widely accepted permissive social rules for the lethal use of force are morally valid even if they are *not* mutually beneficial. The same, for the same reasons, is also true for the convention of the moral equality of combatants if indeed it is widely accepted in a conflict. Thus, Benbaji's and Statman's condition of *Mutual Benefit* is unnecessary.

Nor are Benbaji's and Statman's three conditions jointly sufficient for generating a new (in comparison to pre-contractual rights) distribution of moral rights.[540] To use again an example from the domestic context of lethal self-defense: Even if a legal norm that prohibits necessary lethal self-defense against even culpable lethal aggressors would be *ex ante* beneficial to all parties in a society, since it would lead to a dramatic decrease in overall lethal rights violations in that society, this does not make necessary lethal self-defense against a culpable aggressor morally impermissible. The obvious explanation for this is again reciprocity: by violating the victim's moral right to life the aggressor has forfeited his own moral right to life and triggered the moral availability of a self-defense justification, whatever the law might want to say about his *legal* rights to life. Moreover, the defender is entitled to value his own innocent life higher than the life of a culpable attacker (in fact, it *is* more valuable). His defensive prerogative remains in full force, and he therefore has a self-defense justification to kill the aggressor. This example also demonstrates another difference between Benbaji's and Statman's account and mine: I say that widely accepted legal norms are *partially* constitutive of morality. Benbaji and Statman, in contrast, seem to believe that widely accepted mutually beneficial laws are *always* morally effective. I see no reason to share this belief.

In fact, Benbaji and Statman sometimes realize themselves that their belief might sound counter-intuitive in the light of certain examples. One we just discussed. They mention another one, namely slavery: if

a system of slavery satisfies their three conditions (which would appear to be possible under certain circumstances), it should be justified, and slaves would have no right to rebel. Benbaji and Statman deny that this example undermines their account although they deem slavery to be unjustified. They argue that the *Fairness* condition is *not* actually satisfied in the case of slavery. "[T]he background circumstances that it [the 'contract' between master and slave] assumes are grossly unjust."[541] But why? They cannot simply presuppose that slavery violates the rights of the slaves – for that is precisely the question. If the contract is accepted and mutually beneficial and fair, it should achieve a redistribution of rights on the contractarian account. Of course, one might think that what makes the contract *ex ante* unfair is the pre-contract situation of duress or coercion that gives rise to the contract in the first place. However, elsewhere Benbaji and Statman explicitly deny that duress and coercion undermine the validity of a contract.[542] So what is it going to be? Either duress and coercion do not undermine the validity of a contract – then slavery can oftentimes be justified – or it does undermine the validity of a contract – then conscripts and states entering the "war agreement" under duress are, contrary to what Benbaji and Statman claim, not bound by the stipulations of that agreement. There is an obvious dilemma here.

So far I argued in this section that *reciprocity* is the decisive mechanism for explaining both the scope and also certain limits of the moral force of widely accepted customs or laws, not Benbaji's and Statman's allegedly mutually beneficial and fair contract. Thus, I argued that the basic theoretical premise of their account is unsound. I will now also show that there are mistakes in their attempts to build on this premise. In particular, I will demonstrate that their rhetoric does not match what they are actually doing. The "mutually fair benefits" they invoke are more posited than demonstrated, and while they constantly talk about "contracts," "consent," "acceptance," and "authorization" between or by individuals, what we actually find are mere *impositions* by *states*. To put this differently: while Benbaji and Statman claim that "the approach [they] advocate might be described as individualist because of the central role it assigns to individual's tacit acceptance of social norms,"[543] their account is in fact entirely state-centric. Benbaji and Statman show little interest in what individuals *actually* accept. Instead, they simply "presume" individuals' "acceptance" of a law if the law has been passed by the state and is mutually beneficial.[544] It goes without saying that individuals on the receiving end of such presumptions might find them, well, presumptuous.

Let us therefore have a closer look at how Benbaji and Statman use terms like "acceptance," "consent," or "authorization," and how they apply them to the ethics of war. A first example concerns the well-worn

boxer/combatant comparison. "To illustrate the relation between tacit acceptance (manifested in one's behaviour) and one's waiver of basic rights," Statman and Benbaji ask us to

> consider the moral permission that boxers obtain to hit and often injure each other, in apparent violation of the adversary's natural rights. The permission is based on their voluntary relinquishment of (some of) these natural rights when they enter the ring.[545]

Furthermore, they liken the boxer's entering the ring to an individual's wearing a uniform and identifying herself as a combatant. They think that the individual thereby tacitly waives her right not to be killed.[546]

In reply, Benbaji and Statman are certainly wrong in claiming that by entering the ring the boxer automatically waives his legal or moral right not to be hit by the other boxer. Entering the ring (as they actually acknowledge) does not count as tacit consent to the rules of boxing under all circumstances. For example, if late at night in the gym boxer *A* enters the ring because boxer *B* is beating up *A*'s elderly father who had dared to step into the empty ring because he always wanted to do so once in his life, then *A* does not tacitly accept that he may hit *B* only according to the rules of boxing or that *B* may hit him back. Accordingly, if he can save his father (and himself) against *A*'s aggression only by kicking *A* in the groin, then he is allowed to do that. *B* is acting as an aggressive thug, and he just has to stop beating up *A*'s father. If he does not, *A* may act in defense of his father, and the mere fact that he has entered the ring does not give *B* the right to hit *A* back. *B* simply has to leave both *A* and *A*'s father alone.

A war in which the justified combatants *A* defend themselves and their fellow citizens against the unjustified combatants *B* is analogous to this case I just described and not to a tidier case of the sort "Klitschko vs. Lewis." The combatants on the justified side are *forced* into the ring by an unjust aggressive act. The aggression was ongoing *before* they entered the ring. But then their entering the ring, as such, cannot be construed as tacitly giving consent to the laws of war, let alone as waiving their moral right not to be attacked.[547] Instead of reading all kinds of things as "tacit consent," it would be appropriate to pay attention to what individuals *actually* consent to or accept or recognize.[548] I agree (and in fact argued above) that donning a uniform can amount to a rights-waiver if certain rules *have already been accepted* – but it is *not* the other way around, that is, that they are accepted merely *by* donning the uniform. In other words, where Benbaji and Statman are happy to see "tacit acceptance," there might actually be no acceptance at all, neither "tacit" nor otherwise.

to collaterally kill civilians under certain circumstances amounts to divesting them of their legal *right* not to be killed under these circumstances. However, a more natural interpretation of the permission to collaterally kill civilians is to conceive of this permission in terms of a lesser evil justification for *infringing the rights* of the civilians. Under this interpretation, the civilians do have a right not to be collaterally killed, although one that can be permissibly overridden. Thus, it would appear that Benbaji and Statman are unduly quick in denying civilians their right not to be killed.

The second projection consists in assuming that the alleged rights waiver would be mutually beneficial. But again, why, exactly, should civilians *ex ante* consider it to be mutually beneficial to simply *waive* their rights not to be killed instead of merely allowing them to be *overridden* on the basis of a lesser evil justification? Why should such a waiver be *rational*? Benbaji and Statman provide no explanation; in fact, the question seems to not even occur to them.[560]

Finally, it should also be noted that *Collateral Damage*, as understood by Benbaji and Statman, "rejects[s] an asymmetrical proportionality rule," that is, one that only allows the justified side in a war to inflict collateral damage. But why is such a rejection "mutually beneficial"? Because, they say, both sides will normally think they are justified, and therefore both sides will (if they accept the asymmetrical rule) perceive the other side's infliction of collateral damage "as the unjustified slaughter of innocent people," a perception which, in turn, "would invite retaliation against civilians of the other side ... in a cycle of escalation."[561] That might sound plausible at first sight, but it quickly becomes highly dubious when we attend to the details of Benbaji's and Statman's account. After all, their official "baseline"[562] for assessing mutual benefit relies on a comparison to *pre-contractual morality*, not to total war: "[A] set of rules is mutually beneficial if the state of affairs where the rules are followed is Pareto superior to a state of affairs in which the relevant parties tried to follow pre-contractual morality."[563] Yet Benbaji and Statman appear to deny that pre-contractual morality allows the deliberate targeting of innocent people.[564] But then the pre-contractual retaliation they talk about can hardly come in form of the deliberate slaughter of innocent people: rather, it would take the form of targeting the guilty, accompanied by the foreseen infliction of collateral damage, perhaps. Given, however, that their own contractual *in bello* proportionality principle fails to impose severe or even particularly clear restrictions on the collateral killing of innocent bystanders,[565] their claim that the alleged contractual principle is mutually beneficial and superior to the pre-contractual one lacks argumentative support. Again mutual benefit is merely stipulated, not demonstrated.

This is true not only of Benbaji's and Statman's account of collateral damage and *in bello* proportionality but also of their claim that it is

mutually beneficial and fair to allow states to have standing armies that can permissibly kill enemy combatants on the justified side. They claim that the rule that equalizes combatants on the justified and on the unjustified side is mutually beneficial. Why? Because they deem it "plausible" to assume that "it is in the interest of individuals who live in a minimally just symmetrical anarchy to be protected by states that control *obedient* armies." Allegedly, any "asymmetrical restriction," for example, the inequality of combatants, would undermine the obedience condition and hence "the ability of states to act in self-defense," an ability "everyone is expected to benefit from."[566]

Yet how "plausible" is it really that "everyone" benefits from being surrounded by armies obedient enough to wage wars of aggression? To give a domestic example: Persons have a right to defend themselves. If they are not allowed to carry machine guns, flamethrowers, hand grenades and perhaps a fair amount of poisonous gas around with them, the efficiency of their self-defensive measures will be undermined. After all, if you are attacked by a whole group of gangsters, a flamethrower or a poison gas grenade might come in handy. Obviously, however, if the other people also start running around heavily armed, this will definitely be a severe blow to your own security. Even if you were not directly targeted, the chances that you become the "collateral" victim of another person's self-defense against an aggressor or what he or she perceives to be an aggressor would be significantly heightened.

The application to war is obvious. Being surrounded by a group of states who have obedient soldiers willing to blindly follow orders to invade other countries and who are laboring under the assumption that the attacked people have waived their rights not to be attacked or collaterally killed by them will certainly seriously undermine your security, even (or perhaps especially) if your own state can count on the equally blind obedience of its own soldiers.[567] Again "mutual benefit" seems to be more claimed than proved.

In fact, their claim that it is mutually beneficial for states and their citizens to subscribe to the symmetric laws of armed conflict even contradicts the logic of their own argument in favor of *asymmetry* in conflicts between states and stateless nations. Their argument for asymmetry in this case is that "such stateless nations do not have organized armies, and their ability to meet the enemy on the battlefield is very limited. ... The power differences in asymmetrical conflicts are so great that the traditional war contract is neither mutually beneficial nor fair ..."[568] That is correct. What is obviously incorrect, however, is the implicit assumption that such power differences only exist between states on the one hand and stateless nations on the other. After all, the Guatemalan state's ability to meet the US army on the battlefield would also appear to be "very limited." Such huge power differences pervade the international order.

Another example of seeing consent where none is to be found is the case of conscripts who are forced to join the army against their will. Benbaji and Statman claim that

> a person who hands over his wallet to a mugger offering a choice between his money or his life *coercively consented* to the transfer. ... we assume that, despite duress, the reluctant conscripts accept the rule that define the role he occupies because he decided to join the army.[549]

This account of consent implies an innovative but not necessarily commendable reconceptualization of consensual sex. On this account, a person who performs oral sex on an aggressor offering her the choice between said performance or her life, *coercively consented* to the sex. Yet a clearly more accurate description of the situation is that the aggressor forces a person to engage in *non*-consensual sex. Moreover, even if, for reasons of their own, Benbaji and Statman want to insist on talking about "consent" here, it is obvious that this is not the kind of "consent" that can possibly generate a rights-waiver on the part of the "consenter."

Yet Benbaji and Statman think they can show otherwise and invoke the boxer again, this time a coerced one, claiming that "[t]he fact that his participation in the boxing match is a result of coercion does not invalidate his consent to be 'unjustly' attacked by his opponent." The proposed reason for this is that by entering the ring he has created certain expectations, and allegedly it "will not help a boxer" to say that he "had no intention of creating such expectations."[550] I beg to differ. If Bill points a gun at Jill's head and forces her to get into the ring with Bob and into bed with Jack and she says to Bob and Bill that she is being forced into the ring or bed and does not want to box or to engage in sex, then Bob's and Jack's availing themselves of Benbaji's and Statman's interpretation of "consent" would amount to battery in the first case and to rape in the second.

Benbaji's and Statman's use of the term "authorization" is just as misleading as their use of the term "consent." They claim, without much ado, that "[c]itizens authorize their state to act on their behalf (or on behalf of their children)."[551] In fact, however, citizens do no such thing. If I grant my lawyer power of attorney to negotiate a contract for me, then, yes, that is indeed a case of me authorizing him to act on my behalf. If, in contrast, a mobster subjects me and other "clients" to a racketeering scheme and negotiates with another mobster a rule (beneficial or not) they will impose upon me and the others without us having personally agreed to it, then the mobster would simply be lying if he claimed that I had *authorized* him to act on my behalf. Every judge would agree; and I fail to see how a state subjecting citizens to taxation and then striking deals with other states without the individual citizens' consent

is different in this respect. I simply *haven't* authorized my state to act on my behalf.[552] If I had, I would surely remember. Thus, Benbaji's and Statman's claim that the state is authorized by its citizens to act on their behalf is unwarranted.

Wittgenstein says that "a wheel that can be turned though nothing else moves with it, is not part of the mechanism."[553] While Benbaji and Statman *claim* that "[a]cceptence is the locus of the moral efficacy of the war agreement,"[554] the fact of the matter is that acceptance, consent, or authorization move nothing in Benbaji's and Statman's contractarian account. Instead, acceptance and consent are simply "presumed" or projected once the state has acted "on behalf" of its citizens in striking mutually beneficial and fair deals. At times Benbaji and Statman are actually quite clear about this.

> [T]he social norm does not have to be endorsed for it to reshape the distribution of moral rights and duties in the society in question. Such distribution can stem from the mere act of non-coercive habitual obedience to the rule.[555]

(As we saw, later on Benbaji and Statman even drop the non-coerciveness condition). Or: "By merely belonging to a society and participating in the social practices within it, individuals vindicate the presumption that they freely accept the mutually beneficial and fair social rules that underlies these practices."[556] Actually, by making such claims Benbaji and Statman vindicate the presumption that actual individual acceptance is irrelevant in their account.

Moreover, even if one jettisoned the requirement of actual consent and acceptance and settled instead for hypothetical "consent" (and thus for *no* consent, since "hypothetical consent" isn't consent), so that the "question to be asked about participants is what they would rationally conceive as mutually beneficial *before* they get themselves in all kinds of trouble,"[557] it would still be a good idea to ask *them* that question and listen to *their* answer instead of just projecting one's own answer upon them. Yet Benbaji and Statman do not really do that. In other words, they not only simply presume that the actually existing laws of armed conflict satisfy the acceptance condition, they also simply presume that it is mutually beneficial.

To give an example for this, they claim: "If *Collateral Damage* [the legal principle according to which the infliction of necessary and proportionate collateral damage is permissible in war[558]] is *ex ante* mutually beneficial to decent parties in war" and states accept this principle, then "civilians lose their right against collateral damage by accepting the rules that empower states to act on their behalf."[559] But why?

There are simultaneously *two* projections at work here. First, Benbaji and Statman simply presume, to use their word, that the legal permission

Let us summarize some of the results of this section. First, Benbaji's and Statman's three conditions of *Mutual Benefit, Fairness,* and *Actuality* are neither jointly necessary nor jointly sufficient for the moral force of widely accepted laws or social norms. Their theoretical framework is therefore unsound.

Second, while they claim that "[a]cceptence is the locus of the moral efficacy of the war agreement,"[569] "consent," "acceptance," and "authorization" between or by individuals play no functional, but merely a rhetorical role in their account. The actual functional work, instead, is done by their assumption that states are "authorized" (without, apparently, this "authorization" stemming from the "inner minds" of individuals) to negotiate away the rights of its citizens so long as this is, allegedly, in their own best interest. But then it is unclear what the boxing match analogy is needed for in the first place. If the state can negotiate away the rights of its civilians, it can also negotiate away the rights of its soldiers, and all appeals to "tacit consent" turn out to be a red herring.

If, however, they were not a red herring, then, third, explicit non-consent should nevertheless be able to cancel any alleged tacit consent (and especially "coerced consent") – which would contradict the apparently quite inescapable moral power Benbaji and Statman attribute to both "decent states" and to the international laws of armed conflict.

In that context, let me add an additional fourth point. Even if one granted, for the sake of argument, that explicit naysaying does not override tacit consent, it is still clear that citizens *fighting against* the state can hardly be considered to have tacitly authorized the state to negotiate away their rights. Indeed, they make it very clear through their rebellion or resistance that they reject – tacitly and explicitly – the state's authority. Thus, if incumbents unjustly suppress a guerrilla movement and its followers, they would violate the rights of innocent guerrilla fighters and civilians. The same would be true of an external force trying to help the incumbents. Furthermore, if a guerrilla movement overthrows the state and founds a new state that criticizes the powers unjustly trying to intervene and to re-establish the old order as ruthless murderers and rejects the legal *jus in bello* in cases of anti-imperialist struggles, then a tacit-consent-based contractarianism would have to grant that the anti-imperialist soldiers and civilians completely retain their rights not to be killed by the imperialist soldiers, for the new state quite explicitly did not negotiate those rights away.

Fifth, even if one also granted, again for the sake of argument, that a state can legitimately and with moral effect subject its citizens to an international "war agreement" as long as this is fair and mutually beneficial, it would still have to be shown that the "war agreement" is, indeed, fair and mutually beneficial. Yet Benbaji's and Statman's arguments to this effect are rather unconvincing if not contradictory. One cannot quite avoid the impression (at least I can't) that Benbaji and Statman are

simply fond of the war convention and then rationalize it by claiming that it is fair and mutually beneficial.

Sixth, and rather importantly, the whole idea that states are somehow authorized to waive rights of their citizens with regard to agents of other states is certainly *not* part of the (liberal) Western tradition, and especially not part of Locke's philosophy – which is worth mentioning since Benbaji and Statman claim that their framework is Lockean.[570] And it is wise of Locke and the Western tradition to reject this idea. Consider this case: Two states have a problem with the deadly and epidemic disease D. In order to find a cure as quickly as possible, human experiments are required. While it is clear that these experiments would kill most of the human subjects, it is also as good as certain that many more people could be saved by these experiments. Both states want to join forces. None of the states, however, wants to have their own scientists conduct experiments on their own citizens. Thus, they officially waive the rights of their citizens not to be abducted and experimented upon by the agents of the other state. An additional agreement stipulates that not more than 100 persons are to be abducted per month. The contract, the state assumes, is *ex ante* mutually beneficial and fair. Thus, according to Benbaji and Statman, given this contract, the agents of state A would not only be morally permitted to abduct and to experiment upon citizens of state B but these citizens would also be morally *prohibited* from defending themselves against near certain death – for they *no longer have* the right not to be abducted and used for deadly medical experiments. I consider this to be a *reductio ad absurdum* of Benbaji's and Statman's account. States simply do not have the power to waive moral rights of their citizens.

I conclude that Benbaji's and Statman's allegedly "individualist" but actually state-centered contractarian account of the moral force of law in general and of the international law of armed conflicts in particular fails. It is not a viable alternative to the straightforwardly individualist and reciprocity-based account defended here.

Notes

1 McMahan (2009a), p. 5.
2 Ibid., p. 6.
3 See Section 4.1.6.2.
4 As I made clear in Section 2, there can be exceptional cases of *individual war*. In *such* cases, there is no distinction between *jus in bello* and *jus ad bellum*.
5 McMahan (2010a), p. 505; Frowe (2014), p. 2; Bazargan-Forward and Rickless (2017), pp. xi-xii.
6 To simply rely on the distinction between "fact-relative," "belief-relative," and "evidence-relative" justifications *is* to ignore this debate. It is also, remarkably (if not bizarrely), to entirely ignore the prevalent account of justification in Western jurisdictions, namely the mixed account – which fits

into none of these categories. See Section 3.2.2.1. For a further elaboration of these points, see also Steinhoff (2020), Section 2.2.5.

7 Incidentally, the focus on *liability* is yet another shortcoming of "revisionism." Moreover, if necessity is, as McMahan grants (and I agree), a valid constraint on justifiable defensive harming but *not*, *pace* McMahan, internal to liability, then there can be no such thing as McMahan's "liability-justification," since someone's being *liable* to a harm X would not yet *justify* inflicting that harm on him. See Steinhoff (2020), Sections 2.1.2.1, 2.2.1.1–2.2.1.2, and 3.3.1.3

8 See Section 3.2.2. See also Steinhoff (2020), Sections 2.2.2.3–2.2.2.4 and 2.2.5.2.2.

9 McMahan (2018), pp. 435–437.

10 See Sections 3.2.2.1 and 3.2.2.2.

11 McMahan (2018), p. 439, n. 31, affirmatively refers to Lazar (2012).

12 Ibid., p. 13.

13 Ibid., p. 12.

14 In contrast, elsewhere I have explained that it is Lazar's substantive account that is implausible. Moreover, Lazar's account also contradicts some other claims he makes, which means that his overall account is incoherent. See Steinhoff (2020), pp. 98–100.

15 McMahan (2018), p. 437.

16 In Steinhoff (2020), Sections 2.2.2.3–2.2.2.5, I provide a *substantive, practical* criterion of the necessity requirement modeled on the requirement found in German self-defense law; and I explain *why* this criterion is preferable to others. I have stated it in this book in Section 3, note 188, and in Section 4.1.3.

17 Statman (2011), who is not a revisionist (and I doubt that he embraces an objectivist account of justification), seems to attribute a literal interpretation of the necessity requirement to the law. He simply misunderstands the law. See Steinhoff (2020), pp. 51–52.

18 See Section 3.2.2.

19 Rodin (2002), p. 41, admits that "[i]n legal discussions imminence is often treated as an independent requirement for self-defense; however, it would appear on reflection that imminence is conceptually derivative from necessity." Yet "it would appear" that some legal scholars actually insist on the independence of the imminence requirement even *after* reflection. Be that as it may, Rodin at least supports the view that under real-world conditions the imminence requirement is a precondition for justified self-defense. Frowe (2011), pp. 36–37, on the other hand, rejects the requirement, appealing to the hostage example (already known from Robinson 1984, p. 78) where self-defense is intuitively – and legally – justified. Yet this does not count against the imminence requirement, given that keeping people captive constitutes not only an imminent but in fact an ongoing attack. See Steinhoff (2020), Section 2.2.3.3.

20 Steinhoff (2020), Sections 2.2.3.7–2.2.3.10.

21 For this merger, see Section 3.3.2. See also Steinhoff (2020), Section 4.1.2, esp. pp. 288–289. Lazar's (2012) necessity criterion, in contrast, has the unappealing feature of *not* keeping necessity and proportionality logically separate criteria in his account of the self-defense justification (ibid., pp. 17–22), which basically amounts to confusing the self-defense justification with a different type of justification. Lazar's confusions on this point are further confirmed by his invoking risks that self-defense may pose to innocent bystanders (ibid, p. 6). Contrary to the way Lazar frames the issue, the self-defense justification covers harms and risks imposed on

aggressors; the harms and risks that may befall bystanders ("collateral damage") are dealt with by other justifications, like the lesser evil justification. This is what I mean with underdifferentiation: different justifications are thrown into the same basket. I lay out in detail the specifics of different justifications in Steinhoff (2020).

22 Compare also Walzer's remarks (2015, p. 336).
23 Steinhoff (2020).
24 McMahan (2005a), p. 394.
25 For example in Fabre and Lazar (2014).
26 Some Anglo-Saxon legal scholars also see the considerable merits of this justification. See Fletcher and Ohlin (2008), pp. 96–102.
27 McMahan (2005a), p. 394.
28 McMahan (2013), p. 124, (2012a), p. 138, and (2014c), p. 115. This equation of liability with justification is actually a further problem of McMahan's account, but I will put this issue aside here. But see the second paragraph of Section 4.2.1.4 and in particular Steinhoff (2020), Sections 2.1.2.1 and 2.2.1.1.
29 See Section 3.2.2.
30 McMahan (2009b), p. 346.
31 McMahan (2009a), p. 43.
32 McMahan (2009b).
33 McMahan (2012a), p. 137.
34 McMahan (2013), p. 124, (2012a), p. 138, and (2014c), p. 115.
35 Robinson (1996).
36 See Section 3.2.2.1.
37 Lazar (2010). Lazar's objection is actually that McMahan faces a dilemma: depending on how McMahan tunes his account, he either makes too few unjust combatants or to many civilians (on the unjustified side) liable to attack.
38 McMahan (2011b), pp. 548–549.
39 McMahan (2005a), p. 394.
40 Ibid.
41 Ibid., p. 396.
42 Steinhoff (2012a), pp. 354–355.
43 For a critique of accounts that make use of these concepts, see Steinhoff (2019a).
44 McMahan (2005a), pp. 394.
45 Ibid., pp. 394–395.
46 Ibid., p. 395.
47 Lazar (2010), pp. 183–184.
48 McMahan (2005a), p. 395.
49 McMahan (2017), p. 5, emphasis added.
50 See for instance Tadros (2018).
51 McMahan (2005a), p. 396.
52 Frowe's (2014) account, which varies McMahan's responsibility theme by introducing a not clearly defined distinction between "direct" and "indirect threats," at best obscures the problem but does not solve it. There is no need to go into this here. For a critique of her account, however, see Uwe Steinhoff, "Expanded Accounts of Self-Defense and the Problem of Discriminating between Combatants and Non-Combatants," unpublished ms.
53 McMahan (2005a), p. 396.
54 Ibid., pp. 387–389. For a defense of Thomson, see Hosein (2014) and (2017). I have amended Thomson's approach in Steinhoff (2007), pp. 71–98, for present purposes esp. 81–94, as well as in Steinhoff (2012a), Section 3.

145 I have elsewhere used this justification to justify the killing of the sleeping soldier and of other soldiers who are not (imminent) attackers. See Steinhoff (2007), pp. 98–101. German law, incidentally, explicitly distinguishes justifying emergency from excusing emergency. As the wording indicates, the latter is only an excuse, not a justification. Note also that I will use the terms "necessity justification" and "emergency justification" as synonymous and, where not otherwise indicated, mean them to include the impartial lesser evil justification as well as an agent-relative form of the necessity/emergency justification. Where necessary, however, I distinguish explicitly between the impartial lesser evil justification on the one hand and the *agent-relative* necessity/emergency justification on the other. I never use the term "lesser evil justification" to refer to an agent-relative justification.

146 Criminal Law Web, "Model Penal Code Annotated," available online at http://www.law-lib.utoronto.ca/bclc/crimweb/web1/mpc/mpc.html, accessed on 9 September 2014. Emphasis added.

147 It can also refer, simply put, to damaging dangerous property. This case need not concern us here.

148 Fletcher and Ohlin (2008), pp. 101–103. However, while Fletcher and Ohlin are correct in their interpretation of the proportionality requirement in defensive necessity, they err in thinking that defensive necessity only applies to non-human actors. It quite generally applies to threats that do not come in the form of imminent or ongoing attacks, where attacks are rights violations stemming from human action. Nozick's non-responsible falling man would be such a threat (he would crush you, but that would not be his intentional *act*); so would someone plotting your future death.

149 See note 143.

150 Erb (2003b), p. 1400.

151 See ibid., pp. 1399–1407; Fletcher (2000), pp. 776–779.

152 Criminal Law Web, "Model Penal Code Annotated," available online at http://www.law-lib.utoronto.ca/bclc/crimweb/web1/mpc/mpc.html, accessed on 9 September 2014. Emphasis added.

153 The Anglo-Saxon law of conspiracy and the law of attempt cannot emulate the function of justifying defensive emergency since they both refer to punishment, not to prevention (leaving the generalized preventive function of deterrence aside, which is not an issue here). Preventive detention can play a small role, but it certainly does not allow preventive killing. It should also be pointed out that national preventive self-defense (let alone individual self-defense) against a non-imminent or even merely potential threat is not recognized in international law either. See on this latter Ferzan (2004), esp. at 224–227.

154 See Erb (2003a and 2003b).

155 Erb (2003b), pp. 1404–1405.

156 See Steinhoff (2020), Section 2.2.3, esp. 2.2.3.1 and 2.2.3.6–2.2.3.10.

157 Uniacke (2010), p. 86, n. 34, is particularly clear on this: "The term 'preventive self-defense' currently canvassed by some advocates of preventive war is nonsense."

158 Compare ibid., p. 88: "The ethical significance of the distinction between aggressive [by which she means 'preventive'], as opposed to defensive force is not merely conceptual. [...] the use of aggressive force is subject to different, more stringent ethical norms than is the use of retaliatory force in self-defense." Ferzan (2004) rightly argues that the self-defense justification does not apply to inchoate threats, but she never considers the possibility that there might be other justifications available to legitimize force against such threats.

159 For detailed argument to this effect, see Steinhoff (2020), Section 4.2.
160 Steinhoff (2020), Sections 2.1.2.1, 2.1.2.5, and 2.2.1.1.
161 As noted above, McMahan sometimes invokes "objective risk." Yet as already pointed out, this invocation is *ad hoc*, obscure (he never explains what exactly he means by this and how he proposes to measure it), and incompatible with the simultaneous appeal to the omniscient observer perspective. Moreover, if facts count, then the fact that a certain harm will not actually occur should cancel the relevance of any alleged "fact" that there is a "objective risk" that the harm occurs (although, *in fact*, it won't occur).
162 Steinhoff (2020).
163 Admittedly, *this* argument, unlike the inequality thesis, is *not* part of the tradition. But then again, most "revisionists" reject it and thus prove to be quite traditional in this respect.
164 See Reitan (1994), esp. pp. 128–129; Cochran (1996), esp. p. 169; Ferzan (2004).
165 See also Steinhoff (2007), pp. 98–101.
166 Just war theory distinguishes between *jus ad bellum* and *jus in bello*. The former gives the conditions under which resort to or the continuation of a war is justified, the latter spells out the conditions for justified conduct *within* war, that is, the moral rules of engagement. See the introduction to Sections 3 and 4, respectively.
167 The claim that this view is the traditional one might still surprise many readers who have become accustomed to associating Michael Walzer's doctrine of the moral equality of combatants with "the orthodox view" and who think that Jeff McMahan's account is "revisionary." However, for a defense of this claim, and for an overview of its history and pertinent references, see Section 4.1.6.1. For further corroboration of this interpretation of the tradition see also Reichberg (2008) and (2013b), Ryan (2011, 13–18), Biggar (2013), esp. pp. 191–196.
168 Its most prominent proponent is of course Walzer (2000), pp. 34–41.
169 I have argued against the latter at length elsewhere, see Steinhoff (2007, Ch. 4).
170 For the importance of punishment and the administration of justice in traditional just war theory, see in particular Reichberg (2013a) and Biggar (2013), esp. pp. 160–175, and 190–191.
171 This is an established principle in criminal law, see for example Hallet (1999), p. 29. The reason for this principle is precisely that there is a "moral asymmetry" between aggressor and defender, so that the former forfeits his right to life if killing him is necessary and proportionate under the circumstances. This view has a long tradition in natural law thinking and the just war tradition. For a clear and early statement (in 1688), see Pufendorf (1934), p. 323 (219, III.I.7). Walzer's mistake is to overlook this asymmetry. For a critique of Walzer (and others who make the same mistake), see for example McMahan (2009a), 11–15.
172 The "more precisely" is important: the point is, as I said, that both parties in a conflict cannot have a *self-defense justification* (understood as a particular type of moral or legal justification) to kill the other. Yet they might nevertheless have *another* kind of justification for defending themselves against the other. Having a justification to defend oneself without having a self-defense justification might sound paradoxical but it is not. For instance, if I am unjustly hitting B, and B can only stop me by knocking me out, but I suddenly hear the super villain credibly telling me through my earphones that he will destroy Earth if I do not defend myself against B, then I am justified to defend myself against B's justified self-defense.

I developed my account of self-defense at considerable length in Steinhoff (2020). As far as I can see, the implications this account generates are all intuitive. They certainly are not "obviously" wrong. At the very least no-one so far has managed to show otherwise. Again, this cannot be said about McMahan's responsibility account of liability to defensive force.

55 McMahan (2005a), p. 396.
56 Ibid.
57 This, in capital letters, is the title of McMahan (2005a).
58 Exhibit A is perhaps McMahan (2014b). Among other things, McMahan appeals there to a "combined liability-lesser-evil justification" to justify defense against "lesser aggressions" while simultaneously claiming that lesser aggressors are not liable to such aggression due to the strictures of the proportionality requirement. I have shown elsewhere that there is no such thing as a "combined liability-lesser-evil justification." See Steinhoff (2019a).
59 In my view, this is true of several of the contributions in Fabre and Lazar (2014).
60 Rodin (2002), p. 40. He does not mention the fourth requirement: the *Dadson* principle, that is, the subjective/mental element. See on this Section 3.2.2.1.
61 Rodin (2002), p. 40.
62 Ibid., p. 127.
63 Ibid., p. 130.
64 Ibid., p. 128.The first reason refers to the fact that combatants in war are allowed to also use force against non-imminent threats (ibid., p. 127). I agree with Rodin that such use of force indeed cannot count as self-defense and must therefore be justified in other ways. See Section 4.1.4. See also Steinhoff (2007), pp. 98–101, and Steinhoff (2020), Sections 2.2.3.1, 2..2.3.7–2.2.3.10, and 4.1–4.2 However, pointing out that certain uses of violence in war are not defensive is not the same as showing that forms of killing in war that are defensive are unjustified: in other words, it is not the same as showing that there cannot be justified self-defense against political aggression.
65 Sangero (2006), p. 195.
66 Card (2010), p. 711; Sangero (2006), pp. 199–200.
67 Criminal Law Act 1967, Section 3
68 Sangero (2006), pp. 200–202.
69 Liptak (2006).
70 Sangero (2002), p. 194. Fishback (2016), p. 280, claims that the argument (he refers to the same kind of argument made by McMahan) "rests on a conceptual mistake." In fact, however, it is Fishback who makes a mistake, namely the mistake of missing the very point of the argument: that not only the right to life is at stake here, but also other rights, which *cannot* be safeguarded (let alone defended) by surrendering or retreating.
71 Sangero (2006), pp. 193–215. Sangero defends the duty to retreat in the end (with certain severe qualifications incompatible with Rodin's position). Since I do not share his proportionality assessments (and certain other elements of his analysis), I disagree with his conclusion. This need not concern us here.
72 Ibid., pp. 202–203.
73 It should be noted that exactly this argument, although in other terms, had already been made before Rodin by Norman (1995), pp. 134–135. There Norman also distinguishes between what Rodin calls the reductive strategy on the one hand and the analogical strategy on the other.
74 Rodin (2002), p. 132.

75 I thank the law professors Christoph Enders and Jan Sorth for kindly answering questions of mine on this issue.
76 Rodin (2002), p. 133, my emphasis
77 Ibid. Incidentally, Rodin's talk about "imminence" is misleading. If the mugger is willing to act on his threat, then the threat to the victim's life is imminent if the victim will not give in. The point is simply that the threat is conditional, whether imminent or not.
78 Rodin (2002), pp. 43–48 and 132–138.
79 As Rodin claims it is, see ibid., p. 134.
80 Ibid.
81 Ibid., p. 137.
82 Rodin (2011), p. 80.
83 Ibid., p. 89.
84 See on this also Øverland (2010).
85 Sangero (2006), p. 194.
86 Erb (2003a), p. 1257.
87 Sangero (2006), pp. 67–73.
88 Card (2010), pp. 708–711.
89 See, to give only one example, Locke's discussion in the *Second Treatise*, Ch. II. I am not aware of any natural law theorist not embracing the dual theory.
90 Rodin knows that, and acknowledges it towards the end of *War and Self-Defense* (Rodin 2002, 174): "The idea that defensive wars may be a form of law enforcement has a long and distinguished history." Indeed, it has. However, in his whole preceding critique of war as self-defense he simply ignores this long and distinguished history.
91 Steinhoff (2007), pp. 77–78; see there also for the precise references to Norman, Narveson, and McMahan.
92 Steinhoff (2007), p. 78.
93 Rodin fails to mention Norman, Narveson, or me in that context.
94 See on this also Uniacke (2011), p. 254.
95 McMahan (2009a), pp. 20–21. As my final distinction shows, I prefer to distinguish between two kinds of "wide proportionality" – if one uses these terms at all. I noted in the last paragraph a good reason for not using it: the appropriate distinction is simply one between different *justifications*.
96 Rodin (2014a), p. 82, my emphasis. He explains: "A conditional threat is one that has the structure of the old highwayman's cry: 'your money or your life!' Analytically it consists in two distinct components – a direct threat to a lesser interest (the money) and a contingent threat to a greater interest (the life). The antecedent of the contingent threat is resisting the direct threat to the lesser interest." Ibid, p. 81. Since I have published an article entitled "The Moral Equality of Modern Combatants and the Myth of Justified War" (Steinhoff 2012d), I should emphasize the difference between Rodin and me: while I argue, *ex post*, as it were, that in reality there are (virtually) no justified wars (which does *not* mean that there are no real wars in which one can justifiably participate), Rodin tries to provide an *a priori* argument for the claim that wars of national self-defense (against political aggression) are impossible in principle. I disagree with that.
97 Rodin (2014a), p. 84.
98 For a discussion of war pacifism or "contingent pacifism," see Steinhoff (2007), pp. 52–59 and 76–101. See also May (2015).
99 Rodin (2014a), p. 82.
100 Ibid., p. 81.

101 Ibid., p. 87.
102 The United States National Conference of Catholic Bishops (1992), p. 101, emphasis of "incurred" added.
103 Rodin (2014a), p. 87.
104 Ibid.
105 Ibid., p. 85.
106 Ibid. Incidentally, Rodin does not mention the "familiar problems" with consent when he himself relies on it to support his account of punishment. See Rodin (2002), pp. 176–177.
107 For a related application of this idea of the fair imposition of an *ex ante* risk to life, see McMahan (2010c), esp. p. 363.
108 De Roose (1990), esp. pp. 165–166, makes exactly the same mistake as Rodin. See on this Steinhoff (2007), p. 80.
109 Rodin (2014a), p. 71.
110 Ibid., pp. 72–73.
111 Ibid., p. 73.
112 Ibid.
113 Ibid., p. 70.
114 Ibid., p. 77.
115 A prime example – and a quite representative one for the views of traditional just war theorists on this matter – is of course Section 3 of Part 2 of Vitoria (1964).
116 Rodin (2014a), p. 88.
117 Rodin (2002), p. 194.
118 Lazar (2011), p. 8.
119 A right to self-defense was, based on the *Decretum*, taken for granted by traditional just war theorists, including, of course, Suárez and Vitoria. Molina, in turn, can almost count as a precursor of possessive rights-individualism. See Kaufmann (2007), pp. 205–226. With regard to the centrality of rights in Hugo Grotius's theory, refer to the entry on rights in Grotius (2005), pp. 1946–1947.
120 Rodin (2014a), p. 89.
121 Rodin (2002), p. 139.
122 Norman (1995), esp. ch 6, and there esp. pp. 237–253; de Roose (1990).
123 Blair (2008), p. 303, abstract. Rodin has commented on a draft of Ilsaas's article and is thus aware of Blair's challenge, as Ilsaas's acknowledgments confirm.
124 Blair (2008), p. 308.
125 Ilsaas (2008), p. 314.
126 Rodin (2002), p. 46.
127 Rodin (2002), 173–188. While Rodin's (ibid., pp. 175–179) exclusion of the moral possibility of private punishment amounts to little more than stipulation, it is at least correct that private punishment as law enforcement is legally prohibited in Western jurisdictions. However, other forms of private law enforcement are legally expressly permitted, including crime prevention, citizen's arrest and, of course, self-and other-defense. As this fact undermines Rodin's whole argument, it might perhaps explain why he prefers to focus on punishment.
128 See the previous note.
129 Rodin (2014a), p. 74.
130 Steinhoff (2020).
131 So far I am simply following the usual German commentaries on the self-defense law: Laufhütte, Rissing-van Saan, Tiedemann, *et. al.* (2006); Joecks and Miebach (2003); Rudolphi, Horn, Samson, *et. al.* (2010).

However, while they, as legal scholars focusing on the real world, understandably focus on *human* action, I, as a philosopher aspiring to universality, talk more generally about persons. These need not be humans, but could, in principle, be extraterrestrials, angels, demons, etc. Moreover, descriptively you can also be attacked by animals, but this is not what the term "attack" means for the purposes of the self-defense justification. You do not *need* a self-defense justification to kill an attacking animal. For a detailed conceptual explication of "self-defense" and analysis of its normative structure, see Steinhoff (2020), Section 2.1.

132 Erb (2003a), p. 1289.

133 I have explained the rationale for the imminence requirement, and defended it against objections, in Steinhoff (2020), Section 2.2.3.

134 For the merger, see Section 3.3.2. See also Steinhoff (2020), Section 4.1–4.2, esp. pp. 288–289. For keeping them apart in the case of self-defense, see ibid., Sections 2.2.2 and 2.2.4.

135 I have argued for this at length ibid., Sections 2.2.2.2–2.2.2.5.

136 The reasonable person is to be understood as not bringing any *special knowledge* to the situation that is not also shared by the defender. Note also that the reasonable person is not asked here to engage in normative judgments about the "*morally* best" way of defending herself. She is confronted with a technical question.

137 This formulation of the necessity criterion is based on, but modifies, a formulation provided by Volker Erb in the *Münchener Kommentar*, one of the most influential commentaries on the German penal code. See Erb (2003a), p. 1296. For a discussion of the relation between his formulation and mine, see Steinhoff (2020), Section 2.2.2.3.

138 Steinhoff (2008), pp. 224–225; McMahan (2009a), pp. 41–42, and note 3; Reitberger (2013), p. 79.

139 Of course, *at some point* a threshold might be reached where the consequences of one's self-defense are *so* dire as to make the costs prohibitive. That is no problem for the self-defense justification as understood here. After all, if there is something like a lesser evil justification that can justify *overriding* the rights of people, then there can also be a *greater evil prohibition* that can justify overriding the rights of people, including the right to self-defense. See Steinhoff (2020), p. 66.

140 See on these concepts Sections 4.1.2.1 and 4.1.2.2. For a detailed discussion of the proportionality requirement, see Steinhoff (2020), Section 2.2.4.

141 This will be discussed at length in Section 4.2, esp. 4.2.1.4.

142 McMahan (2006b), p. 172. Of course, a small number of legal scholars have also attempted to stretch the concept beyond imminent attacks. For a detailed discussion, see Steinhoff (2020), Section 2.1.1.6 and 2.2.3.

143 This means that one cannot act in *self-defense* (that is, on grounds of the specific self-defense justification) against Nozick's falling man. In Nozick's example, a villain pushes an innocent person into a well. The falling man would crush the other innocent person standing at the bottom of the well who could only save himself by disintegrating the falling man with his ray gun. See Nozick (1974), pp. 34–35. The view that force used against such a non-responsible threat would not constitute self-defense is also taken by Erb (2003a), p. 1270. For Uniacke (2011), p. 265, n. 26, "conceptually speaking, the use of force against passive threats lies on a borderline of self-defense and necessity: it is akin to self-defense insofar as the threat is fended off; it is akin to necessity in that the source of the threat is not the agency of the person against whom force is used."

144 See for example Ferzan (2004).

But my justification to defend myself is not a self-defense justification (which is only triggered by an *unjust attack*, and which A indeed has), but rather a lesser evil or necessity justification. McMahan himself (2014c), pp. 113 and 118, also draws this distinction, while simultaneously firmly and quite rightly upholding the idea that the *self-defense justification itself* is asymmetrical. Authors who claim that there can be symmetrical self-defense justifications are in fact lumping different kinds of justifications together, which is a problem endemic among moral philosophers as opposed to legal scholars. See on these issues also Steinhoff (2020), Sections 2.2.3.1 and 4.1–4.2

173 See also the simple example offered in the last note.

174 See Section 4.1.6.1.

175 Anscombe (1981), p. 73.

176 Walzer (2000), p. 39.

177 Another, more recent argument basically deducts the two inequality doctrines from an alleged more general principle or claim, namely that it is *always* (or at least in situations where a conflict is not valuable in itself) impermissible to use lethal force against a permissible or justified act. Such arguments have been advanced by Shalom (2011) and Tadros (2011), pp. 202–216. There is no such general principle, however. For a critique of Tadros, see Steinhoff (2020), Section 3.3.2, and for a critique of Shalom, see Uwe Steinhoff, "Shalom on the Impermissibility of Self-Defense against the Tactical Bomber," unpublished ms., available at http://philpapers.org/rec/STESOT-9.

178 Grotius (2015), p. 417 (II.1.XVIII.1).

179 McMahan (2009a), p. 14.

180 Moore (2010), p. 39, talks in this context (self-defense) of "strong, agent-relative permissions" that "permit one to do some action A even if A does *not* maximize good consequences." See also Steinhoff (2008), pp. 224–225, and (2020), Section 2.1.2.6. An anonymous reviewer suggested that Juanita might be justified in shooting not because she can give extra weight to her own interests and the interests of her daughters, but because she can give less weight to those foreseen consequences of her actions that come about via the voluntary decisions and actions of another agent. In other words, consequences caused by intervening action do not count or could at least be discounted. However, this is still *agent-relative*: an *impartial* agent would not be permitted to help Juanita instead of Bob. Moreover, intervening action has nothing to do with the lenient proportionality requirements of self-defense. To wit, Juanita would also be legally and morally justified in killing Bob in self-defense if Bob were a surgeon about to save 20 other people in the evening who could not be saved without him. Here no voluntary decisions and actions of another agent come into play. The 20 people do not die because somebody else kills them (there is no hitman, as in the original example), but they die because there is no intervening action at all (no intervener to kill them, and no intervener to save them). What she does is, as in the original example, to *prevent them from being saved*, and I distinguish this from killing them ("collateral damage"). See also Section 4.1.5.3.

181 See Section 4.1.3. See also Steinhoff (2020), Sections 2.1.1.6 and 2.2.3. Compare also Ferzan (2004) and Uniacke (2010).

182 See Section 4.1.4.

183 See Sangero (2006), pp. 117–121; Tadros (2011), pp. 179–181.

184 See on this and for further references, Steinhoff (2020), Section 2.2.3, esp. pp. 104–111.

185 See Norman (1995), pp. 134–135; Cochran (1996).

186 See note 171.
187 Robinson (1975–1976), p. 278.
188 See also Section 4.1.4.
189 McMahan (2005a), p. 400. Meanwhile, of course, McMahan (2014c) has changed his mind and thinks that the civilians are not allowed to fight back. Few just war theorists are willing to follow him here, though. For further discussion of this issue, see Section 4.1.6.3. See also Steinhoff (2020), Sections 3 and 4.3.2.
190 See note 180.
191 Alexander (1999), p. 1495, contemplates this possibility under the heading "personal justification."
192 For both explorations and doubts about this tenet, see Steinhoff (2014d).
193 Pogge (2012), p. 328.
194 McMahan (2014a), p. 437.
195 Fabre (2012a), p. 20.
196 Ibid., section 1.3.2.
197 Ibid., p. 21. For a criticism of Fabre's view, see Steinhoff (2013c). Fabre (2014), 405, n. 12, has called my criticism of her quite contradictory "egalitarianism" "entirely misconceived." It would appear, however, that it is rather her completely uncritical reliance on Stephen Darwall's notion of "recognition respect" that is entirely misconceived. For reasons why, see Steinhoff (2014c), pp. 156–158.
198 Of course, people could flatly deny that principle, but it seems the burden of proof would then be on them.
199 McMahan (2009a), 41–42, and note 3, now concedes this point, which I had already made in Steinhoff (2008), pp. 224–225.
200 This is also the case in German law. I thank Prof. Volker Erb for an email-discussion of this topic.
201 See Hoffheimer (2007–2008).
202 American Law Institute (1962), p. 42. There is a further condition referring to the special case where the dangerous situation was created or provoked by the agent himself. This proviso is not relevant for the present discussion.
203 This also clearly shows that such a necessity justification is not utilitarian or consequentialist. Rather, it is a *threshold deontological* justification. See on this concept Alexander and Moore (2016). Such a justification takes rights seriously (without absolutizing them). To wit, the necessity justifications in, for example, Germany, the United States, or Israel work against the backdrop of jurisdictions that come with "bills of rights."
204 Hoffheimer (2007–2008), esp. pp. 234–240.
205 Card (2010), p. 758.
206 Erb (2003a), pp. 1387–1390.
207 Christie (1999), p. 1039.
208 See note 171.
209 Robinson (1975–1976), p. 278. As regards German law, it does not allow a necessity justification for homicide in the first place. However, if it were allowed, German law would seem to be compelled to allow defense against such a form of justified homicide, since it firmly holds that innocent people do not have a duty to sacrifice their lives or bodily integrity for the benefit of strangers.
210 In fact, justified soldiers who engage in "collateral killing" forfeit their right not to be attacked. See Section 4.1.6.3. For further detail, see Steinhoff (2020), Sections 3 and 4.3.2.
211 Incidentally, it is easy to come up with hypotheticals where the stakes are even higher.

212 This seems to have happened in Iraq, see Voice of America, "Report from Iraq: More Iraqi Troops Would Surrender if They Could, says Iraqi Defector," available at http://m.voanews.com/a/a-13-a-2003-03-31-32-report-66845687/375516.html, accessed on 1 Sept. 2015. My guess is that this is not an isolated historical occurrence.

213 Sometimes, by the way, such participation can be justified even if it does make the collective action more excessive.

214 This was also the verdict of the British scholar Anscombe (1981, originally published as a pamphlet in 1939), pp. 72–81. A number of people pointed out to me that the British war against Germany might not be a good example since many people consider this war to be justified. Let me point out, in turn, that the justice of wars is not decided by opinion polls (not even among philosophers) but by the valid criteria of just war theory. I do not deny that the British had a just cause nor that *a* war against Germany would have been justified. I simply deny that the war the British *actually* waged was justified. And while Anscombe has given a detailed argument for her assessment (which I share), I have yet to come across a detailed argument that would bother to address Anscombe's line of reasoning, let alone one that would show it to be wrong. Incidentally, that there was no terror bombing in the first stages of the war might mean that those first stages were justified. However, since the *whole* war included not only the (perhaps) justified first stages but also the unjustified latter ones, the whole war (the collective action as a whole) was unjustified. This is no different with self-defense: a complex act of self-defense comprising the following sequence: pushing, stabbing, pushing again will be morally and legally unjustified if the stabbing was unjustified, even if the two acts of pushing were justified. See also the discussion of Finlay at the end of Section 3.4

215 See also Steinhoff (2020), Sections 3 and 4.3.2. For a different argument (which leaves the "ordinary peacetime morality" behind) to the same effect, see also 4.2.1.6.

216 Beevor (2003).

217 Some authors claim that soldiers of a democratic state have – on the grounds of a combination of *certain institutional arrangements* with certain further circumstances – a duty to wage an unjustified war even if they know the war to be unjustified. For one of the most nuanced formulations of this view, see Estlund (2007), pp. 213–234. (For a critique of Estlund, see Renzo [2013]). If there is such an *institution-based* duty, however, there are two possibilities. Either the duty is "deontological," like a promise or a contract or some obligation of fairness. However, if is difficult to see how any promise (or mere fairness considerations) could be so weighty as to override the countervailing pro tanto duty not to participate in unjustified wars and the deontological duty (which is not only pro tanto) not to kill innocent people. (If some other kind of deontological duty is in play, one would like to know what duty that is.) Or the duty is "consequentialist," referring to the bad things that would happen if one does not abide by it. Maybe the democratic state's just institutions would crumble. (This possibility is more clearly entertained by Cheyney Ryan [2011], esp. 30–32, than by Estlund. Ryan, however, in the end draws pacifist conclusions instead of endorsing obedience.) But this is simply entirely implausible: democratic institutions won't crumble only because private Bob stays at home. The reply might be: "What if everybody stayed at home?" But the response to this is that the mere fact that something will have terrible consequences if everybody does it (like all New Yorkers going to the MOMA

on the same hour on the same day) does not mean that it is immoral for Bob or Kate to do it. Again, in the case of war, it might be "unfair" to stay at home if the others go, but to kill innocent foreigners out of fairness to one's fellow citizens seems to ascribe far too much weight to fairness considerations and far too little weight to the rights of innocent people. Obviously, more could be said on these issues, but they are beyond the scope of the present section.

218 There are exceptions. Consider this example: You are driving down a road. Through no fault of yours you are losing (full) control of the car. You will, whatever you do now, kill one of the two children playing on the street by running him or her over. One child is a stranger, the other your daughter. You need not to be impartial in this case of the foreseeable infliction of harm because you *already have* (after having lost control) a justification to harm *one* of them. (German law speaks here of a conflict of duty justification: If whatever you do or not do will harm a person from a certain group of persons, then you have a justification to harm one person of this group. Note that this is different from a mere duress *excuse*.) It is not that partiality gives you the justification to start with. Incidentally, you are allowed to prefer your own child even if the accident is your fault (perhaps you are driving under the influence).

219 Sartre (2005), pp. 212–213.

220 See Section 3.2.2.

221 This seems to be also the opinion of Estlund (2007), p. 213: "the soldier will need to think for himself about whether they [certain justifying conditions] are met."

222 Christopher (1995), p. 229.

223 Again, while present day just war theorists often list the right intention condition only under *jus ad bellum*, traditionally it is also a *jus in bello* condition, applying not only to state leaders but to individual soldiers as well. The traditional Christian just war theorists were also addressing the question of whether, and under what circumstances, individuals may participate in war, and they made it clear that when they do participate in war, these individuals must have a right intention. See the introduction of Section 3.2.2.

224 For a different argument to the same effect, see also Pattison (2013).

225 McMahan (1994a), p. 256, fn. 7, and (1994b), p. 194, fn. 3.

226 Walzer (2000), pp. 34–41. He states (ibid., p. 37): "Hence the moral reality of war can be summed up in this way: when soldiers fight freely, choosing one another as enemies and designing their own battles, their war is not a crime; when they fight without freedom, their war is not their crime."

227 Walzer (2000), p. 39.

228 McMahan (2009a), 237–238, n. 26; see also the text on p. 33 that McMahan's note refers to.

229 Soto (2006), p. 120 (Articulus Primus, Dubium Septimum); Cano (2006), p. 152 (An Christianis sit licitum bella gerere, Secunda Quaestio) (152); Molina (2006), p. 273 (Articulus Primus, Disputatio Tercera, 1–3); Cajetan (2006), p. 429 (Bellum, quando dicatur iustum vel injustum, licitum vel illicitum).

230 Aquinas (2006), p. 195.

231 Augustine (1887), p. 301.

232 Frowe (2011), pp. 161 and 118.

233 Not from Grotius's text, apparently. While she mentions him a few times, she never actually quotes him, nor is his book included in her bibliography.

For a succinct interpretation of Grotius that supports mine, see Forde (1998). For in-depth analyses, see the contributions in Onuma (1993).

234 Grotius (2005), p. 1167 (II.26.III.1).
235 Ibid., p. 417 (II.1.XVIII.1).
236 McMahan (2006c), p. 379
237 Grotius (2005), pp. 1181–1183 (II.26.VI).
238 McMahan (2009a), 16–17.
239 Ibid., p. 16.
240 McMahan (2005b), all quotes in this paragraph are taken from fn. 17 of that article.
241 Anscombe (1981), p. 73. In Steinhoff (2007), p. 62, I correctly argued that her ideas would imply the moral inequality of combatants and incorrectly pondered that she might not have realized this. As the Anscombe quote just provided shows (which I had also overlooked, and which, incidentally, McMahan does not mention), she definitely did realize it. I already corrected this mistake in Steinhoff (2012a), p. 345, n. 10.
242 Anscombe (1981), p. 67.
243 McMahan (2009a), p. 3.
244 Frowe (2011), p, 124, follows McMahan here, too: both in making the claim and in not providing evidence for it.
245 McMahan (2009a), p. 105.
246 McMahan (2008c).
247 Ibid., p. 34.
248 See Lazar's reply to me at http://peasoup.typepad.com/peasoup/2015/05/ethics-discussions-at-pea-soup-cecile-fabres-war-exit-with-critical-precis-by-helen-frowe.html. Ironically, Lazar (2017a) now refers to himself as a "traditionalist" (does this mean, still applying the same logic, that he revises nothing?) – which, I presume, makes him provocatively unorthodox against a backdrop of a new "revisionist" orthodoxy. Be that as it may, I, for one, find Lazar's use of these different terms unhelpful.
249 Leveringhaus (2012); Chehtman (2017), p. 340.
250 McMahan (2012b), pp. 285–287, 289–291.
251 McMahan (2009a), 237–238, n. 26.
252 Coady (1980).
253 Biggar (2013).
254 McMahan (2009a), p. 5.
255 No revisionist has ever refuted this claim; and only one has addressed it at all, namely Lang (2012), pp. 55–56. He does not address it quite fairly, though. To wit, he states that my alleged "dismissal of McMahan's argument strikes [him] as uncharitable" (ibid., p. 55) However, it is actually Lang who is uncharitable. To wit, I have certainly not rested my case after pointing to the deep flaws of McMahan's terminology. Instead, I have addressed McMahan's arguments at length – and evidently not without at least some success, as Lang himself must admit (ibid., p. 58, the sentence before footnote 4). However, I did indeed claim that McMahan's formulation of the inequality doctrine is question-begging. And here, too, Lang admits that McMahan's terminology is at least "infelicitous" (ibid., p. 55). Yet Lang does not hesitate to avail himself consistently of the question-begging "unjust combatant"/"just combatant" terminology, thereby unsurprisingly missing my very point that there aren't necessarily any "unjust combatants" on the unjustified side. Moreover, neither he nor any other revisionist has made any effort to improve their terminology. Given the time that has passed since then, this seems not to be so much a "venial"

offense, as Lang would have it (ibid., p. 55) but, philosophically speaking, a capital one.

256 McMahan (2014a), p. 434. I argued in Section 3.2.1.1 that McMahan's distinction between "liability" and "potential liability" makes no sense, but this need not concern us for present purposes.

257 See Sections 4.1.5 and 4.1.6.3.

258 See also Section 3.2.1.1.

259 McMahan (2009a), p. 43; see also, for instance, (2013), p. 135, and (2014c), pp. 118–123.

260 See the first paragraphs of the introduction to Section 4.1.

261 McMahan (2013), p. 124; (2012a), p. 138; (2014c), p. 115.

262 McMahan was evidently not aware of them for some time. In McMahan (2012b), p. 293, note 8, he credits me with alerting him to the agent-relative necessity justification, and he does at least not deny the possibility of such agent-relative justifications (see also 2012a, pp. 137–138). Yet he has still failed to properly address them, let alone to deal with their apparent negative implications for the "revisionist" inequality thesis. In any case, the permissibility of giving greater weight to one's own interests and to the interests of those one holds dear is almost universally accepted – and explicitly endorsed by at least some "revisionists." See for instance Fabre (2012a), pp. 89–90; Bazargan-Forward (2018).

263 Section 4.1.5.

264 McMahan (2004a), p. 721.

265 See for instance McMahan (2005a), pp. 388–389, (2008a), p. 234, (2009a), p. 38, (2014c), esp. pp. 105 and 107.

266 McMahan (2008a), p. 227.

267 Ibid., pp. 231–235.

268 Ibid., p. 234.

269 Ibid., p. 233.

270 Ibid.

271 Ibid.

272 McMahan (2005a), 394.

273 Christie (1999), p. 1008.

274 McMahan (2014c), p. 105.

275 Sugarman (2006), pp. 5–6).

276 *Official Model Code*, section 3.01, as quoted in Christie (1999), p. 1026.

277 Ibid., p. 1026.

278 Ibid., pp. 1034–1039.

279 Ibid., p. 1039.

280 McMahan (2010a), p. 499, has made statements like these: "It is curious that the law of *jus in bello* should be asymmetrical, and thus apparently at variance with considerations of justice, when the morality of individual conflict, the domestic law, and the international law of *jus ad bellum* are all largely asymmetrical." He provides no evidence or reference for his assertion about domestic law, which is not surprising because it is wrong: While there is indeed no self-defense justification for acts countering other acts that are themselves justified by a self-defense justification, law in many jurisdictions does allow self-defense against other kinds of justified acts (see Sections 4.1.4 and 4.1.5). It would appear that just as McMahan has made far-reaching statements about "the tradition" without consulting said tradition (see Section 4.1.6.1), he also makes far-reaching statements about law without consulting law.

281 McMahan (2003), p. 412.

282 Ibid., p. 243.
283 McMahan (2010a), p. 498.
284 McMahan (2008a), pp. 234–235.
285 Anscombe (1981), esp. p. 73.
286 Steinhoff (2007), pp. 95–97.
287 Steinhoff (2008).
288 McMahan (2008a).
289 Frowe (2011), pp. 132–137.
290 Steinhoff (2012a).
291 Steinhoff (2016b), pp. 260–264.
292 McMahan (2014c), esp. pp. 115–123.
293 Steinhoff (2016c).
294 Steinhoff (2014b). Recently Walen (2018), esp. pp. 407–409, has also, with me as his specific target, endorsed the view that the innocent civilians in the infamous *Tactical Bomber* example are not permitted in fighting the justified bombers. While he brings a new (and not particularly helpful) *terminology* to the table, he does not really offer any *substantive arguments* that have not already been made by McMahan and in particular Tadros (but quite a bit of additional question-begging) – with the result that his position suffers from the same problems as theirs. In fact, his position is not so much a reply to my arguments, but a mere repetition of claims I argue against. See my response to Walen in Steinhoff (2018d).
295 Steinhoff (2016a), pp. 262–296. Section 4.1.5 is a slightly revised version of that article. The other articles of mine mentioned in this paragraph are incorporated in slightly revised form in Section 3 of Steinhoff (2020).
296 Hosein (2014) and (2017).
297 Of course, after the first round one could already note an unwillingness of some revisionists to make any reference to the argument that the sweeping moral inequality thesis is wrong because soldiers on the justified side also pose unjust threats ("collateral damage") and hence become liable because justification does not defeat liability. Fabre (2012a) is a case in point. She ignores the argument entirely on the pages where mentioning it would certainly have suggested itself (see ibid., pp. 60–61 and p. 73).
298 Lazar (2017a).
299 For example regarding assumptions in the literature about who may legitimately wage war (see the first paragraph of Section 3.1.1 above), regarding the importance in the literature of right intention, and by ignoring the strongest objections to the bloodless invasion argument.
300 Lazar (2017a).
301 Steinhoff (2008), p. 25; (2013b [contained in this book, in slightly revised form, as Section 4.1.2]), esp. pp. 1021–1023 (in this book Section 4.1.2.2); (2016d), esp. Section VII. See also McMahan (2009a), pp. 41–42, and note 3; and Reitberger (2013), p. 79.
302 Steinhoff (2016a); see Section 4.1.5.3 in the present book.
303 Lazar (2017a).
304 Ibid.
305 The inequality thesis is understood as an endorsement of unequal *liberty-rights* to kill, as endorsing unequal *liability*. This does not keep him from providing an argument for an equal *justification* (in some wars) to kill enemy combatants that overrides rights not to be killed. See Lazar (2013).
306 Bazargan-Forward (2018), p. 196.
307 Bazargan (2014), p. 136. For a critique of his account, see Steinhoff (2019a), esp. Section 3.

308 Bazargan-Forward (2018), p. 196.
309 There is no way that Bazargan-Forward does not know this literature (if he doesn't, then he should).
310 Frowe (2018), pp. 475–479.
311 Steinhoff (2020), Section 4.3.2.
312 Frowe (2018), p. 478.
313 One reason why these accounts might not be influential lies in their running into problems that the prominent alternative account can easily avoid. Quong (2020), a main defender of the agent-relative or self-preference account, ignores the objections I first made in Steinhoff (2016d). These objections, unlike his account, therefore stand unrefuted. For a further developed defense of the liability account against Quong's self-preference account, see Steinhoff (2020), Section 3.1. For a critique of Quong's "stringency principle," see ibid., section 2.2.4.2. See also Uwe Steinhoff, "Firth and Quong on Liability to Defensive Harm: A Critique," unpublished ms., available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2362549.
314 While some liability accounts equate liability with justification, mine of course does not. The liability to be killed only provides a justification to kill in *conjunction* with a positive reason to kill. This positive reason is defense of the innocent would-be victim.
315 Nozick (1974), pp. 34–35; Thomson (1991).
316 Kamm (2008), pp. 167–169; Uniacke (1994), pp. 26–29.
317 Draper (2016), for example, pp. 83 and 185; Rodin (2011), pp. 85–87 and 101.
318 Hosein (2014) and (2017); Steinhoff (2020), Section 3.
319 Frowe (2011), pp. 132–137.
320 Lazar (2017a).
321 McMahan (2009a), pp. 41–42. He states that he has been alerted to this fact by Adil Ahmad Haque, see ibid., p. 238, n. 3. However, I had already made this point in my critique of McMahan in Steinhoff (2008), p. 225.
322 See note 262.
323 Bazargan-Forward (2018), pp. 191–196.
324 Ibid., p. 196.
325 Fabre (2012a), p. 14.
326 Rodin (2011).
327 Lazar (2015), pp. 56–73.
328 Frowe (2018), p. 477. Frowe does not provide a defense of the doctrine elsewhere in her work either.
329 McMahan (2009b), p. 345.
330 Draper (2016), Ch. 6.
331 Tadros (2015a); Walen (2014) and (2016).
332 Steinhoff (2019b).
333 For a treatment of terrorism and the importance of conventions in this context, see Steinhoff (2007), Chs. 4 and 5.
334 It seems that Aquinas, who is often credited as the "inventor" of the principle, did not consider the infliction of proportionate punitive harm on wrongdoers to be evil. We can avoid such complications by focusing, as modern discussions of the DDE mostly do, on harming the innocent.
335 This explanation is then often referred to as the "Kantian" rationale of the DDE. See, for instance, Cavanaugh (2009); Nelkin and Rickless (2014), pp. 131–133 and 147–154.
336 Mangan (1949), p. 43. The first condition actually seems odd: if the act is "good in itself," what else is there to say? It would therefore make more

sense to formulate the condition negatively: the act is not supposed to be *bad* in itself. If, however, it is not possible for acts to be bad in themselves, then the condition will *always* be satisfied. In the following, I will have nothing to say on this condition.

337 Nelkin and Rickless (2014), p. 154.

338 Even *that* might sometimes not even be *pro tanto* wrong. See Guerrero (2016).

339 Bennett (1998), p. 218.

340 Bruers (2016), p. 417.

341 Nelkin and Rickless (2014), p. 131

342 Bruers (2016), p. 417, lists these notions in support of the means principle.

343 Nelkin and Rickless (2016), p. 378. These examples, in slightly different formulations, pervade the entire pro-DDE literature.

344 Nelkin and Rickless (2016), p. 378, claim: "Not unreasonably, proponents of DDE see this pair of cases as evidence that the moral distinction between terror bombing and strategic bombing hinges on the distinction between intending harm and merely foreseeing harm ..." Given that things are unequal in the two examples, however, it is entirely unreasonable. Compare also Draper (2016), who rightly deems the approach taken by defenders of the DDE "methodologically suspect," and points out: "[I]f we consider cases of terror bombing and tactical bombing that are very similar to each other, I doubt that most of us do have Quinn's intuition that the tactical bombing would be 'much easier to justify.'" (Ibid., p. 140.) Or as a psychologist complaining about confounding factors in the typical hypotheticals employed by defenders of the DDE puts it: "[P]hilosophers may endorse the DDE at least in part because they misattribute strong intuitions to the DDE that are in part driven by other factors." Cushman (2016), p. 774. Cushman's empirical findings might also find theoretical support in the "precautionary principle" of Guerrero (2016).

345 I have come across the objection that it is allegedly not obvious that the inflammatory terms influence the judgments of philosophers who spend a long time considering the cases before settling on a view that is intuitively acceptable. However, my point is that given that it *is* obvious that there is at the very least a *risk* of such an influence and given that this influence could easily be avoided by using a neutral terminology, choosing a non-neutral one anyway is an expression of bias and clearly methodologically inept. Moreover, these examples are presented not only to philosophers but also to a wider audience, including undergraduate classes. The same anonymous reviewer to whom I dedicate the next paragraph in the main text states, however, that he or she "does not know of any moral philosopher who provides potentially biasing labels to students when presenting pairs of cases designed to elicit unbiased intuitions." Given that countless undergraduate courses (this is easy to google) that deal with the DDE routinely have Quinn (1989) on their reading lists, an article that of course prominently features the terminologically biased "Strategic Bomber/Terror Bomber" comparison (as do other articles that are popular in such reading lists), and given that quite a few of the teachers of such courses defend the doctrine by relying on precisely such examples, it is not really difficult to do the math.

346 This objection was raised by an anonymous reviewer. All quotes in this paragraph stem from this objection.

347 See also note 345.

348 I said "almost as inadequate" in the previous paragraph because there is an additional difference in the first set of examples, namely the difference

of color. However, removing this difference definitely does not keep *all else* equal in the second set of examples.

349 An anonymous reviewer objects that this difference is "irrelevant" because, allegedly, intuitions will not change if we "suppose that the Terror Bomber also intends to destroy the enemy munitions factory on which the bombs are dropped." First, the reviewer misses the point of the present discussion: the point is that it *is a difference* and that it is methodologically inept to proceed by announcing its "irrelevance" and keeping it instead by simply getting rid of it, thus *equalizing* the examples. Moreover, the reviewer declares the "irrelevance" of the distinction by now introducing an entirely *new* difference and thereby displaying the very methodological ineptitude I am criticizing: the "Terror Bomber" now wants to destroy *both* targets, the Strategic Bomber only *one* (I assume, for if he *also* wants to destroy *both* targets, then we have just *one* kind of bomber, not two). So how does the reviewer know that it is not this *new* difference that plays the decisive role? Clearly, the only methodologically adequate course is to keep all else equal.

350 It is correct that in the original *Strategic Bomber/Terror Bomber* examples not even the "terror bomber" targets the civilians. But again, this is beside the point. The point is that there is still said difference between them: one bomber targets what he wants to destroy, the other not. The only way to exclude this difference without introducing a new one is by having both bombers target some neutral third target (see below for a relevant example).

351 I am not sure what a corollary principle is. Either the principle is implied by the DDE, and then it is a part of it and cannot explain anything the DDE cannot also explain; or it is not, then it is a different principle, and thus additional. I will therefore put the talk about corollaries aside.

352 The reviewer in question actually admits that but then claims that "[t]he question ... is whether this is a difference that makes a difference." Actually, that is *not* the question we need to ask if we want to find out whether the DDE finds intuitive support. Then the question is rather why we should risk distorting factors in the first place given that we can easily avoid them. Avoiding them would clearly be the methodologically appropriate course to take. Moreover, the reviewer claims that one could "equalize" the cases by either supposing that the *Tactical Bomber* bombs the munitions factory knowing (but not intending) that the resulting fallout will also terrorize the enemy population into giving up the war effort or by supposing that the terror bomber does not want to terrorize but merely to "demoralize." Yet one has certainly not achieved any equalization by simply replacing one unequal factor ("terror) with another one ("demoralization); nor by having the tactical bomber foresee the terror stemming from destroying the factory. Such terror hardly equals the terror stemming from killing civilians.

353 For a fascinating discussion of what happens if one attributes to the "terror bomber" and to the "tactical bomber" the same causal beliefs and a demonstration that this does not end well for the DDE, see Di Nucci (2014), pp. 163–166. I consider Di Nucci's book to be a definite refutation of the DDE. It is therefore not surprising that recent defenses of the DDE entirely ignore it – apart from a hostile note that dismisses the book without argument. See Gordon-Solmon (2016).

354 Di Nucci (2014), pp. 164–166, makes a similar point, though not in terms of ends in themselves.

355 If that *is* the reason – whether consciously or not – for the loyalty toward the irrelevant examples, then the affected authors have crossed over from the pursuit of truth about the DDE to pro-DDE propaganda.

356 Delaney (2008), p. 346.
357 Ibid. The parentheses and brackets are in the original.
358 Scanlon (2010), p. 29.
359 Ibid., p. 28.
360 Kamm (2004).
361 Examples for this strategy are McMahan (2009b), pp. 365–369; Lippert-Rasmussen (2010), pp. 551–553; Nelkin and Rickless (2014), pp. 144–145; Elster (2012), pp. 84–86; Tadros (2015b), pp. 6–7. None of these authors seems to notice that *targeting* is a further unequal factor in the *"Terror Bomber"/"Tactical Bomber"* examples.
362 Liao (2012), p. 713. However, while Liao complains about "confounding factors" introduced by "the context of war" when discussing a certain war-related counter-example to the claim that a permissible act can be made impermissible on grounds of intention alone, he does not mention these very same confounding factors at the beginning of the same article when offering the *Terror Bomber/Tactical Bomber* example in support of said claim (ibid., pp. 704–705). Moreover, while he removes the "institutional role factor" in a pair of revised bombing examples subtly labeled *Neutral* and *Thug*, he adds entirely new confounding factors in *Thug* (which therefore is twice as long as *Neutral*): namely bad character (the bomber is a thug), bad emotions (hatred of children), and bad attitudes (he does not care about winning the just war or about hiding his hatred) – and then Liao informs the nonplussed reader that the moral "key difference" between these two cases surely must be intention (ibid., pp. 719–720).
363 While Cushman (2016), p. 763, says that the influence of the intended/foreseen distinction is "Lilliputian," he acknowledges its existence "even after the relevant confounds are eliminated" (ibid., p. 766), but states that it might be due to the psychological effect of "a mere statistical co-occurrence" with other factors normally present (ibid., p. 768), which suggests that the effect is not only Lilliputian but due to distortion. That is bad enough for the DDE, of course. However, it should also be noted that the cases used by Cushman and his colleagues do not involve such drastic uses of force as bombing or vaporization. My guess – confirmed by Di Nucci's study (2014, pp. 177–187) – is that in such cases the effect of the distinction is not only Lilliputian but non-existent (I am, of course, open to empirical evidence to the contrary). Finally, it is worth mentioning that "[a]part from the influences of confounding factors ... current models of the psychological basis of the DDE raise even more fundamental concerns about its normative status" (Cushman 2016, p. 774). These additional concerns are beyond the scope of this section.
364 Nelkin and Rickless (2014), p. 125.
365 Quinn (1889), p. 336; Lippert-Rasmussen (2010), p. 543.
366 Tadros (2015b), p. 2. Liao (2016), p. 850, simply talks of "people's judgment that *Terror Bomber* is a case of impermissible action while Tactical Bomber is a case of permissible action." What people are that? *All* people?
367 Stuchlik (2012), p. 183.
368 Draper (2016), p. 141, also laments the lack of evidence in support of such claims. However, I have, remarkably enough, encountered the curious suggestion that a more "charitable" reading of the usual "most people" claim of defenders of the DDE is that they are not really meant as empirical claims. Yet, first, I do not think that it is charitable to assume that analytical philosophers, who usually praise clarity, are unable to express themselves clearly. Secondly, they do explicitly make the claims I just quoted,

and it is only fair to point out that these claims are unsupported by any evidence. Third, in personal conversations I found no indication whatsoever that they do not mean them as empirical claims. Fourth, if defenders of the DDE nevertheless secretly do not "mean" them as empirical claims, although semantically that is exactly what they are, then they are misleading their readers. That is understandable, however regrettable, since admitting that their intuitions are *not* "widely shared" will not inspire confidence in the DDE.

369 McMahan (2009b), p. 347.

370 Ibid., p. 362.

371 Ibid., p. 347.

372 Incidentally, McMahan seems to think that opponents of the DDE must deny the "relevance of intention to permissibility." Ibid., p. 346. It depends what this means, though. Opponents of the DDE deny that there is a morally relevant distinction between intended harming and foreseen harming, but of course they need not deny (some do, I don't) that there is a morally relevant distinction between intended harming and accidental or even unwitting harming. Moreover, McMahan (2009a), p. 43, distinguishes between "objective justification" and "subjective justification." Intention *cannot* be relevant for *objective* justification, since objective justification is "independent of the agent's beliefs" (ibid.) – intention, however, obviously is not.

373 Di Nucci (2014), pp. 177–187.

374 This objection was raised by an anonymous reviewer. All quotes in this and the next paragraph refer to this reviewer's comments.

375 The critic also thinks that it is a shortcoming of the case that only one person is involved. Really? Would adding a few further hermits and spiders elicit different intuitions about the two cases? I invite readers to test this for themselves.

376 For a treatment of also the other examples, see Steinhoff (2018b), Section 3.

377 Again I take the formulation from Nelkin and Rickless (2016), p. 379.

378 The two elements of touching and applying kinetic energy combine to constitute "personal force." Empirical studies "indicate that harmful actions involving personal force are judged to be less morally acceptable." See Green (2016), p. 183. Some versions of the examples remove the two mentioned elements – that still leaves the other two confounding factors. Moreover, having the large man stand on a trap door, for example, adds the additional factor of "pulling the rug from under somebody's feet."

379 According to Quong (2009), esp. pp. 530 and 532–533, treating a person as a means comprises using (against his consent) his property or anything he has a right to. Thus, he might say that there is still a relevant difference between *Trolley* and *Trolley II*: by extending his movement into the large man's space, the bystander uses him as a means. However, if the man on the side track in *Trolley I* stood exactly at the beginning of the new track, diverting the trolley would also only be possible by infringing his space. If one says that the tracks he is standing on are not his property, we can also have the fat man stand on the tracks. Do these variations make any difference to the justifiability of the respective actions? It does not seem so. For critiques of Quong's account, see Ferzan, (2011); Hanna (2012); Ross (2015); Draper (2016), pp. 132–134; Steinhoff (2020), Section 3.1.2.

380 There can be further complications, which need not interest us for the moment. See Kamm (2008), esp. Ch. 5. Another principle one could consider

is Walen's (2014) "Restricting Claims Principle." Øverland (2014) has developed a similar account. A powerful but succinct (two pages) criticism of Walen's original "Restricting Claims Principle" has been offered by Draper (2016), pp. 136–137. Walen has reformulated his "RCP" in Walen (2016). I find the new version somewhat obscure and do not want to speculate what it implies for the *Ray Gun* options.

381 Quinn (1989), p. 344, thinks that "eliminative agency" is easier to justify than "opportunistic agency." Opportunistic agency might not always be the same as using a person as a means, as we will see in a moment. See also Tadros (2015a), p. 64, n. 21.

382 Note that the vaporization of the Apache is *not*, unlike the shifting of the trolley in *Trolley*, the "noncausal flip side" of the five being saved. The saving of the five is *not* "constituted" by the vaporization of the Apache; it is constituted by the computer's stopping the train. See on these concepts Kamm (2008), p. 141.

383 Of course, if he had not been there another one could have been vaporized, but that hardly means that the one who has actually been vaporized has therefore not been used or opportunistically killed.

384 More precisely, *a* Cherokee's vaporization would be intended, not necessarily the vaporization of this one.

385 For an ingenious argument that all these different distinctions and principles cannot be important enough to outweigh the value of an additional saved (or spared) life, see Nye (2014). Nye's article, like Di Nucci's (2014) book, is another definite refutation of the DDE and related principles. Not surprisingly, recent defenses of the DDE or of related principles do not mention it.

386 Thomson (1986), pp. 101–102.

387 For a discussion of also the *Loop* case, see Steinhoff (2018b), Section 4.

388 Bennett (1981), p. 111.

389 Ibid., p. 114.

390 I actually think that "the only account of intentions which [Bennett] can make sense of" (ibid., p. 111) and on which he relies elsewhere does *not* imply the absurd conclusion at all, but this is something I need not go into here. See, however, Steinhoff (2018a), pp. 73–80.

391 Foot (1978), pp. 21–22.

392 Bennett (1998), p. 210.

393 Quinn (1989), p. 335. He uses the term "strictly intended" several times.

394 This is also how, for instance, Nelkin and Rickless (2016), p. 381, and Liao (2016), p. 851, see the problem of closeness.

395 I take this formulation from ibid., p. 851, but have shortened it. The talk about the terror bomber becoming "philosophically sophisticated" comes from Quinn (1989), p. 340.

396 Revising the DDE seems meanwhile to be a philosophical discipline in its own right. There are several articles that announce the revision of the doctrine in their very titles, and many other articles and books offer one revision or the other in the course of their discussion.

397 Quinn (1989), p. 343.

398 For doubts, see Fischer, Ravizza, and Copp (1993); Liao (2016), pp. 853–858; and McMahan (1994c). McMahan offers a revision of the revision, which then is criticized by Mapel (2001). For a defense of Quinn, see Smith (2007). Nelkin and Rickless (2014) support Quinn, but in the end also offer a variation. Sarch (2017), Section 1.4, doubts that this variation works.

399 If someone claims that "most people" would see a difference here, I would very much like to see empirical evidence for this astounding claim, especially given that the empirical evidence we have on the original *Tactical Bomber/Terror Bomber* suggests otherwise, as we saw.

400 So, for that matter, are the "rationales" they offer. I will not go into this here, but see Steinhoff (2019b).

401 As shown by the empirical evidence offered by Cushman (2016), Di Nucci (2014), pp. 177–187; and Green (2016). Note that I have heard the – methodologically confused – objection that I have not done empirical testing of my own examples. Obviously, to substantiate the claim I just made, it need only be the case that there are *some* methodologically adequate empirical studies that undermine the claim about the "intuitiveness" of the DDE while there are *no* methodologically adequate empirical studies that support it – and this *is* true. So the burden of proof is flatly on the other side now. But if DDE defenders want to empirically test my examples: be my guest. I am pretty sure, however, that they will avoid doing so at all costs.

402 Haque (2017), p. 15.

403 I do not claim that his account is the only example. I have discussed other examples elsewhere. Nor do I claim that this kind of moral fundamentalism is a monopoly of "revisionist" just war theory. (And if there are "revisionists" who are not moral fundamentalists in this sense – for which, however, is see absolutely no evidence – then that is good for them, but of no concern here.) On the contrary, I see no indication that most traditional just war theorists did not share the morally fundamentalist outlook I am criticizing. Suffice it to say for the present section, however, that McMahan's approach is probably the *clearest* example of moral fundamentalism regarding the relation between the morality and the laws of war and hence an ideal foil against which to develop the alternative account defended here.

404 McMahan (2008c), p. 35.

405 McMahan (2012b), p. 278, emphasis added.

406 McMahan (2006a), p. 47.

407 McMahan (2008c), p. 37.

408 Shue (2008), p. 106, also questions "whether [McMahan's] whole account is coherent." He further states that "it is far from obvious that prohibitions should always trump permissions in the circumstances of war" (ibid., p. 107). I would add that one thing that is obvious and conceptually necessary is that at least *morally* no non-moral rule ever trumps a moral one.

409 It might be a prudential "ought," of course. However, sometimes it might be prudent for an army to put both the morality and the laws of armed conflict aside and indiscriminately kill everyone in their path. Finally, it could be an "all things considered ought." However, while I know what an "ought" is that considers all things (for example rights and free-floating duties) from a moral perspective, I do not know what an *ought* is supposed to be that considers everything from every perspective and then comes to a conclusion of what to do from the perspective of every perspective taken together – I fail to see how this makes any sense. Finally, I encountered the claim that McMahan means this "ought" in a rule-utilitarian or -consequentialist sense. However, first, that is wrong since in "The Morality of War and the Law of War" (McMahan 2008c) he does not even mention rule-consequentialism, and in "Laws of War" (McMahan 2010a) he argues against it (ibid. pp. 504–505). Second, an appeal to rule-consequentialism would not help anyway, for reasons explained in the next paragraph.

410 The quotes in this paragraph, apart from the citation of McMahan, are taken from the objections of an anonymous critic.
411 McMahan (2008c), p. 33, headline, format changed.
412 Of course, the morality this critic and McMahan refer to as "non-conventional," namely the peacetime morality, is *also already* influenced by conventions. So from a methodological point of view, one would like to know in which secret laboratory the critic and McMahan have managed to observe "non-conventional morality."
413 In addition, it should be noted that while the fragmentation of different kinds of justification (prominently "fact-relative/objective," "belief-relative," and "evidence-relative," with the emphasis – for no apparent reason – being put on the first kind of justification) is popular among "revisionists," this conceptual fragmentation is unhelpful for answering substantive moral questions. See also Section 3.2.2.2.
414 However, McMahan attempts to downplay this implication of his view, arguing that only very few non-combatants would be liable. See McMahan (2011b). These attempts seem to be unsuccessful, however. See Lazar (2016a). See also Uwe Steinhoff, "To Be Killed or Not to Be Killed? On McMahan's Failure to Draw a Line between Combatants and Civilians," available at https://philpapers.org/rec/STETBK-2.
415 McMahan (2004b), p. 76, argues that in the domestic case, "[n]ormally one may not kill a sleeping person even if one has reason to believe that this person will pose a lethal threat the following day." Unfortunately, the reasons McMahan then adduces to argue that in case of war this is different also apply to the soldiers the chaplain kills: "A soldier sleeping in invaded territory has already attacked and is engaged in attacking."
416 Fabre (2012b) argues that McMahan's account implies the permissibility of the "internecine killing of commanding officers by their own men as committed by the latter on the grounds that the officer subjected the soldier to a lethal attack" in order to make them comply with an order (ibid., p. 235, see also 215). As my argument shows, however, McMahan's account permits "internecine killing" on a much larger scale: when enemy combatants may kill the soldiers, then the soldiers' very own chaplains and medics (and comrades sympathizing with the enemy, for that matter) may kill them too.
417 McMahan (2010a) p. 505.
418 The objection was raised by an anonymous critic, text on file with author.
419 Walzer (2006), p. 43.
420 This justification seems not to figure in McMahan's thinking at all, although it is a well-established legal and moral justification. See Robinson (1984), pp. 113–220. For a philosophical analysis of this justification, see Steinhoff (2020), Section 5.3.
421 Obviously, I am assuming here a reasonably just society as a background condition.
422 I will get back to this in Section 4.2.1.8.
423 McMahan (2012b), p. 278, emphasis added.
424 Incidentally, this paragraph also answers a somewhat quaint question I received: namely the question as to what "entitles" me to make the claim that there is a difference, let alone a big one, between my approach and McMahan's. I can explain what "entitles" me: it's called *semantics*. McMahan makes the statements I just quoted, and I negate them. That's a difference. For *still further* (*alas!*) information about the nature and the extent of this difference, I refer the interested reader also to the next paragraphs.
425 McMahan (2010a), p. 505.

426 McMahan (2012b), p. 278, emphasis added.

427 "It is curious that the law of *jus in bello* should be asymmetrical, and thus apparently at variance with considerations of justice, when the morality of individual conflict, the domestic law, and the international law of *jus ad bellum* are all largely asymmetrical." See McMahan (2010a), p. 499. Incidentally, McMahan misinterprets the morality of both individual conflict and domestic law. See the entire Section 4.1, except 4.1.2.

428 Frowe (2014), p. 2. See also (2011), p. 34: "the individualist takes war to be a continuation of domestic life."

429 Frowe (2014), p. 2. For the purposes of the present discussion, we can set aside the fact here that self-defense alone will not do for the justification of war – one at least needs also the lesser evil justification to justify "collateral damage."

430 Ibid.

431 So does Lazar (2012), who uses the same label ("reductivist individualism"). See also Parry (2015b).

432 Frowe is not alone. Davidovic (2016), p. 604, explains that "reductionist ... theories reject the traditional just war theory's commitment to *sui generis* war morality," but she provides no evidence for this alleged "commitment" of traditional just war theory. Incidentally, a critic claimed that I am "imprecise" in claiming that Frowe did not provide evidence, for, the critic says, she refers to Walzer. First, she doesn't say "Walzer," she says "traditional just war theory," second, Walzer is not the tradition, and third, the quote is from page 2 of a 227-page book in which Frowe mentions Walzer six times in total (footnotes and index included) and does so the first time on p. 123 in a footnote.

433 Aquinas (2006), p. 191 (II.2, Question 64, Article 7).

434 For the importance of punishment and the administration of justice in traditional just war theory, see in particular Reichberg (2013a); and Biggar (2013), esp. pp. 160–175 and 190–191.

435 This is overlooked by Parry (2015a). While he is quite right in claiming that classical theorists did not justify war under recourse to the self-defense justification, it is simply a non-sequitur to conclude from this fact that they were non-"reductivists." Accordingly, his claim that traditional just war theory used the criterion of legitimate authority to demarcate an area – war – in which moral norms apply that are "irreducible to the principles that govern other domains of action," thereby effectively assuming a war justification "*sui generis*" (ibid., p. 181), is mistaken.

436 One such explanation, it should be duly noted, has been provided by Mavrodes (1975). However, he exclusively talks of obligations, and he explains them with a basically consequentialist argument: upholding (and thus also by and large abiding by) certain conventions is justified because doing so reduces the destructiveness of war. In contrast, in what follows I will demonstrate the moral force of customary rules, including widely accepted laws, in the context of the resulting more relaxed *permissions* to inflict harm in war, and my argument will not be consequentialist, but rather deontological, focusing on rights-forfeiture.

437 Haque (2017), p. 15. Haque's service view is based on Joseph Raz's ideas on political obligation, applying them to the case of war; see ibid., p. 40. An account similar to Haque's in some ways has also been defended by Lamb (2013), esp. pp. 4–5.

438 I have already pointed out above that this definition is unhelpful, namely either circular or non-sensical. See Section 3.2.2, note 193. I put this issue aside here.

439 Haque (2017), p. 44.
440 Section 3.2.2.
441 Haque (2017), p. 15 (see also p. 55), seems to think that the law of war does not contain any permissions (like a permission, granted to combatants, "to fight for an unjust cause") but only contains "symmetrical legal prohibitions on certain means of fighting as well as symmetrical legal immunities from criminal prosecution for acts that are not prohibited by the law of war." However, even if the law of war does not explicitly *permit* certain things, Haque concedes here that there are certain types of acts "that are not prohibited by the law of war" (ibid., pp. 15 and 270). Killing combatants is one such type of act.
442 Ibid., p. 45.
443 Ibid., p. 44.
444 Ibid.
445 We will come back to the issues of "clear mistakes" in a moment.
446 Haque (2017), p. 15.
447 Ibid.
448 On exclusionary reasons, see Raz (1990), pp. 35–48, 182–186.
449 If Haque means something else by it, I would like to know what, and how that different conception of probability fits his account (subjective probability, for example, clearly does not).
450 Haque (2017), p. 45.
451 Ibid., Ch. 3.
452 Ibid., p. 66. Note that Haque apparently thinks that someone who is not wronged by an attack therefore *may* be attacked, that is, can be attacked *justifiably*. See ibid., p. 9.
453 This quite legitimate question also shows that an objection that I have received to the hospital example, namely that "a complete set of rules" would solve the problem, is self-defeating. Haque is precisely arguing for keeping certain rules, for instance the one just mentioned, *out* of his set of legal rules. Yet he has not explained how this is supposed to work. The likelihood approach itself does *not* provide such an explanation.
454 Haque (2017), pp. 43–44.
455 Ibid, p. 45. See also Haque (2019), pp. 653–654.
456 I encountered the objection here that Haque has a response for this, for he allegedly denies that the laws of war contain any permissions to kill and claims that they are entirely prohibitive. This response is actually *non*-responsive, for even if the laws of war were entirely prohibitive, Haque's morality is not. And my point is precisely that there is nothing in his service view that could establish that in cases of conflict one is more likely to abide by one's moral duties if one follows the legal prohibition on targeting *any* civilians instead of following the moral permission to target *liable* ones. Incidentally, Haque actually does *not* claim that the laws of war are entirely prohibitive (see note 441). He nowhere says that law prohibits fighting for a *just* cause. Consequently, it might well be that under certain circumstances one is not only permitted but morally *required* to kill liable civilians in defense of innocent people to which one has a duty of care, instead of killing liable combatants (the latter course of action might cost more lives).
457 Haque, *Law and Morality at War*, p. 66.
458 Ibid, p. 65.
459 For several examples for contributing and enabling, see pp. 66–78. For the single example of jointly killing, see p. 59. I shall describe and analyze this example below.

460 Ibid., pp. 73–74.
461 Ibid., p. 74.
462 Ibid.
463 I got the curious objection here that this argument of mine is a "cheap shot" because Haque's conclusion is allegedly based on the premises a) that one can only be liable for an impermissible contribution to an unjust threat, and b) that enabling harm is easier to justify than direct harming. In reply, even if enabling harm were easier to justify than direct harming, that would neither show that all enabling of harm is permissible, nor that those who enable harm impermissibly are not liable. Again: cutting off people's arms might also be easier to justify than killing people, but that shows neither that cutting off arms is permissible nor that those who engage in this activity remain immune from attack, that is, non-liable. Incidentally, Haque fails to *establish* the correctness of the two premises; he pretty much takes them for granted. This need not concern us here, but for arguments against premise (a), see Section 4.1.6.3 and in particular Steinhoff (2020), Section 3.
464 Haque (2017), p. 75.
465 Ibid., p. 265.
466 Ibid., p. 266. For a second round of exchanges between them on this point, see Frowe (2019), esp. pp. 634–636, and Haque (2019), esp. pp. 675–676.
467 Haque (2017), p. 59.
468 For overviews of such attempts, see Steinhoff (2007), Ch. 4; Frowe (2016), Ch. 8.
469 McMahan (and most "revisionists") confuse rights-forfeiture/liability and justification by talking about "liability justifications." See for instance McMahan (2012a), p. 138, (2013), p. 124; (2014c), p. 115. However, liability and justification must be distinguished. See Steinhoff (2020), esp. Sections 2.1.2.1 and 2.2.1.1.
470 Frowe (2013). Compare also Frowe (2014), Section 4.6; McMahan (2008b), p. 119. A critic (anonymous, text on file with author) claims that it is "not a common intuition" that "people 'cannot complain' when treated as they treat others." He adds: "Most people would think that there are things we should not do even if others do them to us, whether in our societies or outside. In terms of the law and morality of war, this example could be used to justify practices like belligerent reprisals – e.g., killing civilians intentionally if the enemy does so to us (in cases when these civilians support that action)." First, obviously McMahan finds the idea very plausible, so plausible indeed as to justify torture with it. Second, the critic provides no empirical evidence for his "most people" claim. However, opinion polls about the permissibility of torture and, even more dramatically, about popular attitudes towards violence in war reveal the critic's trust in "most people" to be unwarranted. For the latter and here pertinent case, see Sagan and Valentino (2017). Third, if the possibility of justifying belligerent reprisals counts against my account, then it also counts against any other just war theory that accepts a lesser evil justification and rejects an absolutist interpretation of the doctrine of double effect – and virtually every present-day just war theory does both. Finally, the moral absolutism the critic is subscribing to here is an implausible and morally irresponsible position to begin with. See Steinhoff (2013a), esp. pp. 149–153.
471 McMahan (2016), p. 196.
472 I say "also" because on McMahan's account it seems to actually mean "unnecessary and non-instrumental and disproportionate," see ibid., *passim*.

If that is not what it is supposed to mean, McMahan should then explain what exactly it is what he means with that word – and how he avoids begging the question.

473 For a more detailed criticism of McMahan's "internalism," see Steinhoff (2020), pp. 69–70 and 77–82. Note that the rejection of such an "internalism" also amounts to the rejection of the idea that forfeiture is necessarily short-lived – that is, that a culpable aggressor regains his right once he does not pose a threat anymore. See ibid., Section 2.2.1.1.

474 Rodin (2010), p. 165. Rodin (2014b) has further elaborated his thoughts on reciprocity. Of course, the general idea is not new. It is part of the natural law tradition and of German Idealism and, it would appear, of common sense. Compare also Osiel (2009).

475 Miller (2014), p. 27.

476 Ibid., pp. 27–28.

477 See, for instance, Kant (1996), p. 28; Locke (2002), esp. pp. 273–274 (§11), 278–280 (§§ 17–18), and 282–283 (§172); Ross (1930), esp. pp. 54–64; Simmons (1991), esp. pp. 335–336; Miller (1993), esp. pp. 332–338; Kershnar (2001), pp. 133–135; Buchanan (2013), p. 66. Incidentally, while I of course appreciate Buchanan's insight about reciprocity, it should perhaps be noted that he is, on the other hand, mistaken in claiming that traditional just war theory did not realize "that the validity of use-of-force norms can depend upon institutional context." Buchanan (2018), p. 65. Pufendorf had already emphasized in the 17th century that "to those living in natural liberty, a far greater range is allowed, in which to exercise a violent defence, than in the case of those whose safety is encircled by the protection of states." Pufendorf (1934), pp. 272–273. See generally ibid., II.V.3–4 and II.V.7–9. Buchanan may be right about "revisionist" just war theory, though.

478 To be sure, a standard argument against the forfeiture of a right against unnecessary force is that this would allegedly imply that torturing torturers or raping rapists would be justified even if doing so served no purpose. However (and again), while "revisionists" like McMahan might indeed believe in "liability justifications," the mere fact that someone is liable to some harm or has forfeited a right against its infliction does not yet *justify* the infliction of the harm, it only makes the justification *easier*. The ultimate justification will need a positive *reason* for inflicting the harm. Given that literally *all* arguments (as far as I am aware) against rights forfeiture conflate justice and justification (while authors like Kant, Locke, or Feinberg, for instance, keep both carefully apart), rights-forfeiture on grounds of reciprocity remains unscathed once the distinction is recognized. For an overview and critique of the anti-forfeiture literature as well as for a defense of the justice/justification distinction and further references, see Steinhoff (2020), Section 2.1.2, esp. 2.1.2.1, and Sections 2.2.1 and 2.2.2.1.

479 For a cinematographic illustration of this situation, see George A. Romero's movie *The Crazies* (1973) or its 2010 remake.

480 Lazar (2019) argues that risky killing worsens the violation of rights – but, of course, it can do that only if there actually is a rights violation. In my view, in contrast, the rights of the person killed have nothing to do with this. To wit, "risky killing" is worse than less risky killing even when it violates *no* rights because the person killed is liable to be killed. In other words, risky killing is neither worse because it is more disrespectful to the specific identifiably non-liable person killed nor, as argues Lazar (ibid., p. 10), disrespectful to "an" innocent person. Rather, it is worse simply

because it risks killing non-liable, innocent people – it is (more) disrespectful towards *them* (plural). For this reason, not only the risky killing of *non*-liable people is worse than the less risky killing of *non*-liable people, but risky killing is simply worse than less risky killing. See also Hecht (2018), pp. 113–114.

481 The claims made in this paragraph, however intuitive they might be (especially the first one), would of course be rejected by "objectivists" about justification, and many "revisionist" just war theorists, McMahan included, are officially "objectivists." We already saw in Section 3.2.2 that the "objectivist" account of justification is mistaken. See also Steinhoff (2018d), Section VII, and (2020), Sections 2.2.5 and 4. For a defense of special responsibilities towards fellow combatants and civilians, see Section 4.1.5.3 above. Compare also Kasher and Yadlin (2005); and Lazar (2016b).

482 The clearest example for this move is probably May (2015), Ch. 5. Another example is Blum (2017). Haque (2017), at pp. 95–105, is slightly more ambiguous although he explicitly states that "[i]t is objectively impermissible to kill opposing combatants whom one could safely capture" (ibid., p. 104). Compare also Statman (2011). Statman, however, uses the argument as a *reductio ad absurdum* of reductivism and in order to endorse a contractualist account a lá Benbaji. See in particular Benbaji (2008) and (2009). I share Statman's and Benbaji's intentions, namely to show that the morality of the use of force in war is not the *same* as the morality of the use of force in times of peace. Yet I doubt that their contractualism or contractarianism works. (I reject the term "contractualism" for the argument provided in this section, but have no problem with the term "conventionalism" or "constitutivism." My conventionalism is very different from Benbaji's though. Reciprocity plays no role in his account, but is central to mine.) For critiques of Benbaji, see Steinhoff (2010) and McMahan (2011a), Section II. Benbaji and Statman (2019) have recently collaborated to further develop the contractualist approach. For a critique of their account, see Section 4.2.2.

483 This latter approach seems to be Benbaji's; see the references in the previous note.

484 May (2015), p. 98, claims that by not recognizing soldiers' rights not to be killed unnecessarily one denies their "dignity" or humanity. Yet holding each other as responsible agents reciprocally to the same standards is the opposite of denying each other dignity or humanity. In turn, however, one might well wonder how much dignity one actually attributes to humanity, including soldiers, if one deems it enslaved to an immutable preexisting morality that cannot be formed by the reciprocally recognized practices of human beings.

485 This then is one reply to the claim that the killing of enemy soldiers cannot be justified for the "mere" defense of territory. Arguments in support of this claim have been offered by de Roose (1990) and Norman (1995), esp. Ch 6. The same point has been popularized by Rodin as the "bloodless invasion" or "political aggression" argument. See Rodin (2002), Ch. 6, esp. pp. 131–132; and (2014a), pp. 69–89. Another reply is that the interpretation of the proportionality requirement on which these three authors rely is mistaken even for the domestic case. For this line of argument, see Section 4.1.2.

486 Some authors insist on calling justified transgressions against rights "infringements," not "violations." For the purposes of this section, it does not matter what you call it.

487 Miller (2014), p. 27.

525 Again, I say "idiosyncratic" because the intuitions "revisionists" purport to have about the morality of the use of force seem to have little to do with *widely* shared moral intuitions, at least not if one takes – as is quite reasonable to do – the self-defense law of Western democracies to be indicative of intuitions shared in these societies. See Section 4.1. As one commentator puts it (in another context, but it is generally good advice): "[R]eflective equilibrium on deeply contested issues of public policy cannot be achieved by the philosopher testing logical implications of her favourite principles against moral intuitions gained from her own – mostly very limited – practical experience. Instead, the theorist must imagine how she would make her case in a conversation with citizens who have a voice in democratic politics." Bauböck (2005), p. 394.

526 For a detailed analysis of a morality or an "ethos" (which is what I call a moral code here) in terms of its being a functional object that can be evaluated on account of its efficiency, see Steinhoff (2006), Ch. 6.

527 This also answers a question or objection of a critic who claims that the account presented here "adopts a version of moral relativism, in which law and conventions create morality. ... Are there any limits to this argument or does everything go? And isn't the idea of convention itself, and reciprocity, a moral idea? If so, why is reciprocity a norm that transcends convention, while other moral rules do not?" I did not say that "law and conventions create morality"; I said that widely accepted laws and conventions are *partially* constitutive of the valid moral norms in different societies or domains. In particular, I most certainly did not *start* with a general premise of relativism. Rather, I based the principle of reciprocity on its venerable philosophical pedigree and on its general intuitiveness and plausibility. I then *derived* the relativity of certain norms from the effects that widely accepted conventions have *because of* reciprocity. Thus, in my account reciprocity is a norm that "transcends the normative force of convention" because it creates the normative force of widely accepted conventions in the first place. So no, I neither said nor implied that anything goes. I said and implied that those things go that can avail themselves of the normative power of reciprocity. Not everything can.

528 This proposal of going beyond "moralism," namely, in his words, beyond the "overconfidence in the ability to ascertain what is universally right combined with an exclusive focus on ideal moral thinking to the neglect of practical strategies for incremental moral improvement," unites me with Buchanan (2018), p. 5.

529 Buchanan (2013), p. 51, points out that "legal processes can provide greater determinateness, with the result that the effort to realize moral human rights in law actually changes our understanding of the content of the moral human rights." This is also true for the rights and liberties people have in war. Obviously, however, I claim that legal determinateness not only helps us to better *understand* the content of the morality of war but actually, well, *make it more determinate*.

530 Benbaji and Statman (2019), p. 6.

531 Ibid., p. 7.

532 Ibid., p. 43.

533 Ibid., p. 40, my emphasis.

534 Ibid., p. 38, my emphasis.

535 Ibid., p. 43.

536 Ibid., p. 116.

537 Ibid., p. 117.
538 Ibid., Ch. 5.
539 See the example in the paragraph before Section 4.2.2.5, which shows that abiding by a widely accepted and mutually beneficial strict interpretation of a limiting condition like the necessity requirement can be morally obligatory.
540 For Benbaji's and Statman's talk about the (re)distribution of rights, see Benbaji and Statman (2019), pp. 49, 67, 82, and 151.
541 Ibid., p. 46.
542 Ibid., pp. 126–127.
543 Ibid., p. 14, n. 16.
544 "If an arrangement is good and fair, one may presume that *all* members of the society in question accept it, even if they are reluctant and somewhat resentful of the social rule in question." Ibid., p. 49. What is actually reasonable to "presume," not least since it is obvious, is that an individual who not only *resents* but also criticizes and refuses to follow a social rule does *not* accept it, however "good and fair" it might be. Talk about presumptions and about what individuals "presumably" accept or consent to pervades Benbaji's and Statman's entire book.
545 Ibid., p. 48.
546 Ibid., p. 127.
547 See McMahan (2009a), p. 53. This and the previous paragraph are taken from Steinhoff, (2010). Benbaji and Statman entirely ignore this early critique of their contractual account. The result is that they have failed to overcome the objections formulated there.
548 They claim that in order "to determine what holders of a role should do, it is not necessary to explore the inner minds of combatants who undertake the duties that define their role." See Benbaji and Statman (2019), p. 125. However, whether people have accepted taking on a certain role in the first place *is* dependent on their "inner minds," not on other people's claims about those minds.
549 Ibid., pp. 126–127.
550 Ibid., p. 127.
551 Ibid., p. 176.
552 See on this point also Steinhoff (2012b), esp. pp. 132–135.
553 Wittgenstein (2010), § 271.
554 Benbaji and Statman (2019), p. 149.
555 Ibid., p. 49.
556 Ibid., p. 47, see also p. 49.
557 Ibid., p. 43.
558 Ibid., p. 142.
559 Ibid., p. 151.
560 Part of the problem here might be that they share with "revisionists" the tendency to not clearly and consistently distinguish justification from liability.
561 Benbaji and Statman (2019), p. 145.
562 Ibid., pp. 46, 55, 137.
563 Ibid., p. 44. A state of affairs is Pareto superior to another state of affairs if it leaves at least one person better off and no person worse off.
564 Ibid., p. 172.
565 See ibid., Section 6.5, esp. pp. 148–149.
566 Ibid., p. 118

488 Some authors claim that "justification defeats liability." For a critique, see Sections 4.1.5 and 4.1.6.3. See also Steinhoff (2020), Section 3 and 4.3.2.
489 For the role of reciprocal retaliation in enforcing conventions of war, see Kalshoven (2005) as well as Osiel (2009).
490 Note that this is most definitely not a distinction between "pre-conventional" and "conventional" morality. Conventions (partially) shape morality in *both* the domestic context and the context of war.
491 In that context it might be worth noting that far as the legal side is concerned, many Western jurisdictions deny a lesser evil justification for homicide.
492 McMahan (2010b) realizes this problem. His reply, however, is unconvincing. For plausible arguments to this effect, see also Saba Bazargan-Forward, "Proportionality, Contingent Pacifism, and Risk in War," unpublished ms., on file with the author. Both authors, however, might think (or, in case of McMahan, once have thought) that they can overcome this problem with the help of an alleged "combined liability-lesser-evil justification." See McMahan (2014b); Bazargan (2014). McMahan has recently admitted that this alleged justification has little if any practical relevance. McMahan (2017), pp. 18–24, esp. 24, first paragraph. In fact, however, the alleged justification is also theoretically unsound. See Steinhoff (2019a).
493 McMahan (2008c), p. 35.
494 See Steinhoff (2020), Section 2.2.4.
495 See ibid.
496 This is also indicated by the internationally well-known debate about a 2005 decision of the German constitutional court. The court found a law unconstitutional that allows shooting down a passenger plane in order to prevent its being used as a weapon to produce mass atrocities (beyond the killing of the passengers themselves). This decision is the basis of the play "Terror" by Ferdinand von Schirach, which has drawn large audiences in cities including Berlin, Tel Aviv, Caracas, Miami, and London.
497 Obviously, these truths are truths in *both* societies. I do not defend relativism about truth, but "relativism" about proportionality standards.
498 For an overview, see Bott (2011), pp. 124–131.
499 See Daniel Statman, Raanan Sulitzeanu-Kenan, Micha Mandel, Michael Skerker, and Stephen De Wijze, "Unreliable Protection: An Experimental Study of Experts' In-Bello Proportionality Decisions," unpublished ms., on file with the author.
500 This idea seems also to inform the account of Johnson (2017), esp. pp. 463–464.
501 See Section 4.1.5.
502 This counter-intuitiveness also undermines the claim of "revisionists" to only be extending the "ordinary" morality of self-defense to the case of war. In fact, they are extending their own rather idiosyncratic morality. See Section 4.1.
503 McMahan (2014c), p. 108, states that he "is sympathetic to this intuition [that the civilians may defend themselves] and once sought to defend it." He defends it in McMahan (2005a), esp. p. 389.
504 See, for instance, McMahan (2014c), esp. pp. 118–123.
505 Namely by Rodin (2011), pp. 85–87 and 101; and Draper (2016), for example pp. 83 and 185.
506 See Section 4.1.6.3.
507 McMahan (2010a), p. 501.
508 See note 469.

509 The permissibility of giving greater weight to one's own interests and to the interests of those one holds dear is explicitly endorsed by at least some "revisionists." See for instance Fabre (2012a), pp. 89–90; Bazargan-Forward (2018).

510 Rousseau (2019), p. 48. Rousseau did not actually endorse this view, though. See on this Nabulsi (1999), pp. 182–204.

511 Walzer (2000), p. 36.

512 McMahan (2018), p. 423. Rodin (2002), p. 167, has made the same observation.

513 Shooting in crowded theaters or bombing crowded cities are attacks even if miraculously nobody gets hurt.

514 I have encountered the objection that if something is justified it cannot be non-innocent. However, in German the terms "guilt" and "culpability" are translated with *Schuld*, which in turn also means *debt*. Since, as we saw in Sections 4.1.5 and 4.1.6.3, justification does not defeat liability, a person who justifiably wrongs another person normally owes her compensation and is thus *indebted* to her. I find nothing odd about the idea that one can incur guilt not only before the law or morality but also before another human being.

515 For a legal account of complicity, see Smith (1991). For predominantly philosophical accounts, see Kutz (2000) and Miller (2001).

516 The idea that one has to distinguish people who aid "the soldier qua human being" from people who are "aiding the soldier qua soldier or fighting man," to use Murphy's words (1973, p. 534), has always been quite popular, and I am sympathetic insofar as I think that this is indeed a widely shared convention. Fabre (2009) has recently argued that it is not correct that civilians who supply soldiers only with food are not liable to attack. I agree, since, as she correctly points out, *some* ways of supplying soldiers with food *are* helping them as soldiers. However, this only reinforces the distinction instead of undermining it. Yet this does not mean that the distinction is a deep metaphysical one drawing "immutable" lines not affected by widely shared conventions. See below.

517 For a very instructive discussion of *Beihilfe* (aiding and abetting) in German law, see Joecks (2003).

518 Anonymous critic, text on file with author.

519 If this is not what the critic wants to say, I have absolutely no alternative idea as to what he does want to say.

520 This is also, against "revisionists," emphasized by Miller (2016), esp. chs. 3, 4, and 6.

521 That the "revisionist" focus on private self-defense is misleading, in particular regarding an alleged "duty to retreat" (which private citizens – *unlike* police officers – have in some Western jurisdictions) was already pointed out above in Section 4.1.2.1 Incidentally, the point is seconded by Oberman (2015), p. 273. Conversely, however, I cannot second Oberman's rejection of "optional" wars. See Steinhoff (2017).

522 I say "the least," because fundamentalism, even in its liberal guise, tends to lead to fanaticism. Helen Frowe's paper "On Killing the Red Cross," unpublished ms., available at https://www.academia.edu/3026074/On_Killing_the_Red_Cross, might be a case in point.

523 See McMahan (2008c) and (2010a).

524 Nor can his "deep morality" on its own provide such action-guidance. That is precisely, as already pointed out, why McMahan feels compelled to turn to the laws of war in the first place.

567 This and the previous paragraph are again taken from Steinhoff (2010). See on the dangerousness of standing armies – even of your *own* state's standing army – also Dobos 2020).

568 Benbaji and Statman (2019), p. 152. They think that the principle of civilian immunity in such cases must be relaxed, but only to the extent as to permit stateless nations the direct targeting of civilian infrastructure, but not of civilians themselves, for the latter would allegedly not be in the interest of the weaker stateless nation; see ibid., pp. 153–157. In my opinion, this is wishful thinking.

569 Benbaji and Statman (2019), p. 149.

570 Ibid., p. 68.

Concluding Remarks

I will not "summarize" the results of this study here (the overview in the introduction is quite sufficient in this respect), but I would nevertheless like to highlight some of the more important results of the three parts of this book.

In this book, I first provided an explication and definition of the concept of war. This definition *conceptually* allows for wars waged by lone individuals against other individuals or the state. I emphasized that this does not prejudge any *normative* questions; in particular, such a definition does not automatically justify force used by individuals against states. Conversely, the rejection of such a definition does not automatically *de*legitimize such force – it would then not be war anymore, but war is not the only form of justified force anyway.

I then addressed the criteria usually listed for *jus ad bellum*, the justification for entering or continuing a war. I began by examining the criterion of *legitimate authority*, thus now confronting head-on the question of whether individual war (or an individual "feud," if you reject my definition) can be justified. I showed that traditional just war theory did allow private, indeed even individual war, and argued, against recent claims to the contrary, that it was quite right in doing so. Accordingly, legitimate authority is not a necessary condition for the justifiability of a war (at least if one understands it in such a way that individuals *qua* individuals cannot have such authority). It therefore cannot be relied on to delegitimize individual war, private war, guerrilla war, or even terrorism.

Subsequently, I argued that the criterion of just cause is not independent of proportionality and other valid *jus ad bellum* criteria. One cannot know whether there is a just cause without knowing whether the other (valid) criteria (apart from "right intention") are satisfied. This also means that "just cause" cannot be understood as an aim. Rather, just cause is a state of affairs. This account is applicable to all wars, even to wars where nobody will be killed or where the enemy has not committed a rights violation but can be justifiably warred against anyway. It also avoids the inefficiency of having proportionality considerations come up at two different points: in a separate criterion of just cause

and in the criterion of proportionality proper. Furthermore, against authors who claim that retribution cannot be a just cause, I demonstrated that retributive effects do have their role to play in the proportionality calculation (and thus in just cause). Finally, I argued – in line with the tradition – that *jus ad bellum* criteria are to be continuously applied during the conflict and that both the so-called "budget account" of proportionality as well as the idea that we need a special *jus ex bello* in addition to *jus ad bellum* are mistaken.

Turning to the "*right intention*" criterion, the "subjective" or mental element in the list of just war criteria, I argued that it has a firm connection to just cause, but not in the way this is usually understood. To wit, it is not the case that a war, to be justified, must be fought *for* the just cause (understood as an aim), that is, with the intention to advance the just cause. Rather, the connection lies in the requirement that the agent must have a justified true belief that the objective, mind-independent conditions of the justification to wage war are fulfilled. This *knowledge requirement* is *indispensable* for just war theory. It is not an *additional* criterion, but one that *constrains* the interpretation of the other criteria. Without the knowledge requirement, the only possible interpretation – short of unwarranted *ad hoc* stipulations – of the mind-independent just war criteria is purely objectivist in the form of being purely fact-relative. Pure objectivism, however, condemns just war theory to irrelevance since it cannot provide proper action-guidance: it is impractically demanding because objective justification is in practice impossible to achieve. (This condemns "revisionist" just war theories, which base their doctrine of the moral *in*equality of combatants on the idea that objective justification defeats liability, to practical irrelevance.) Moreover, the knowledge requirement is not only necessary, it is also sufficient as far as the mental element of justification is concerned. That is, it need not be amended by *additionally* requiring "good intentions" or "kind emotions" or "acceptable motivations." One can justifiably wage war even with the worst intentions, emotions, or motivations, as long as one knows that the objective justifying conditions are fulfilled.

I then turned to the condition of *prospects of success*. Many accounts of just war theory posit a prospects of success condition for the justification of a war. I argued that success can be interpreted in this context in two ways: as winning the war or as achieving a certain political goal. The aim of winning and the aim of achieving a certain political goal, however, can come apart; and by way of different examples, I demonstrated that some wars can be justified although they lack prospects of success in both senses. I addressed a number of objections and showed that they all fail. Thus, prospects of success is not a necessary condition for the justification of war.

The same is true for the condition of *last resort*. I argued that it is not morally mandatory to use war only as a *last* resort. It can be preferable

to other means in certain circumstances. A good example is economic sanctions, which can be very costly in terms of lost lives, in particular civilian lives and the lives of children. If one then has the choice between either using these harsher non-military means or war, one should rather choose war. I also demonstrated that the claim that this objection to last resort rests on a misinterpretation of the criterion is mistaken. Thus, neither last resort nor prospects of success are independent, necessary conditions. They are labels for considerations regarding the available alternatives to war (or to a certain war) and their (moral) costs, and while they have to be taken into account in the balance, they are not *necessarily* (in *all* wars) a decisive objection against war when they are not satisfied.

Combining my definition of just cause with the indispensability of both the proportionality and the knowledge requirement I concluded that agents satisfy *jus ad bellum* and are hence justified in their starting or continuing a war if they *know* (which neither requires certainty nor excludes doubts) that they *have a just cause* and that their resort to war *will indeed be proportionate*. Of course, this formulation does not provide much guidance by itself; but it does provide it in conjunction with the detailed analyses of the different criteria given previously. Even the abstract formulation by itself, however, does safeguard against the grossly mistaken and disturbingly permissive claim that a war is justified as long as waging *it* is *better* than not waging *a* war *at all*. Just war theory is more demanding than that. It requires us to compare a war not only against the option of not warring against the enemy at all, but also against the option of waging *another* more restrained war against the enemy (without, however, positing *over*demanding restraint conditions). That appears to be eminently reasonable, and certainly moral.

One motif running through this study was the critique of "revisionist" just war theory. This motif had to be particularly strong in the first part on *jus in bello*, namely the part dealing with the question as to how ordinary peacetime morality can be extended to the context of war. After all, "revisionists" claim that they come to revisionist conclusions about the ethics of war by applying the ordinary domestic or peacetime morality of the use of force to the realm of war. I argued that it is, ironically enough, the other way around: while their conclusions about the ethics of war can only be called "revisionist" if one misinterprets or ignores the actual just war tradition, the "revisionists" are mistaken in claiming that they expand the *ordinary* morality of the use of force to the realm of war. On the contrary, their account(s) of the self-defense justification as well as their relative neglect of other justifications and of the differences between them appear to be more idiosyncratic than ordinary.

The foremost alleged innovation "revisionists" lay claim to is the thesis of the moral *in*equality of combatants, that is, the thesis that combatants on the justified side and on the unjustified side do *not* have an

equal liberty-right or justification to kill each other. Yet this is not a revisionist claim at all, but in fact one already made some time ago by Aquinas (13th century), who is rather foundational for just war theory, as well as scholastics like Vitoria and Suárez (and many others) (16th and early 17th century), lawyers like Grotius (17th century), analytical philosophers like Anscombe (20th century), and 21st century philosophers or theologians like Coady and Biggar. In other words, the claim could hardly be more traditional.

The second alleged innovation "revisionists" like to emphasize is "reductive individualism," which supposedly distinguishes them from the allegedly "collectivist" tradition. Unfortunately, "revisionists" lump two quite different understandings of "reductive individualism" together. One defines it as the view that the same (kinds of) *justifications* that apply to the use of force in the domestic peacetime context also apply to the use of force in the context of war. This interpretation leaves room for the possibility that the *limiting conditions* that are part of these justifications, for instance, proportionality or necessity, are different in war and in peace, for example, more stringent in one context than in the other. The other understanding is that *exactly the same rules* regarding the use of force apply to both contexts. In the first (certainly more reasonable) sense of "reductive individualism," however, traditional just war theorists were no less reductivist and individualist than "revisionists." While it is true that they focused on the law enforcement or public authority justification and not, like "revisionists," on self-defense, this does not turn them into "collectivists" but merely into "reductive individualists" with a different focus. Moreover, it is not entirely clear (and "revisionists" do not provide any textual evidence to this effect) that traditional authors were not also reductive individualists in the second sense. If they were, they would have committed a mistake, though.

What is *really* revisionist, in contrast, namely idiosyncratic and rather misleading, is the account "revisionists" give of ordinary peacetime morality. This idiosyncrasy, in my view, arises from an insufficient engagement with existing law and legal scholarship. Especially criminal law would seem to reflect widely shared intuitions as far the ordinary morality of the use of force is concerned, and hence require some attention if the reconstruction of said ordinary morality of the use of force is the aim. However, "revisionist" discussions of the self-defense justification in particular and of the use of force in general markedly differ from law and legal scholarship in a number of ways. They therefore also differ from ordinary morality.

For starters, "revisionists" propose a "moral responsibility account of liability to defensive force" that is not to be found in law or ordinary morality. It is not to be found there because it has entirely implausible, draconian implications. McMahan has actually conceded this early on, failed to overcome the problem, and yet refused to draw the logical

conclusion: namely to reject the account. Furthermore, "revisionist" accounts of proportionality tend to be too restrictive or inflexible to be plausible (or to be found in law); their accounts of necessity are too abstract or too literal to be applicable and useful; and their rejection of the imminence requirement lacks sufficient, let alone convincing, argumentative underpinnings. In addition, the "revisionist" fondness for the doctrine of double effect seems to be partly a matter of blind faith and partly a matter of relying on a completely biased and inadequate methodology. Once one employs an adequate methodology, it becomes clear that the doctrine of double effect lacks intuitive support and is *not* part of ordinary morality.

All of these mistakes undermine the credibility of the "revisionist" ethics of war. A *particularly* grave mistake, and certainly grossly misleading, however, is the revisionist tendency to choose examples of the domestic use of force that are of limited relevance for war, to say the least. For example, they focus on private self-defense instead of considering the use of force by state agents like police officers. Likewise, they focus on "clean" cases of self-defense that, in contradistinction to war, do not involve "collateral damage." Once one properly *re*focuses attention, it becomes clear that Rodin's bloodless invasion argument is spurious since police officers do not have a duty to retreat and to cede property to bloodless muggers, and that the sweeping "revisionist" moral inequality thesis is equally spurious because "collateral damage" cannot be justified by a self-defense justification but only by a lesser evil or necessity justification – and while there is no justified self-defense against justified self-defense, there *is* justified self-defense against force inflicted on the basis of a lesser evil or necessity justification.

In fact, McMahan, as we saw, has once admitted that the argument from "collateral damage" would appear to vindicate ("embarrassingly" – his choice of words) the doctrine of the moral equality of combatants on the basis of his *very own* original claims about liability (namely that you become liable by being morally responsible for a threat of ***unjust*** harm, which soldiers producing "collateral damage" are). In order to escape this embarrassment, McMahan invoked the "justification defeats liability" doctrine, which almost all other "revisionists" also subscribe to. Yet while they *subscribe* to it, they have done nothing to *defend* it against the latest round of objections leveled against it. Instead, they opt to *ignore* all (both old and new) objections to the doctrine rather conspicuously, as it were, namely by not even mentioning them in a footnote. It is certainly not unreasonable to take this as an indication that they have no counter-arguments.

As if this weren't enough, however, the "revisionist" "justification defeats liability" thesis and with it the "revisionist" inequality thesis would be *practically irrelevant* even if they were true. The reason for this is that McMahan and other "revisionists" claim that only *objective*,

fact-relative justifications defeats liability. Yet we saw that in the real world attaining objective justification is practically impossible (which, incidentally, explains why it is *not* part of ordinary morality). Consequently, combatants on both sides will always be *un*justified in the objectivist sense, and thus objectivist accounts of justification imply the practical irrelevance of the allegedly "revisionist" thesis of the moral inequality of combatants.

In short, once one really pays attention to the "ordinary morality of the use of force," many "revisionist" claims lose credibility. This is particularly true for the "justification defeats liability" doctrine and the sweeping moral inequality of combatants thesis it is meant to support. What remains is a dogma we have every reason to reject.

Moreover, we not only have reason to reject the flawed "revisionist" interpretation of ordinary morality and its application to the context of war; we already have reason to reject the very idea motivating this application in the first place, namely the idea that the same moral rules that apply to the use of force in peacetime also apply to the use of force in war. In the second part of the *jus in bello* section, I did indeed reject this idea, and along with it what I call "moral fundamentalism." This is the view that morality dictates what the laws of war have to be (even where the laws have to deviate from an alleged "deep" morality for pragmatic reasons), while, conversely, widely accepted positive law or widely accepted conventions do *not* influence what morality is, let alone partly *constitute* the morality of the use of force.

To set the scene, I first criticized both McMahan's and Haque's accounts of the relation between law and morality as flawed and incoherent. More importantly, I then laid out an alternative approach. I explained how moral mechanisms based on a principle of *reciprocity* cause widely accepted laws and conventions to be *partly constitutive* of the *moral* rules that apply in a conflict. I explained the practical implications of this approach for the variable moral scopes and limits of necessity and proportionality in war, for the moral equality of combatants (which it does much to support), and for the principle of distinction. I argued that this moral force of widely accepted laws and conventions means that we are not enslaved (as "revisionists" think) to a "deep morality" of war but have the moral power – precisely *through* the customs and laws of war – to at least *partially* devise the morality of war. This is good news, for this approach, apart from tallying much more closely with common sense assumptions about the morality of war and – relatedly, in fact – providing a more accurate picture of it, also has significant advantages over both "revisionist" *and* traditionalist approaches in terms of action-guidance and practicality. Finally, I also explained how this account differs from a similar-sounding account recently offered by Benbaji and Statman. While moral fundamentalism in just war theory must certainly be rejected, Benbaji's and Statman's state-centric and

supposedly "contractarian" account cannot, as I showed, offer a viable alternative. The reciprocity-based and individualist account defended in this book can.

One final note. It should, I hope, be quite obvious that this book does not take a particularly permissive stance toward the justifiability of war. On the contrary, toward the end of the *jus ad bellum* section, I denied that what many just war theorists and perhaps many citizens at least in the Anglo-Saxon world take to be a *paradigmatic* example of a justified war, namely the Allied war against Nazi Germany, really was a justified war. Of course, the Allies had, on my account, a just cause for war, and would have been justified to wage a war that abided by the proportionality and knowledge constraints – but the war they *actually* waged did not abide by these constraints given the indiscriminate and disproportionate bombing of civilians. I do not deny, though, that Allied soldiers were justified in participating in this war – they, as individuals, were not obliged to wait until another more justified war was being waged in which to participate. *This* was the war they could participate in to resist the Nazis, and they were justified in doing so. Thus, given that I even deny that the Allied war against Nazi-Germany was justified, it will certainly not surprise the reader that I have severe doubts regarding the *jus ad bellum* credentials of most real wars. It is difficult to identify real wars that did not fall short.

Admittedly, however, I *am* more permissive regarding the participation of combatants in war. I grant that, and in fact explain why, they can often permissibly, justifiably participate even in *un*justified wars. Often, not always; and probably not even more often than not. There is, for instance, neither an ordinary-morality-based nor reciprocity-based justification for combatants to join an American invasion of Nicaragua to acquire its resources or territory, or join a German invasion of Sweden to acquire its resources, or to join an Iraqi invasion of Kuwait to acquire oil – let alone a justification to invade a country in order to enslave or even exterminate some ethnic group (whether this enslavement and termination will be carried out by the invading army itself or not). This means that combatants or potential combatants cannot be absolved of responsibility. They have to think hard before they join the cause. But once they do join the cause with good reason (or even without), they are by and large well advised to follow widely accepted laws or customs of war instead of taking their cues from some fundamentalist moral philosophy or doctrine – not even if that philosophy or doctrine happens to be liberal. This study gave some non-fundamentalist moral and philosophical reasons as to *why* this is the case. One final reason is that by co-operatively devising moral norms and abiding by them in times of war, one builds trust that is not only useful during war but also a basis to build upon for the time after war.

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