Proportionate Defense

1 Introduction

Proportionality in defense is a relation between the good and bad effects of a defensive act. Stated crudely, proportionality requires that the bad effects of such an act not be excessive in relation to the good. If this seems simple, the apparent simplicity is an illusion. The purpose of this essay is to explore some of the hitherto unappreciated complexities in the idea of proportionality. I will explain how a requirement of proportionality differs from a requirement of necessity, distinguish among various types of proportionality, and examine the ways in which proportionality in defense differs from proportionality in punishment. I will also suggest that certain good or bad effects may have less weight than others, or even no weight at all, in the assessment of proportionality. Finally, I will argue that proportionality is not just a matter of the consequences of action but is also sensitive to the ways in which consequences are brought about.

Although I will discuss proportionality in the law of private defense and the law of armed conflict, my main concern is with proportionality itself – that is, with proportionality as a moral constraint on action. I assume that acts of self-defense or defense of others can be disproportionate in the absence of law, and therefore independently of the law. That such acts are disproportionate is, I further assume, an objective moral fact that is independent of what we may believe or what our customs or practices are. Whereas proportionality constraints in law are statutory or customary in origin, proportionality constraints in morality are not designed but are discovered or discerned. Proportionality in morality is thus logically prior to proportionality in law and provides the standard against which proportionality constraints in law are to be evaluated. My aim in this essay is thus not to report how proportionality is understood in the law, or to suggest an interpretation of proportionality in the law, but to offer an understanding of the nature of proportionality as a constraint on defensive action that may help to guide the evaluation and possibly the reform of the ways in which proportionality is understood in the law.

2 Proportionality, Necessity, and the Opportunity Costs of Defensive Action

The concept of proportionality is often conflated with the concept of necessity, particularly in some of the legal literature, as I will indicate later. It is important, therefore, to clarify at the outset the precise nature of the distinction between a requirement of proportionality and a requirement of necessity as they apply to acts of defense.

The difference between necessity and proportionality is in the different comparisons they require. The determination of whether an act of defense is necessary as a means of avoiding a threatened harm requires comparisons between its expected consequences and those of *alternative means* of achieving the same defensive aim. An act of defense violates the requirement of necessity if there is an alternative act that has an equal or higher probability of preventing a threatened harm but would cause less harm in relevant ways. As with my crude statement of the requirement of proportionality, this simple formula conceals a great many complexities. For example, an act of defense may satisfy the requirement of necessity even if it would cause greater harm overall than some alternative defensive act, provided that it would cause less harm to those who are not morally liable to be harmed. And it is not strictly correct that an act of defense satisfies

the requirement of necessity provided there is no less harmful act that would have at least an equal probability of success. For there must be trade offs between the likelihood of success of different possible means of avoiding a threatened harm and the harms that these different means might inflict on innocent people as a side effect. An act of defense may be ruled out as unnecessary if, for example, there is an alternative act that would have only a slightly lower probability of success but would cause significantly less expected harm to bystanders. In this case, the significantly decreased harm to innocent bystanders might outweigh the slightly lower probability of success. But because my topic is proportionality rather than necessity, I will pass over these and other complexities in the requirement of necessity.[1]

Whereas necessity requires comparisons between an act of defense and alternative means of avoiding a threatened harm, proportionality requires a comparison between an act of defense and *doing nothing* to prevent the threatened harm. Another way of making this point is to say that necessity compares the expected consequences of an act of defense with those of other means of defense, negotiation, or retreat, while proportionality compares the consequences of an act of defense with those of submission or, in the case of third party defense, nonintervention.

This helps to explain why the failure of an act of defense to satisfy the proportionality requirement may be worse than a failure to satisfy the necessity requirement. If an act of defense satisfies the proportionality requirement but fails to satisfy the necessity requirement, there must be an alternative means of avoiding the threatened harm. But if an act of defense satisfies the necessity requirement but fails the test of proportionality, the potential victim has no morally permissible alternative but to submit to the threatened harm.

When an individual is threatened with attack, doing nothing to avoid the harm usually involves nothing other than being harmed. But in other cases, doing nothing to prevent a harm necessarily involves doing something else. For example, not engaging in third party defense, preventive defense, collective defense, or humanitarian intervention involves an individual or a state doing something other than engaging in defensive action. Yet there are indefinitely many things an individual or a state can do rather than defend another person or other people. Suppose, for example, that one state is considering conducting a humanitarian intervention in another state and the question arises whether the intervention would be proportionate. With which of the many courses of action the state could take were it not to go to war should its going to war be compared?[2]

One possibility is that the consequences of the state's going to war should be compared with the consequences of its doing whatever it would be most likely to do if it

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[1] For illuminating discussions of many of the subtleties and complexities in the requirement of necessity, see Seth Lazar, *Necessity in Self-Defense and War*, 40 PHIL. & PUB. AFFAIRS 3 (2012).

[2] This problem of specifying the relevant counterfactual situation with which the consequences of an act of defense must be compared was first noticed, to the best of my knowledge, by Gregory Kavka in *Was the Gulf War a Just War?*, 22 J. SOCIAL PHIL. 23 (1991). For an extended discussion of the problem, see David Mellow, *Counterfactuals and the Proportionality Criterion*, 20 ETHICS & INT'L AFFAIRS 434 (2006).

were not to go to war.[3] But this suggestion is vulnerable to various objections, one of which seems decisive. If what the state would be most likely to do if it were not to conduct the humanitarian intervention (for example, carry out a genocide) would cause more harm than the intervention would cause, the intervention would be proportionate no matter how much harm it would cause.[4]

Other terms of comparison might be suggested – for example, what the state would have been most likely to do among the permissible alternatives, or whatever would be the best of the permissible alternatives. But the first of these seems arbitrary, in that it makes proportionality depend on contingent inclinations, while the second would convert proportionality into a maximizing requirement. Thomas Hurka has proposed a different comparison – namely, that "we should compare the net effect of war with that of the least beneficial alternative that is morally permitted."[5] But suppose that the worst of a state's permissible alternatives to war would involve its working to collect debts owed to it by poor countries that it would not collect if it were to go to war. It seems arbitrary to suppose that the benefit to the poor countries of the state's going to war should weigh against the war's bad effects, such as the killing of innocent bystanders as a side effect of military action, in determining whether the war is proportionate.

Proportionality in defense does not, it seems, take account of either the opportunity costs (that is, the good effects the agent was prevented from causing) of defensive action, or the "opportunity benefits" (the bad effects the agent was prevented from causing, such as the further impoverishment of poor countries through the collection of debts). Proportionality, it seems, takes account only of good and bad effects that defensive action *causes*. It does not take account either of those effects it allows to occur, because engaging in the defensive action prevents the agent from being able to prevent them, or of those effects it allows not to occur because the defensive action prevents the agent from being able to cause them. Proportionality, in other words, does not require a comparison between entire possible worlds. It requires only a comparison between the relevant bad effects that defensive action (including war) would cause, either directly or indirectly, and the relevant good effects it would cause – in particular, the prevention of harms that would otherwise be caused by others. What a person or a state would or could do if he or it were not to engage in some defensive action is irrelevant to the determination of whether the defensive action is proportionate.

This is not to say that the opportunity costs (or benefits) of defensive action are irrelevant to the permissibility of the action; it is just that they are not relevant to *proportionality*. Nor are they relevant to necessity. Necessity is concerned with alternative means of achieving the *same ends* that some act of defense would be intended to achieve. But it may well be that an act of defense is impermissible because it excludes action that is morally required because it is necessary to achieve a *different* end. Suppose, for example, that a state has resources that are sufficient either to fight a just war of humanitarian intervention or to eradicate a fatal disease in a certain area of the world.

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[3] Kavka, *supra* note 2, defends this proposal.

[4] For this and other objections, see Jeff McMahan and Robert McKim, *The Just War and the Gulf War*, 23 CANADIAN J. OF PHIL. 501, 508 (1993).

[5] Thomas Hurka, *Proportionality and Necessity*, *in* WAR: ESSAYS IN POLITICAL PHILOSOPHY 127, 130 (Larry May, ed., 2008).

But its resources are insufficient to do both. If the state goes to war, it will prevent 10,000 innocent people from being wrongly killed. But if it uses its resources instead to eliminate the disease, it will save 100,000 people. It is at least arguable that even if the war would satisfy both the necessity and proportionality requirements, it would still be impermissible because the state is morally required to use its resources to eradicate the disease instead. This might be true even if both fighting the war and eradicating the disease would, considered separately, be supererogatory. For even if it were permissible for the state to do neither, it might be that if it decides to use its resources to do one or the other, it ought to do what would save 90,000 more lives, especially given that going to war would inevitably involve the killing of innocent bystanders as a side effect and the sacrifice of soldiers' lives, whereas eradiating the disease would involve the sacrifice only of money.

This is of course controversial. There is, I think, one type of case in which it is uncontroversial that one of two possible supererogatory acts is impermissible because the other is conditionally required. In this type of case, it is permissible, because of the cost involved, not to aid anyone. But suppose one decides to incur the cost by aiding someone. One then has two options. One can either prevent a certain harm to a person or prevent that harm and a further harm to the same person at no additional cost. Or, when there are many potential beneficiaries, one can aid only some of them or aid those and others as well at no additional cost. In cases such as these, while it is permissible not to prevent any harm, it is impermissible to prevent only some *rather than* all of the avoidable harm, for to prevent only some is to allow harm to occur when one could prevent it at no cost to oneself.

But few choices between an act of defense and some other beneficial act are like this. The usual situation is that the relevant alternative to preventing harm through a supererogatory act of defense is to prevent harm or provide benefits to entirely different people through a different supererogatory act. And it is less clear in such cases that there can be a requirement to choose the act of supererogation that would prevent the most harm or provide the greatest benefits. Yet it does seem plausible to suppose that if the difference between the amount of harm prevented by one supererogatory act would be very substantially greater than that which different people would be prevented from suffering by a different supererogatory act, and no other considerations (such as special relations) favor one over the other, it may be impermissible to prevent the lesser harm rather than the greater harm.

If that is right, just war theory must include a new principle of *jus ad bellum* that states the conditions in which war is impermissible specifically because it would exclude the pursuit of different, more important goals. But, while it may be necessary for just war theory to incorporate such a principle, the law of *jus ad bellum* cannot plausibly include a principle of this sort. It would be futile, and indeed counterproductive, to try to hold states legally liable for resorting to war solely on the ground that they could have done even more good by doing something else instead.[6]

3 Narrow and Wide Proportionality

[6] I have discussed the issue of war's opportunity costs with Victor Tadros but our views have developed, and to some extent converged, quite independently. For his views, see Tadros, *Unjust Wars Worth Fighting For*, J. PRACTICAL ETHICS (forthcoming).

Particularly in the legal literature, discussions of proportionality in individual self-defense are typically concerned with the question whether the harm the defender inflicts on the threatener is proportionate in relation to the harm the defender thereby averts. If, for example, the only way one can prevent oneself from being viciously pinched is to kill the potential pincher, the necessary defensive action would be disproportionate and one must submit to being pinched.

The literature on proportionality in war, by contrast, is almost exclusively concerned with the question whether harms that a war or act of war would inflict on innocent bystanders (usually identified with civilians) as a side effect of military operations would be proportionate in relation to the aims of the war or act of war. The harms that a war or act of war would inflict on enemy combatants are generally assumed to be irrelevant to questions of proportionality. This is true both in just war theory and in the law.

To the extent that people assume that proportionality in individual self-defense is a matter only of harm to aggressors, whereas proportionality in war is a matter only of harm to innocent bystanders, they are mistaken, at least as a matter of morality. There are in fact two distinct dimensions of proportionality.[7] One of these is concerned with harms inflicted on people, such as wrongful aggressors, who are potentially liable to be harmed. People sometimes act in a way (for example, by posing a threat of unjustified harm) that involves the forfeiture of their right not to be harmed – or at least their right not to be harmed in a certain way, for a certain reason. In some instances these people may deserve to be harmed; in others they may only be morally liable to be harmed. I will elucidate the difference between desert and liability in section 6. Here I will confine the discussion to liability. When a person is liable to be harmed, there is in practice a limit to the amount of harm to which he can be liable. (Thus, although there have been many people who have been liable to be killed, there has never been anyone who was morally liable to be tortured continuously for many years.) When a person is liable to be harmed in defense of someone he will otherwise harm without justification, but the harm the defensive act inflicts on him exceeds the maximum harm to which he can be liable, the act is disproportionate in what I call the *narrow* sense. Narrow proportionality is thus a constraint on a liability justification for harming.

The other dimension of proportionality is concerned with harms to which the victims are not liable at all. The most common form of justification for harming people who are not liable to be harmed is a lesser-evil justification. This label should not be understood literally. The claim is not that it can be justifiable to harm a person whenever doing so would prevent a greater harm, even if the harm prevented would be only slightly greater. Rather, the claim is that it can be justifiable to harm a person who is not liable to be harmed when that is necessary to avoid a *substantially* greater harm to another, or to others, who are also not liable to be harmed. Whereas a liability justification for harming a person involves his having forfeited a right not to be harmed, a lesser-evil justification applies when the victim's retained right not to be harmed is *overridden*. When an act inflicts harm on a person to which he is not liable and that harm exceeds what can be justified as the lesser evil, the act is disproportionate in the *wide* sense. (The labels "wide"

[7] The distinction between narrow and wide proportionality is drawn in JEFF MCMAHAN, KILLING IN WAR 15 (2009).

and "narrow" are intended to reflect the fact that in most situations there are more people who are not liable to be harmed than there are people who are liable to be harmed. The scope of harm to which people are not liable is therefore wider.)

People can sometimes make themselves liable to suffer defensive harm that is greater than the harm they would otherwise inflict. A person can, for example, make himself liable to be killed if killing him is the only way to prevent him from culpably torturing another person, even though death would be a greater harm than the torture. But while defensively inflicted harm that is greater than the harm it prevents can thus be proportionate in the narrow sense, it seems that it cannot be proportionate in the wide sense. It seems, in other words, that it cannot be permissible to inflict greater harm on a person who is not liable to be harmed as a means, or even as a side effect, of preventing a lesser harm to another person who is not liable to be harmed. (The only possible exception to this might be the infliction of a greater harm on a bystander as a side effect of preventing a somewhat lesser harm to someone to whom one is specially related in an important way, such as one's child.)

It is a corollary of this that the violation of wide proportionality is sufficient for impermissibility. That is, if there is no lesser-evil justification for harming a person who retains and has not waived her right not to be harmed, the infliction of that harm cannot be permissible. But the same is not true of narrow proportionality. An act of defense that is disproportionate in the narrow sense can nonetheless be permissible. It can be permissible if the harm it inflicts on the threatener beyond that to which he is liable can be justified as the lesser evil. Suppose, for example, that because of his partial responsibility for a threat of unjustified harm, a person is liable to be harmed up to degree x as a means or side effect of preventing the unjustified harm. But suppose further that the only way to prevent the threatened harm is to cause the person to suffer harm $x + n$. The infliction of the additional harm n would be disproportionate in the narrow sense. But if the harm for which he is partially responsible would be sufficiently great, there could be a lesser-evil justification for causing him to suffer the additional harm n as a means or side effect of preventing it. It would therefore be permissible to do the defensive act that would cause this person to suffer harm $x + n$. The harm up to degree x would have a liability justification while the additional harm n would have a lesser-evil justification. I call such a justification a *combined justification*.

The idea of a combined justification raises a potentially quite important question. Call the person who bears partial responsibility for the threat of an unjustified harm P_1. He is liable to be harmed only up to degree x. But to prevent the unjustified harm, it is necessary to inflict harm $x + n$. In the previous example, the additional harm n had to be inflicted on P_1. But suppose the unjustified harm could be prevented equally effectively by inflicting harm x on P_1 and inflicting the additional harm n on another person, P_2, who is in no way responsible for the threat of unjustified harm and is thus not liable to be caused any harm at all. If there is a lesser-evil justification for inflicting n on P_1, there should also be a lesser-evil justification for inflicting it on P_2. After all, neither of them is liable to suffer harm n. Is it then a matter of moral indifference whether it is inflicted on P_1 or P_2? Ought one to flip a coin? Or is there a reason to inflict it on one rather than the other?

The question here is similar to the question whether there is a moral difference between punishing a guilty person by a certain amount more than he deserves and

punishing a wholly innocent person by the same amount. Many people have the intuition that the punishment of an innocent person is worse than the overpunishment of a guilty person to an equivalent degree. It may seem, similarly, that it would be worse to inflict the additional harm *n* on P_2, who is not liable to any harm at all, than to inflict it on P_1, who is already liable to be harmed to some degree to prevent the harm for which he is partially responsible.

I am uncertain about this matter. But it is potentially quite important for the morality of war. Suppose, as I believe, that the criterion of liability to be harmed in war is moral responsibility for a threat of unjustified harm. When a state fights an unjust war, many civilians in that state bear some responsibility for the war and the unjustified harms it inflicts, though the degree of their responsibility is usually very slight. These civilians may therefore be liable to suffer a certain amount of harm, presumably quite small in most cases, as a means or side effect of thwarting their state's unjust aims. They might not, for example, be wronged by being made to suffer certain small harms as a result of the imposition of economic sanctions. Next suppose that the constraint against inflicting harms to which the victims are not liable is weaker in the case of those who are already liable to some harm than in the case of those who are not liable to any harm. In that case there would be a stronger lesser-evil justification for causing harms to civilians beyond the minor harms to which they might be liable than there would be to cause them those same harms if they were not liable to any harm at all. That is, combining the idea that civilians can be liable to some harms with the idea that harms that exceed the victim's liability count less than equivalent harms inflicted on wholly nonliable people leads to a more permissive view of the morality of harming civilians in war. This, to me, is disturbing.

One possible response for those who believe that a harm in excess of liability counts less than an equivalent harm to a wholly nonliable person would be to claim that the extent to which harms beyond liability are discounted varies with the degree of harm to which the victim is liable. On this view, a fixed harm beyond the harm to which the victim is liable has less weight if the victim is already liable to suffer great harm than it would if the victim were liable to suffer only a small harm. Then, assuming that most civilians in a state that is fighting an unjust war are liable at most to only relatively small harms, the acceptance of the view that harms beyond liability have less weight than equivalent harms inflicted on wholly nonliable people would not increase the moral vulnerability of civilians by much.

4 Narrow Proportionality in War

I noted at the beginning of the previous section that discussions of proportionality in the morality and law of individual self-defense tend to focus on the harm that defensive action inflicts on the threatener, so that these discussions are generally concerned with narrow proportionality only. But individual self-defense is also governed by a requirement of wide proportionality. It is just that it less frequently happens that individual self-defense harms or imposes unjustified risks on innocent bystanders. When, in 1984, Bernard Goetz shot four panhandlers in a New York subway car, he exposed other passengers who were trapped in the car to risks of harm that seem clearly excessive in relation to the threat of harm, if any, that he faced from the panhandlers. His repeated firings of the gun were thus instances of individual self-defense that were disproportionate in the wide sense (as well as in the narrow sense).

In contrast with discussions of proportionality in individual self-defense, discussions of proportionality in war tend to ignore harms to threateners – that is, combatants – and thus to take account only of harms inflicted on bystanders who pose no threat – that is, civilians. In both just war theory and the law of war, there is one set of principles that govern the resort to war (*jus ad bellum*) and another distinct set of principles that govern the conduct of war (*jus in bello*). In just war theory, each set contains a principle of proportionality. Thus, for it to be permissible for a state to resort to war, the expected bad effects the state's war would cause must not be excessive in relation to the importance of achieving the just cause for war, together with any other good effects that may weigh against the bad. Similarly, for each individual act of war to be permissible, its expected bad effects must not be excessive in relation to its expected good effects. The bad effects that count in the assessment of *in bello* proportionality are the same as those that count in the assessment of *ad bellum* proportionality – namely, harms to those who are "innocent," or not liable to be harmed. In the traditional theory of the just war, those who are not liable to be harmed are noncombatants (whom for present purposes we may identify with civilians, though the two categories are often defined in ways in which they are not coextensive). Proportionality in war is thus understood in the just war tradition as wide proportionality only. Narrow proportionality, which is concerned with harms to those who are liable to some degree of harm – combatants – is not recognized as a moral issue.

There are various mutually compatible explanations of why just war theory excludes harms inflicted on enemy combatants from the assessment of both *ad bellum* and *in bello* proportionality. Foremost among these is that the traditional theory assumes that all combatants are liable to be killed at any time during a state of war. That assumption leaves little scope for harming them in excess of the harm to which they are liable.

In law the situation is rather more vexed. Although there are references in the legal literature to the notion of proportionality in *jus ad bellum*, in neither statutory nor customary international law does there seem to be a legal prohibition of the resort to war when the war's expected bad effects would be excessive in relation to its expected good effects.[8] Certainly there is no suggestion that a war as a whole could be disproportionate in the narrow sense – that is, that it could be disproportionate, and therefore illegal, because the expected harm it would cause to *enemy combatants* would be excessive in relation to the importance of achieving the just cause, such as national self-defense.

There is, however, a statutory proportionality requirement in *in bello* law (sometimes referred to as the law of armed conflict or, more often, as international humanitarian law, or IHL). This requirement is in Article 51(5) of Additional Protocol I of the 1977 Geneva Conventions. It prohibits any "attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct

[8] For references to the notion of proportionality in *ad bellum* law, though with indications that the notion has no practical function, see JUDITH GARDAM, NECESSITY, PROPORTIONALITY, AND THE USE OF FORCE BY STATES, 14, 20, 22-23, 74 (2004).

military advantage anticipated."[9] This principle, to which I will return, is a principle of wide proportionality, in that it restricts only acts that are expected to harm civilians, who are not legally liable to attack. It says nothing about harms to those, such as enemy combatants, who are liable to attack.

It is widely held, however, that IHL also contains principles of proportionality that limit the harm that it is permissible to inflict on enemy combatants – that is, principles of narrow proportionality. It is even said that when proportionality was first introduced as a principle governing the conduct of war, its aim was the protection of combatants, and that a parallel principle aimed at the protection of civilians did not enter the law until later, after the ratification of the United Nations Charter.[10] Yet references in the legal literature to proportionality in the harming of enemy combatants seem, on inspection, to be claims about necessity rather than proportionality. The relevant statutes concern prohibitions of certain types of weapon. Consider, for example, an early agreement to prohibit certain weapons – the St. Petersburg Declaration of 1868. Its preamble contains these phrases:

> That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; That for this purpose it is sufficient to disable the greatest possible number of men; That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; That the employment of such arms would, therefore, be contrary to the laws of humanity.[11]

This is a clear statement of a requirement of necessity, which condemns weapons that inflict more harm on combatants than is necessary to disable them from participation in combat. Because the additional harms exceed what is necessary to achieve the legitimate aims of combat, they are gratuitous or wanton.

Statements such as this are the basis of subsequent regulations that prohibit certain weapons on the ground that they cause "superfluous injury" or "unnecessary suffering." An injury is superfluous when it involves more damage to the victim than is necessary to incapacitate him or render him *hors de combat* – for example, an injury that inevitably kills rather than merely disabling. And suffering is unnecessary when it exceeds whatever suffering is unavoidable in rendering a combatant *hors de combat*. When it is claimed that a weapon inevitably causes superfluous injury or unnecessary suffering, there is an implicit comparison with other weapons that could incapacitate enemy combatants equally effectively without inflicting the additional injury or suffering. And comparisons between one way of achieving an aim and alternative means of achieving that same aim are, one may recall, precisely what is required to test for necessity. Thus, according to one commentator, "the crucial question is whether other weapons or methods of warfare available at the time would have achieved the same military goal as effectively while causing less suffering or injury." This is a succinct statement of the test

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[9] *1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, in* DOCTRINES IN THE LAWS OF WAR 416 (Adam Roberts & Richard Guelff, eds., 1982).

[10] GARDAM, *supra* note 8 at 29 & 50.

[11] Quoted in *Id*. at 50-51.

of *in bello* necessity, yet it is quoted by another writer as a formulation of "the proportionality equation."[12]

There could scarcely be a clearer conflation of proportionality with necessity than a brief passage from the ICRC commentary on anti-personnel mines, which observes that it is a "basic rule" of IHL that "it is prohibited to use weapons which cause unnecessary suffering. Therefore, the use of weapons whose damaging effects are disproportionate to their military purpose is prohibited.[13] *In bello* proportionality in law is indeed, as Additional Protocol I makes clear, a relation between the expected "damaging effects" of an act of war and the "military purpose" it is expected to achieve. But this is quite different from the relation between the suffering caused by one means of achieving a military purpose and that which would be caused by alternative means of achieving that military purpose. It is this latter relation that determines whether the suffering caused by the one means is unnecessary. An act of war is disproportionate if the harm or suffering it causes is excessive in relation to the military advantage it provides. The same act of war is unnecessary if the harm or suffering it causes exceeds that which would be caused by an alternative, equally effective means of achieving the same military advantage (or a different military advantage of equivalent importance). These are entirely different judgments about the act of war, one based on a comparison between an act's good and bad effects, the other based on comparisons between its combined good and bad effects and the combined good and bad effects of alternative possible means of achieving the good effects.

Judith Gardam, whose book, *Necessity, Proportionality, and the Use of Force by States*, provides a scholarly survey of legal thought about proportionality in war, acknowledges that "the use of the term 'proportionality' in relation to the rules that regulate the means and methods of warfare for the protection of combatants has been criticised."[14] She goes on to observe, however, that "the relevance of proportionality to the assessment of weapons is borne out by the fact that many articulations of the test of superfluous injury or unnecessary suffering use this term," citing as an example the passage from the ICRC quoted in the preceding paragraph.[15] What this suggests is that the conflation between proportionality and necessity is quite systematic in legal thinking about proportionality in harms to combatants in IHL. As a consequence, it is doubtful whether IHL recognizes a genuine proportionality constraint on the harming of enemy combatants. I know of nothing in IHL that would rule out an act of war on the ground that the harm it would inflict on enemy combatants is too great to be justified by the military advantage the act would bring, given that it would afford *some* military advantage.

Although neither the traditional theory of the just war nor the law of war seems to recognize the possibility of narrow disproportionality either in the resort to war or in the

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[12] *Id*. at 69.

[13] ICRC, BANNING ANTI-PERSONNEL MINES: THE OTTAWA TREATY EXPLAINED 24 (1998).

[14] GARDAM, *supra* note 8, at 15.

[15] *Id*. at 69. In note 57 on page 15, she also remarks that "commentators constantly use the word 'proportionate' in relation to the regulation of weapons to protect combatants."

conduct of war, morality itself clearly imposes a proportionality constraint on expected harms to enemy combatants, both in the resort to war and in the conduct of war. This may seem an almost a priori truth. Most just war theorists assume that many combatants are liable to be harmed in war, though they differ in their accounts of the bases of liability. In my view, there cannot be a just cause for war unless the combatants whom it is necessary to attack to achieve the aims of the war are liable to be attacked.[16] But if many combatants are liable to be attacked in war, it seems that it must be possible to harm them in excess of the harm to which they are liable, just as this is possible in individual self-defense. Hence there must be a possibility of narrow disproportionality. Yet, as I noted, the traditional theory of the just war claims that all combatants are liable to be *killed* at any time in war. One might think that this entails that it is impossible to harm them beyond their liability.

There are two replies to this. One is the familiar point that there are harms worse than death, or at least worse than immediate death. Suppose a group of enemy combatants are occupying a relatively unimportant military facility. Gaining possession of the facility in an intact condition would confer a minor military advantage but the combatants occupying it cannot be killed or driven out in any of the ordinary ways without destroying it. The only way to take possession of the facility is to release a gas into it that will kill the combatants only after causing them to suffer incapacitating agony for a week. Even if these combatants are liable to be killed, they may not be liable to be killed in this way as a means of securing a minor military advantage.

The second reply is more important. It is that, as a matter of morality, not all combatants are liable to be killed during a state of war. I have argued at length elsewhere that "just combatants" who fight for a just cause, in a just war, and by permissible means are not morally liable to be harmed in any way.[17] I also believe, though I will not argue for it here, that not all "unjust combatants" who fight for an unjust cause in an unjust war are liable to be killed. There are some who pose only a minor threat of harm and are only minimally responsible for even that minor threat. They are not liable to be killed at all. And there are others whose liability to be killed is conditional on there being a limited number of them that would have to be killed to achieve a certain aim. If more than a certain number would have to be killed to achieve that aim, none may be liable to be killed. In the Falklands War, British combatants had to kill 650 Argentine combatants to preserve British sovereignty over the Falkland Islands, which had only 1800 inhabitants at the time. Perhaps those combatants were liable to be killed as a means of preventing the success of Argentina's aggression. But had it been necessary to kill an additional 100,000 Argentine combatants to secure victory, it is reasonable to believe that killing all of them would have been disproportionate in relation to the importance of preserving British sovereignty and hence that it would not have been permissible to kill any of them. In that case we should probably conclude that none of them would have been liable to be killed.[18] A parallel argument could be given for a proportionality restriction on

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[16] For elaboration, see Jeff McMahan, *Proportionality and Just Cause: A Comment on Kamm*, J. MORAL PHIL. (forthcoming).

[17] McMahan, *supra* note 7 at 7-15.

[18] For more on the ways in which narrow proportionality can be sensitive to the number of unjust combatants, see Jeff McMahan, *The Relevance to Proportionality of the*

individual acts of war that would kill a large number of unjust combatants when doing so would achieve no more than a minor military advantage.

From the fact that morality imposes a narrow proportionality constraint on the practice of war, it does not follow that either the law of *jus ad bellum* or IHL ought to include a narrow proportionality requirement. There are various reasons for thinking that the law ought not to mirror morality in this respect. I will mention only two. One derives from the fact that there is as yet no mechanism for the coordinated international enforcement of the prohibition of unjust war. It is therefore necessary for the deterrence of unjust war that victims of unjust aggression fight defensively rather than submit. And a legal *ad bellum* proportionality requirement, whether narrow or wide, that might inhibit defense against unjust aggression would therefore threaten to weaken deterrence. In determining whether the law ought to recognize any *ad bellum* proportionality constraint, this consideration would have to be weighed against the otherwise obvious appropriateness of the legal enforcement of the moral prohibition of disproportionate war.

The second reason for doubting that there should be a narrow proportionality requirement in the law of war is in tension with the first. It is that such a requirement would be pointless because it would not be taken seriously. It is hard to imagine any state refraining from engaging in an otherwise just war on the ground that the war would require harming enemy combatants to an extent that would be disproportionate in relation to the importance of achieving the just cause.

5 The Relation Between *In Bello* Proportionality and *Ad Bellum* Proportionality

Merely for the sake of simplicity, however, let us confine the discussion for the moment to wide proportionality in war, which has always been the focus of discussion in the moral and legal literature. Wide proportionality is proportionality in harms inflicted on people who are not liable to suffer those harms. According to traditional just war theorists, those who are not morally liable to be harmed in war are civilians. Similarly in international law, while combatants are legally liable to attack in war, civilians are not. Thus, in both just war theory and international law, the bad effects that must be outweighed if a war or an individual act of war is to be justified are primarily harms inflicted on civilians as a side effect of military operations. As I noted near the beginning of the previous section, the relevant bad effects are the same whether the assessment is of *ad bellum* proportionality or of *in bello* proportionality.

One would naturally suppose, therefore, that the relevant good effects against which these bad effects must be weighed would also be the same in both *ad bellum* and *in bello* proportionality. In that case, a war would be guaranteed to be proportionate if all its constituent acts of war would be proportionate. But in fact traditional just war theory weighs harms to civilians against one set of expected effects in assessing *ad bellum* proportionality and against a wholly different set of expected effects in assessing *in bello* proportionality. To the extent that the law of war recognizes a proportionality constraint on the resort to war, it must do the same.

In just war theory, *ad bellum* proportionality is a matter of whether the harms to civilians the war can be expected to cause are excessive in relation to the importance of

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Number of Aggressors, in THE ETHICS OF WAR: NEW ESSAYS (Saba Bazargan & Samuel Rickless, eds., forthcoming).

achieving the just cause for war, together with other relevant good effects (which I will discuss later in section 7). Suppose, for example, that one state has been wrongly invaded by another and that the only effective means of national self-defense will unavoidably cause extensive casualties among the aggressor state's civilian population. Just war theory asserts that defensive war is permissible only if the expected harm to enemy civilians will not be excessive in relation to the achievement of the just cause of defeating the wrongful aggression.

It is worth mentioning that some contemporary just war theorists argue that it is possible that a war could be permissible even in the absence of a just cause. These theorists interpret a just cause for war as providing a liability justification for the intentional harming and killing that war typically involves. They claim, that is, that there is a just cause for war only when those whom it is necessary to attack as a means of preventing or correcting a wrong are morally liable to be attacked as a result of their responsibility for that wrong.[19] But it is possible in principle, these theorists concede, that there could be a lesser-evil justification for a war fought against people who are not morally liable to be attacked. For a war of this kind to be proportionate, the good effects that it could be expected to achieve must substantially outweigh the harms the war would inflict on people who are not liable to be harmed (which in this case would include combatants on the opposing side). Such a war would be unjust, because it would infringe the rights of those warred against, but nevertheless morally justified. The rights infringed would be overridden.

I mention this possibility only for the sake of completeness and will not discuss it further. The important point here is that in virtually all actual cases of justified war, the expected harms to civilian bystanders must be weighed against the expected value of achieving the just cause to determine whether the war would be proportionate. If the aims of the war are unjustified, it is scarcely possible that the war could satisfy any plausible *ad bellum* proportionality requirement, as it would have few or no effects that could weigh against and counterbalance the inevitable harms to civilians. In short, a war that lacks a just cause, or at least a war that lacks justified aims, cannot satisfy the moral requirement of wide *ad bellum* proportionality.

Given that whether a war as a whole is proportionate depends on whether its expected good effects, which consist primarily of the effects that are constitutive of the achievement of the just cause, outweigh the harms it is expected to cause to civilians, one would naturally expect that just war theory's *in bello* proportionality constraint would require that the expected harms that an individual act of war would inflict on civilian bystanders be outweighed by the expected causal contribution the act would make to the achievement of the just cause, together with any other relevant good effects it might have. But traditional just war theory instead agrees with IHL that the expected harms from an act of war must be weighed against the military advantage the act can reasonably be expected to provide.

The situation in the law is similar to that in traditional just war theory. As we have seen, there is no generally recognized proportionality requirement – not even a requirement of wide proportionality – in the law of *jus ad bellum*. But if there were, it would almost certainly have to require that the expected harms to civilians not be

[19] See McMahan, *supra* note 16.

excessive in relation to the legally legitimate aim of the war, which would normally be national self-defense or collective defense against aggression. It could not require that expected harms to civilians be weighed against the type of effect that IHL requires they be weighed against – namely, military advantage. For a legal *ad bellum* proportionality requirement could not plausibly say that a war as a whole can be proportionate only if the harms it is reasonably expected to cause to civilians would be outweighed by the expected military advantage the war would provide. Military advantage is good only instrumentally, and what it is instrumental to is usually victory in war. Wars are seldom if ever fought only for the sake of achieving a military advantage, either over the state warred against or over other states that would be militarily disadvantaged by the defeat of the state warred against. *Ad bellum* proportionality therefore could not in general be a matter of whether the harms a war would inflict on civilians would be outweighed by the military advantage that would be gained through victory. Thus, if there were a substantive legal criterion of *ad bellum* proportionality, it could not weigh harms to civilians against the same type of effect against which they are weighed by the *in bello* proportionality requirement in IHL.

The reason why traditional just war theory cannot assess *in bello* proportionality by weighing the harms that an act of war would cause to civilians against the contribution the act would make to the achievement of the just cause is that it insists that combatants can permissibly fight in an unjust war, provided that they do not violate the principles that govern the conduct of war – that is, the principles of *jus in bello*. But this means that they can fight permissibly only if it is possible to fight in an unjust war without violating the *in bello* principles, such as the requirement of proportionality. This would not be possible, however, if an act of war that harmed civilians could be proportionate only if it made a contribution to the achievement of a just cause, or of other justified aims. For acts of war will not contribute to the achievement of justified aims if the war itself pursues only unjustified aims. It is therefore essential to traditional just war theory's claim that it can be permissible to fight in an unjust war that acts of war can be proportionate even in a war that has no morally justifiable aims. This is why traditional just war theory cannot assess *in bello* proportionality by weighing harms to civilians against an increase in the probability of achieving the aims of the war. It has to weigh harms to civilians against some kind of effect that both just and unjust combatants can consistently aim to achieve, such as military advantage.

The theoretical explanation of why the law of war also insists that *in bello* proportionality be assessed by weighing expected harms to civilians against expected military advantage is similar. But there is also a historical explanation. The law of war was developed gradually over a number of centuries. When states began to consolidate their power after the Treaty of Westphalia of 1648, it became increasingly possible to regulate the conduct of war through treaties and agreements among states. Restraints on the conduct of war, if observed by all, could work to the advantage of all. And compliance could be monitored by states and violations punished by reprisal. By contrast, restraints on the resort to war remained largely infeasible because, in the absence of any means of enforcement, observing them would often be against the interest of powerful states. This practical obstacle to restraining the resort to war was compounded by the continued evolution of the doctrine of state sovereignty, which eventually recognized the resort to war as a sovereign right of states. These developments discouraged efforts to

impose legal constraints on the resort to war, so that by the nineteenth century, *jus ad bellum* had effectively ceased to be an element in the law of war. Only *jus in bello* remained. Its principles, therefore, had to be formulated without reference to *jus ad bellum*. A criterion of *in bello* proportionality had to be found that was neutral with respect to the aims of a war. Military advantage was the natural aim against which harms to civilians could be weighed.

It is, however, highly problematic to suppose that *in bello* proportionality can be determined by weighing harms to civilians against military advantage. It allows, for example, for the bizarre possibility that a war that necessarily violates *ad bellum* proportionality, because all the aims it will successfully pursue are unjustified, could nevertheless consist entirely of acts of war that are proportionate, because in each case the military advantage afforded by the act would somehow outweigh the harms it would inflict on civilian bystanders. I say "somehow outweigh" because there is an even deeper problem here. Proportionality is essentially a requirement that the bad effects of an act be justified by being outweighed by other effects. And only an effect that is *good* can outweigh and thus justify the causing of one that is bad. Yet military advantage is not itself good, impartially considered. Its value is entirely instrumental and whether it is good or bad, impartially considered, therefore depends on the ends it is instrumental to achieving. Only if the aims of a war are justified, and therefore good, is military advantage instrumentally good. If the aims are unjustified, and therefore bad, military advantage is derivatively bad as well.

It seems, therefore, that the idea that an act of war can be proportionate if the harms it causes to civilians are outweighed by the military advantage it affords is incoherent in its application to wars that are unjust because they will achieve only aims that are unjustified. This is particularly clear in cases in which the aim of a war is to do something that is impermissible even under the principles of *jus in bello*: for example, genocide, which involves the intentional killing of civilians. In a war that is fought with the aim of committing genocide, military advantage is instrumental to the killing of civilians. The understanding of *in bello* proportionality in the traditional theory of the just war and in IHL therefore implies that an attack on a military target in such a war is proportionate if the civilian deaths it causes as a side effect are outweighed by the instrumental advantage it provides in enabling the perpetrators to kill other civilians. This is clearly unacceptable; so, therefore, is the understanding of *in bello* proportionality found in the traditional theory of the just war and in IHL.

This problem is easily remedied in just war theory by making the criterion of *in bello* wide proportionality the same as that in *ad bellum* wide proportionality – that is, by weighing the harms an act of war causes to civilian bystanders against the contribution that the act makes to the achievement of the justified aims of the war. This of course entails that acts of war that harm civilians in a war that has no justified aims cannot be proportionate in the wide sense. Because the satisfaction of wide proportionality is a condition of moral permissibility, it follows that it cannot be permissible to harm or kill civilians, even as a side effect, in a war that lacks a justifying aim.

The problem is far more difficult in law. I have elsewhere explored some possible solutions, with disappointing results, but will not rehearse those arguments here.[20]

6 Punishment and Desert, Defense and Liability

Proportionality is perhaps more familiar as a constraint on punishment than it is as a constraint on defense. It is therefore important to understand the ways in which proportionality in defense differs from proportionality in punishment.

As I mentioned earlier, proportionality in individual self-defense is normally assumed to be concerned only with the harm inflicted on the threatener by the defender – that is, it is assumed to be a matter of narrow proportionality only. A parallel assumption is generally made about punishment as well – that it is concerned only with harms inflicted on those who are punished. But this is a mistake that has had terrible consequences. Punishment often harms innocent bystanders as a side effect, just as military action in war does. This is particularly true of capital punishment. The death of a child is one of the worst misfortunes that a parent can suffer. And the death of a parent, perhaps especially by killing, can also be a dreadful misfortune for a child, particularly when the child is young. Yet capital punishment often inflicts these terrible harms on the parents or children of the person who is executed. This is an important moral reason in many cases to sentence an offender, no matter how evil or depraved, to life imprisonment rather than execution.

Proportionality in punishment is generally thought to be a relation between the wrongdoing a person has done in the past and the harm that is later inflicted on him as punishment. It is therefore essentially retrospective, in that it requires a comparison between past action and present harm. Disproportionate punishment inflicts harm that is excessive in relation to what the criminal has done in the past.

Many people assume that proportionality in defense, and particularly *ad bellum* proportionality in war, is similarly retrospective. During and after the Israeli invasion of Gaza in 2008, for example, many critics of the invasion claimed that it was disproportionate because the harms that the Israeli forces inflicted on Palestinian civilians were vastly excessive in relation to the harms that Palestinians in Gaza had inflicted on Israeli civilians, which provoked the invasion. These critics pointed out that the rockets that the Palestinians had fired into Israel had killed only a few Israeli civilians, whereas the invasion killed over a thousand Palestinian civilians.

If the Israeli attack on Gaza had been a *reprisal*, this way of assessing proportionality would have been appropriate. In law, a reprisal is a use of force intended to compel an adversary to halt or repair some breach of international law and it is generally held that the harm done by way of reprisal must be proportioned to the harm caused by the initial offense. In the International Criminal Tribunal for the former Yugoslavia, for example, the Trial Chamber ruled that "reprisals must not be excessive compared to the precedent unlawful act of warfare."[21] But it would be a mistake to conflate proportionality in reprisal with proportionality in defense. The aim of defensive

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[20] Jeff McMahan, *War Crimes and Immoral Action in War, in* THE CONSTITUTION OF CRIMINAL LAW 178 (Antony Duff, Lindsay Farmer, Sandra Marshall, & Victor Tadros, eds., 2013).

[21] *Prosecutor* v. *Kupresic*, Case Number IT-95-16-T_14. Judgment, January 2000, para. 535.

violence is the physical prevention of harm by a threatener. Proportionality in defense is therefore essentially prospective. It weighs the harms that an act of defense will *cause* against those that it will *prevent*. For this reason, the harms that Palestinians in Gaza had inflicted on Israeli civilians in the past were relevant to the proportionality of the Israeli invasion only insofar as they provided evidence of the Palestinians' intentions and capabilities in causing further harm in the future.

That proportionality in punishment is retrospective while proportionality in defense is prospective is only one difference between them. It is generally thought that another difference is that proportionality in defense is simpler, in that it is concerned only with weighing harms caused against harms prevented, whereas proportionality in punishment must take account of the mental elements in the crime for which punishment is imposed. Proportionality in punishment must take account not only of how much harm an offender caused but also the extent of the offender's culpability, for both of these considerations together determine how much harm the offender deserves. It matters, therefore, to how much harm an offender deserves as punishment what his motives and intentions were in committing the offense for which he is to be punished, what he knew or ought to have known, whether he acted recklessly or under duress, and so on.

That proportionality in defense does not take account of the mental elements that are essential to the determination of proportionality in punishment is a natural assumption for those concerned with proportionality in war, since it has been assumed that proportionality in war is wide proportionality only – that is, that it is concerned only with harms caused to civilians, who are not liable to be harmed. The mental states of civilians are clearly irrelevant to how much harm it can be proportionate to cause them as a side effect of military action. Yet the mental states of someone who is potentially liable to be harmed in certain ways are highly relevant to the determination of the degree of harm to which he is liable, and thus to how much harm it can be proportionate to inflict on him in defense. A threatener's mental states are, in other words, highly relevant to narrow proportionality. The degree of harm that it can be proportionate to inflict on a threatener in defense varies, for example, with the degree of his moral responsibility for the threat he poses and, in particular, with whether he is culpable and, if so, the degree of his culpability for posing the threat. If, as I argued in section 4, narrow proportionality can be a serious issue in war, then there is a dimension of proportionality in war that is sensitive to considerations of motive, intention, epistemic limitation, duress, and so on, just as proportionality in punishment is.

The main difference between narrow proportionality in punishment and narrow proportionality in defense is that while the former is concerned with harms that people allegedly *deserve*, the latter is concerned with harms to which people are *liable*. To understand the difference between narrow proportionality in defense and narrow proportionality in punishment, we must therefore understand the differences between desert and liability. Both desert and liability are corollaries of the forfeiture of rights, but the moral implications are different in the two cases.

It is generally agreed that to deserve to be harmed, a person must be culpable. Yet according to most accounts of the basis of liability to defensive harm, liability does not require culpability. There are, however, accounts of liability to defensive harm that claim that culpability is a necessary condition of liability. It is therefore not a conceptual

difference between desert and liability that the former requires culpability whereas the latter does not.

There are two main differences between desert and liability. The first is that a person can deserve to be harmed even when harming her will have no good effects other than the fulfillment of her desert, whereas a person cannot be liable to be harmed unless harming her will have good effects, such as the prevention of a harm that she will otherwise unjustifiably cause. There are several ways of making this point. One is to say that while giving a person what she deserves can be an end in itself, a person can be liable to be harmed only if harming her is a means or unavoidable side effect of bringing about some good effect, such as the prevention of a harm. It is a corollary of this claim that there is a necessity condition internal to the concept of liability. A person cannot be liable to be harmed in a way that is unnecessary for the achievement of some good effect.

Another way of making the same point is to say that liability is a matter of justice in the distribution of harm when *some* harm is unavoidable. Suppose, for example, that it is unavoidable that one person in a group of people will be harmed but it is a matter of choice which person it will be. If one person rather than any of the others is responsible for creating the threat, he is then liable to be harmed – though if harm could be avoided altogether, there would be no reason to harm him. By contrast, a person can deserve to be harmed even when further harm is wholly avoidable. Normally it is hoped that the infliction of deserved harm will, through defensive or deterrent effects, diminish the overall level of harm that people will suffer; but it is usually held that the infliction of deserved harm can be permissible even when it will not have any such good effects.

The second important way in which liability differs from desert is that the amount of harm a person is liable to suffer can vary with the circumstances whereas the amount of harm a person deserves to suffer cannot, or at least not in the same ways. The amount and perhaps even the kind of harm a person deserves to suffer is fixed by the nature of the wrongdoing of which he is guilty and the degree to which he is responsible for that wrongdoing. There is, of course, controversy in the philosophy of punishment about whether the nature of the wrongdoing that is the basis of desert can be a matter of chance – for example, whether a person who attempts a murder but fails as a result of conditions beyond his control deserves the same punishment as he would have if he had succeeded. But whatever position one takes on the relevance of luck to desert, it remains true that liability is vulnerable to chance in ways that desert is not.

Whereas the amount of harm a person deserves is fixed by the gravity of the wrong for which he is responsible and the degree to which he is responsible for it, these two factors do not determine the degree of harm to which a person may be liable but at most set a limit to it. There is always a limit to the amount of harm to which a person can be liable as a matter of defense. And it seems that this limit is determined by the amount of unjustified harm he will otherwise cause, together with the degree of his responsibility for the threatened harm. Yet there are various ways in which the amount of harm to which he is liable can vary beneath the limit. I will mention two.

First, the harm to which a person is liable can vary with the action of others. Suppose that, as I believe, liability to harmful preventive action arises from moral responsibility for a threat of unjustified harm. On that assumption, if I alone am responsible for the fact that either I or another person will unavoidably suffer a harm, then I am liable to suffer that harm. It does not follow that it is permissible, all things

considered, to impose it on me, for it is possible that liability can be outweighed by other considerations. But in the absence of other relevant considerations, I am liable to be harmed by the other person, or by a third party, if that is necessary to prevent the other person from becoming the victim of the threat for which I am responsible. Next suppose that I and the other person share responsibility for the fact that one of us must be harmed, but that the greater share of the responsibility is his. In that case, although I may bear as much responsibility as I did in the case in which I alone was responsible, it is the other person who is liable to suffer the harm, assuming that all of the harm must go to one or the other of us. That is, whether I am liable to suffer the harm depends on whether someone else's responsibility for the fact that someone must be harmed is greater than my own. If, furthermore, the unavoidable harm is divisible between the other person and myself, I may be liable to a share of the harm that is proportional to my share of the responsibility.

The amount of defensive harm to which a person is liable can also vary with the defensive options of others. Suppose, for example, that one person is charging toward another wielding a meat cleaver with the evident intention of lopping the other's head off. Suppose the only means of defense the potential victim has is a flame thrower. Assuming that chopping the intended victim's head off would be unjustified and that the threatener is morally responsible for the threat he poses, he is in these circumstances morally liable to be killed – that is, he has forfeited his right not to be killed. But suppose that in addition to the flame thrower, the potential victim happens also to have a pistol and is a skilled marksman. In that case the threatener is not liable to be killed but is liable only to be incapacitated by being shot in the leg. This example illustrates my earlier claim that there is a necessity condition implicit in the notion of liability, so that a person cannot be liable to suffer a greater defensive harm if the infliction of a lesser harm would have an equal or greater probability of fully achieving the defensive aim.

One implication of the fact that the harm to which a person is liable can vary in these ways though the harm a person deserves cannot is that a person can be liable to suffer far more harm, or far less harm, than he deserves. A driver who is momentarily distracted by the use of her mobile phone is liable to be killed if that is necessary to prevent her from running over a pedestrian, but she certainly does not deserve to be killed. Similarly, a person whose attempt at murder can be thwarted by knocking him unconscious is liable only to be knocked unconscious, though he may deserve a substantially greater harm.

In concluding this section, it is perhaps worth mentioning a challenge to the idea that there is a limit to the amount of defensive harm to which a person can be liable that is a function of two variables I cited – namely, the amount of harm the person will otherwise cause and the degree of his responsibility for the threat of that harm. It may initially seem obvious that a person who will otherwise inflict only a tiny harm on another person – for example, a brief, minor pain – cannot be liable to be killed as a means of preventing him from inflicting the harm, even if he is fully culpable for doing so, in the sense that no excusing or mitigating conditions apply to his action. Consider, for example, a person who would like to cause pain to his enemy, who is in no way liable to suffer any pain. The most this person can do, however, is to press a button that will cause his enemy to experience a barely perceptible pain for several hours. It seems that

while he is liable to be caused some small harm as a means of preventing him from doing this, he cannot be liable to be killed.

But now suppose that there are 999 other people who at the same time are also about to press a button that will have the same effect, so that these 1000 people's acts will together cause the one victim to suffer excruciating torture for several hours.[22] Suppose further that the one person with whom we began knows that the slight pain that he will cause will be added to the pains caused by the 999 others, so that he knows that he will be making a tiny contribution to the torture of his enemy. Indeed, each of the 1000 knows that the other 999 will press their buttons at the same time, so that the effect of their combined acts will be the torture of one innocent person, and each of the 1000 is motivated to press his or her button by a malicious desire to inflict pain on the innocent victim. Suppose, finally, that the potential victim, or a third party, can kill all 1000 people before they push their buttons. It is not possible, however, to kill fewer than all 1000. Either they will all be killed or the one innocent victim will undergo a horrible torture.

I know of no one who believes that it would be permissible to kill the one button pusher in the first case in which he alone will inflict a minor pain on one person. But some people, including one eminent moral philosopher with whom I have discussed this problem, believe that in the second case it would be permissible to kill all 1000 culpable button pushers in defense of the victim. Since it is worse for 1000 people to die than for one person to suffer intense agony for several hours, the justification – if there is one – for killing the 1000 button pushers cannot be a lesser-evil justification. In fact, there is no kind of justification it could be other than a liability justification. It seems, therefore, that those who believe that it would be permissible to kill all 1000 culpable button pushers to prevent them from together torturing their single victim must reject the idea that there is a limit to the amount of defensive harm to which a person can be liable that is fixed by the amount of harm he will otherwise cause and the degree of his responsibility for the threat he poses. For the harm the one button pusher will cause and the degree of his responsibility are the same in the two cases, yet those who believe the pusher is liable to be killed in the second case cannot plausibly believe that he is liable to be killed in the first case.

I do not have an intuition about the second case in which I have confidence. This seems to me a type of problem about which our intuitions cannot be expected to be reliable. It is a type of case for which we need guidance from a moral theory. But to the extent that I have an intuition, it is that it is not permissible to kill any of the malicious button pushers. Since this does not seem to be a case in which they are liable to be killed but the liability justification is defeated by other considerations, my tentative view is that none of them is liable to be killed. This is not because I think that whether a person is liable to be killed cannot depend on what other people are doing. As I just noted, I think it can; indeed, there are, I believe, cases in which a person is not liable to be killed if he acts alone but becomes liable to be killed if he does the same act when others are doing it

[22] This example is obviously indebted to case of the harmless torturers in DEREK PARFIT, REASONS AND PERSONS 80 (1986). The difference is that in Parfit's case, each of the 1000 button pushers causes a very slight pain to each of 1000 victims.

as well.[23] The reason why it seems to me that none of the button pushers is liable to be killed is simply that each will otherwise cause only a tiny harm, so that killing any one of them would do no more than reduce one person's pain by a barely perceptible amount. Killing any one of them therefore cannot be proportionate in the narrow sense; hence none of them is liable to be killed. This is what seems right to me, though many would disagree.

7 The Deontological Nature of Proportionality

It is often said that proportionality is the consequentialist element in doctrines of self-defense and just war. But if this is meant to indicate anything more than that proportionality is concerned with the consequences of action, it is highly misleading. The assessment of proportionality involves a great deal more than simply aggregating harms and benefits to see how the sums compare. It instead takes into account various principles and distinctions found in deontological ethics. In this final section I will examine some of the ways in which the weighing of harms and benefits in the assessment of proportionality is complicated by deontological considerations.

Thomas Hurka, author of several seminal and important articles on the nature of proportionality, was among the first to identify some of the deontological elements in proportionality and to appreciate just how extensive they are.[24] Much of the discussion in this section draws its inspiration from his work, though it also takes issue with some of his explanations of the non-consequentialist dimensions of proportionality. One of Hurka's claims is that certain harms caused by war are either excluded from or discounted in the assessment of proportionality, but there are reasons for doubting whether this is right. He says, for example, that "if an aggressor nation's citizens will be saddened by its defeat, that does not count at all against a war to reverse its aggression."[25] Perhaps this is right. If so, the explanation is probably that this is an instance of a type of harm that people have no right not to be caused to suffer. Another instance is the frustration that a man suffers when the threat of punishment effectively deters him from engaging in child molestation. If this is the only kind of sexual fulfillment he could enjoy, it seems that he is harmed by being forced to live without it. But because he has no right not to be forced to endure this deprivation, his frustration does not weigh at all against the establishment and enforcement of the law.

This may not, however, be the right explanation in the case of sadness caused by defeat. Compare the sadness that parents on the unjust side in a war experience when their child is killed in combat. If their child is liable to be killed, perhaps they have no right not to be caused to grieve at his death. Yet it seems that *this* sadness must count in assessing the proportionality of an otherwise just defensive war. It counts in the assessment of wide proportionality. It may be that Hurka's example appears to be a type of harm that does not count at all only because it is too trivial a harm to be taken

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[23] Jeff McMahan, *What Rights May Be Defended by Means of War?, in* THE MORALITY OF DEFENSIVE WAR section 6.7 (Cécile Fabre & Seth Lazar, eds., 2014).

[24] Hurka, *supra* note 5; also *Proportionality in the Morality of War*, 33 PHIL. & PUB. AFFAIRS 34 (2005), and *The Consequences of War*, in ETHICS AND HUMANITY: THEMES FROM THE PHILOSOPHY OF JONATHAN GLOVER 23 (N. Ann Davis, Richard Keshen, & Jeff McMahan, eds., 2010).

[25] Hurka, *supra* note 5 at 135.

seriously in a context in which there are so many incomparably greater harms that have to be taken into account.

Hurka also suggests that harms inflicted on enemy combatants must be "discounted" both in the assessment of *ad bellum* proportionality and perhaps even more so in the assessment of *in bello* proportionality. Yet this way of understanding the matter seems to derive from the failure to distinguish between narrow and wide proportionality. If there were only one proportionality constraint that applied equally to harms to culpable aggressors and harms to innocent bystanders, then at least those harms inflicted on combatants fighting for unjust aims in an unjust war would have less weight than equivalent harms inflicted on civilian bystanders. One could understand their lesser weight as a form of discounting. But once it is recognized that narrow proportionality is distinct from wide proportionality, harms inflicted on unjust combatants can be understood as counting fully in the assessment of narrow proportionality but nevertheless being fully proportionate in relation to the combatants' liability. They only seem not to count because they are fully justified by the combatants' liability to suffer them.

While Hurka believes that only a few types of harm are excluded from or discounted in the assessment of proportionality, he argues that "there are many types of benefit that are irrelevant."[26] He cites various examples: the pleasurable excitement that one's own soldiers might get from combat, the stimulation of creativity in artists who will produce more profound works of art, and economic benefits, such as the US's recovery from the Depression as a result of World War II.[27] Yet in determining whether or how such benefits might count in the assessment of proportionality, it is again essential to distinguish between narrow and wide proportionality. Consider economic benefits, which Hurka says "seem incapable of justifying war" even when they are substantial. "An otherwise disproportionate conflict cannot," he says, "become proportionate because it will boost gross domestic product."[28] But he later qualifies this judgment by distinguishing between different ways in which a benefit may be caused in war. He argues that if an economic benefit "results from a means to the war's just cause," it does not count in the assessment of proportionality. But if "the benefit results from the achievement of the war's just cause itself," it does count. His contention, in short, is "that economic goods count when they are causally downstream from a war's just cause, but not when they result only from a means to that cause."[29]

This seems an inadequate explanation and justification of the intuitions that Hurka is trying to defend. Indeed, Hurka himself supplies a counterexample: "If a nation's citizens get pleasure from its military victory, that seems irrelevant to the war's justification even if the pleasure results from the nation's achieving a just cause."[30] There is, however, a different explanation of why some economic benefits count in the assessment of narrow proportionality while others do not. Consider two instances of economic benefits resulting from the same war. First, a state's just war of defense against an aggressor state requires that it make substantial purchases of expensive

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[26] *Id*.
[27] *Id*. at 131.
[28] *Id*.
[29] *Id*. at 133.
[30] *Id*. at 134.

armaments from a third state, thereby stimulating that third state's economy. Second, the first state's defeat of the aggressor involves the overthrow of its despotic regime, which has been forcibly imposing damaging economic constraints on a neighboring state. As a result of the regime's overthrow in the war, the neighboring state's economy begins to flourish. Hurka would say that the economic benefit from the arms sales does not count in the assessment of proportionality because it results from the means to the achievement of the just cause, but that the economic benefit to the neighboring state from the removal of imposed economic constraints does count because it results from the achievement of the just cause itself.

A better explanation, at least with respect to narrow proportionality, is that the benefits from the arms sales do not weigh against the harms to the aggressors because the aggressors are in no way responsible for the fact that the third state has lacked the benefits of those sales. Only if the aggressors were responsible for the absence of those benefits would they be liable to be harmed as a means of providing them. By contrast, the economic benefits to the neighboring state do weigh against the harms to the aggressors because the aggressors are responsible for the conditions that prevented the neighboring state's economy from flourishing. The aggressors are therefore liable to be harmed as a means of eliminating the harmful economic constraints they have unjustifiably imposed.

There remains the question whether either of these economic benefits can weigh against harms to people who are not liable to those harms in the assessment of wide proportionality. Hurka's distinction between benefits that result from means to the achievement of the just cause and those that result from the achievement of the just cause seems irrelevant to whether the economic benefits can weigh against harms to nonliable bystanders. The question whether an economic benefit produced by the state fighting a just war can help to justify harms it causes to innocent bystanders as a side effect in the course of the same war seems unaffected by whether the benefit derives from the fighting or from the victory.

Yet there does seem to be one way in which either of the two economic benefits – the arms sales or the lifting of wrongly imposed economic constraints – can weigh against harms to nonliable people in the assessment of wide proportionality. These benefits can offset or compensate for economic harms suffered by the same people who receive the benefits. Suppose, for example, that a military operation by the state fighting a just war will have as an unavoidable side effect the destruction of an unoccupied warehouse in the territory of the third state that contains a stockpile of advanced and therefore expensive weapons. It seems that this economic harm should count against the military operation in the assessment of wide proportionality. But it also seems that it can be offset and rendered proportionate by the economic benefits that the owners of the warehouse are deriving from the increased sale of arms.

It may seldom happen, though, that civilians who suffer a certain type of harm as a side effect of military operations in war also receive benefits of a corresponding type as a further side effect. In practice whatever benefits are produced as a side effect of war usually go to different civilians from those who are suffer harms as a side effect. (Indeed, the benefits often go to civilians on one side while the harms go to civilians on the other.) And here Hurka's intuitions about economic benefits seem correct. It may be doubtful, for example, that economic benefits to some nonliable civilians can weigh against and

cancel economic harms to others. And it seems even less likely that economic benefits to some can outweigh and render proportionate certain other types of harm – such as death and wounding – inflicted as a side effect on others. But this is not, as Hurka suggests, because economic benefits as a type do not count at all in the assessment of proportionality, or that they count only when they are side effects of the achievement of the just cause. As we have seen, they do count in some instances, such as when they compensate the victims of economic harm. The issue seems to be the quite general issue of when acts that harm some people are rendered permissible because they also provide benefits for others.

There are many dimensions to this issue, which is much too large to be more than superficially addressed in the remainder of this article. But it is worth mentioning a few distinctive elements of deontological morality that seem highly relevant to the ways in which harms and benefits weigh against one another in the determination of narrow and wide proportionality.

One consideration that seems relevant to the weighing of harms and benefits is whether what is called a "benefit" is the conferral of a pure enhancement – for example, making the already affluent even more affluent – or the prevention or elimination of a harm – for example, preventing civilians from being wounded or releasing political prisoners from captivity. Benefits of the latter type are more likely than those of the former to weigh against harms inflicted as a side effect. (Similarly, a "harm" may have greater weight if it involves causing people to be in an intrinsically bad state, such as a state of suffering, than if it involves only a loss that leaves the victims in a good state overall, such as a modest financial loss suffered by the highly affluent.) Some philosophers have argued that even when a harm and a benefit go to the same person, the ability of the benefit to outweigh the harm depends in part on whether it takes the form of a pure enhancement or involves the prevention of a harm.[31]

There are also various ways in which the weight that a benefit or harm has in the assessment of proportionality may depend on the way in which it is brought about. It seems to make a difference, for example, whether a harm to a person who is not liable to suffer it is inflicted as an intended means of achieving a goal in war or as an unintended but foreseen side effect of military action. Traditional just war theorists generally claim that intentionally harming or killing civilians as a means is ruled out by the requirement of discrimination, so that the issue of whether such harms can be rendered proportionate by outweighing benefits does not arise. But very few people, and very few moral philosophers or just war theorists, are genuine absolutists about discrimination. Most of us accept that it can be permissible to harm or kill a wholly innocent or nonliable person as a necessary means of preventing a much greater harm to other innocent people. That is, we accept that there can, in rare conditions, be what I call a lesser-evil justification for the harming or killing of a person who retains her right not to be harmed or killed. But the proportionality constraint governing such acts is significantly more demanding than that which governs the harming or killing of a nonliable person as an unintended side effect. It may help to elucidate this claim to offer an illustration that presupposes an admittedly artificial and unrealistic degree of precision. Suppose that it would be

[31] Seana Shiffrin, *Wrongful Life, Procreative Responsibility, and the Significance of Harm*, 5 LEGAL THEORY 117 (1999).

proportionate to kill five innocent people as a side effect of action necessary to save 100 innocent people but that it would be disproportionate to kill six innocent people as a side effect of saving 100. It would then be clearly disproportionate to kill five innocent people as a means of saving 100 and might be disproportionate to kill five even as a means of saving 300. But it would be permissible to kill five as a means of saving 10,000.

It is particularly wide proportionality that is sensitive to the mode of agency by which harms and benefits are produced. It is sensitive not only to the distinction between means and side effects but also to the distinction between doing harm and allowing harm to occur. Thus, an act of war that causes a certain amount of harm to innocent people as a side effect is not rendered proportionate in the wide sense just because it also prevents an equivalent, or even somewhat greater amount of harm to other innocent people. Suppose, for example, that by destroying a certain military target, just combatants can prevent 20 innocent civilians from being killed. But the strike on the target will unavoidably kill 10 different innocent civilians as a side effect. This attack would be disproportionate even though it would save twice as many civilians as it would kill. This is because of the moral asymmetry between killing people and allowing them to die, or allowing them to be killed.

Next consider a variant of this example. Suppose that the strike on the military facility that would prevent 20 innocent civilians from being killed would not kill any civilians as a side effect. But it would kill 10 enemy combatants (who are on the unjust side). Suppose that these combatants have two roles: they alternate between fighting and serving as medics. Today they are fighting but tomorrow each them is scheduled to perform a life-saving surgery on a civilian. If these 10 combatant-medics are killed today, the 10 civilians whom they would have saved will die in the ensuing days. It seems that in this case, in contrast to the previous one, it is proportionate to strike the military target, even though in both cases the strike will result in the deaths of 10 civilians as a side effect. The explanation of why the strike is disproportionate in the first case but proportionate in the second is that in the first case it kills 10 innocent people whereas in the second it prevents 10 innocent people from being saved. And the constraint against killing people is stronger than the constraint against preventing people from being saved.[32] (These constraints can of course interact with others. It might be, for example, that if the number of people who could be saved were high enough, it would be proportionate to kill 10 innocent civilians as a side effect of saving them but disproportionate to intentionally prevent 10 people from being saved as a means of saving them.)

I will conclude by noting one further way in which considerations of agency seem to affect the assessment of proportionality. Suppose that Aggressia, a state that is fighting an unjust war, sincerely threatens that if its adversary, Justitia, continues to fight, it will destroy the capital of its adversary's closest ally with a nuclear weapon. Suppose that in the absence of this threat, it would be clearly proportionate for Justitia to continue to fight. The question is whether the fact that Aggressia will kill millions of innocent people if Justitia continues to fight can make it disproportionate in the wide sense, and therefore impermissible, for Justitia to continue. What is distinctive about this issue is

[32] See Matthew Hanser, *Killing, Letting Die and Preventing People from Being Saved*, 11 UTILITAS 277 (1999).

that what might make the action of one agent disproportionate is the action of another. In the moral philosophy literature, this is referred to as the *problem of intervening agency*.

There are three broad responses to this problem. One is that whether an agent's action is proportionate in either the wide or the narrow sense cannot be affected by the consequences of the action of other agents. Agents cannot be responsible for what other free agents choose to do. It is, however, hard to believe that this could be right. Decision makers in Justitia know that if they decide to continue to fight, their ally's capital city will be destroyed, whereas if they cease to fight, it will not be. These facts *must* be relevant to the permissibility of continuing to fight, and the way they are relevant is through their effect on proportionality.

The second response is to treat the acts of others as if they were natural forces. To the extent that it is predictable that another agent will inflict a harm if one does a certain act but not if one refrains from doing the act, that harm should count in the assessment of proportionality in just the way as an equivalent harm one's act might cause through purely physical processes, with no intervening agency. Yet this too is hard to believe. If whether an agent causes or allows a harm to occur can affect that weight that the harm has in the assessment of wide proportionality, then whether the agent causes a harm or another agent causes it must also make a difference.

The third response is that harms that an agent's action provokes through the intervening agency of others must count in the assessment of wide proportionality but must have a somewhat discounted weight in relation to equivalent harms of which the agent's action would be the proximate cause. This seems more plausible than either of the other more extreme positions.

There are various other complexities in the proportionality restrictions on defensive action that I cannot discuss here. I hope, however, to have revealed some of the intricacies in the notion of proportionality. Until these hitherto unappreciated dimensions of proportionality are taken into account, discussions of proportionality in self-defense and war will continue to be inadequate and misleading.[33]

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