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Partially Culpable Combatants   **Saba Bazargan**

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1.

Orthodox moral and legal thought prohibits intentionally killing civilians, and permits intentionally killing combatants. Much of the work done by just war theorists over the past decade is aimed at undermining this orthodoxy. Those working on the morality of war have argued that the doctrine of the moral equality of combatants is mistaken, in that it is morally impermissible to target combatants who are fighting in furtherance of a just, necessary, and proportionate aim. Likewise, some have argued that civilians can, at times, be intentionally targeted, either because doing so is necessary to avert a catastrophic harm, or because some civilians bears significant moral responsibility for unjust aims that their country is pursuing.

We can characterize the revisionary project as that of narrowing the allegedly 'impassable gulf' between civilians and combatants: the lives of the former are not as sacrosanct as have been thought, and the lives of the latter are similarly not as expendable. Civilians and combatants are morally closer than what we might assume from a naïve or superficial reading of international law. This revisionary project is 'reductive' in nature in that assumes that morality is 'all of a piece': the moral principles determining permissible self- and other-defense between individuals (in a state of nature) morally constrain conduct in warfare as well.

I agree with this reductive approach to the morality of war as well as its implications (such as the falsity of the doctrine of moral equality of combatants, which has come under withering criticism for over a decade). I will not here defend the reductive approach; instead, I will argue that the project does not go far enough. I aim to narrow the impassable gulf between combatants and civilians even further. I do so here by arguing that combatants who are furthering unjust aims are often not morally liable to be killed. This will have substantial implications for jus ad bellum calculation of proportionality, which partly determines whether the resort to or continuation of a war is just.

A war satisfies proportionality just in case the harms it imposes are not disproportionate relative to the relevant good it achieves. It is clear that the death of innocent non-combatants should be awarded substantial weight in such a calculation. But how should the death of unjust combatants be weighed -- i.e., combatants whose participation in a war is wrongful on the grounds that it does not promote any

just aims? I will argue that such deaths should receive substantially greater weight than has been thought. This is because often such combatants are only partially culpable for their wrongful participation in war. The upshot will be that satisfying the jus ad bellum constraint of proportionality is a lot more difficult than has been thought.

Before I begin, I will clarify some terminology. These clarifications are precise only to the extent necessary for presenting the arguments in the paper; they are not meant to be exact. An *unjust combatant* is a combatant who is furthering only unjust aims. A person is *morally liable* to a harm just in case her has done something to forfeit a right to be harmed in that way, where imposing that harm is necessary for averting some wrong for which her is at least partly morally responsible. A person's rights are *violated* when a) we wrong her by imposing harms upon her to which her is not morally liable, and b) we do so impermissibly. A person's right is *infringed* (as opposed to violated) when there is a consequentialist moral justification for wronging that person. (I am leaving 'culpability' unanalyzed).

2.

Liability-based justifications for killing aggressors who pose wrongful harms (i.e., 'wrongful aggressors') have become prominent in the last decade. According to liability-based views, wrongful aggressors are morally liable to be killed if necessary to avert the threat they pose so long as the aggressor is culpable for their unjust aggression. (Some argue that the aggressor need not be culpable; it is enough that they are attributively responsible for the a harm which is in fact wrongful. Though I support these 'responsibility-based' accounts, here I focus on the more conservative 'culpability-based' accounts of liability). There is, then, a moral asymmetry between wrongful aggressors and their potential victims: the potential victim (or a third party) – but not the aggressor – is morally permitted to engage in defensive violence. This is, fundamentally, what explains why the moral equality of combatants is mistaken, as a moral doctrine.

According to supporters of the liability-based view, the degree of defensive harm to which an individual is potentially liable becomes greater as her moral responsibility for that harm increases. So all things being equal, a wrongful aggressor who is partially excused for her conduct is liable to less severe defensive harm than someone whose wrongful aggression is wholly inexcusable. Put in the jargon of the literature on self-defense, culpability affects the stringency of the narrow proportionality constraint. This constraint says that the amount of harm imposed on a wrongful aggressor cannot be too great

relative to the wrongful harm that it averts. So, for example, if the only way to prevent someone from stealing a dollar from you is to kill her, doing so would be impermissible on the grounds that it violates the constraint of narrow proportionality.

Partial excuses affects the narrow proportionality constraint in that we might be morally required to absorb some wrongful harm or risk of wrongful harm when defending ourselves against partially culpable aggressors (PCAs). A PCA is someone who is culpable for posing or contributing significantly to a wrongful harm, but whose culpability for the wrong is substantially diminished -- though not eliminated -- by mitigating circumstances. (Unless stated otherwise, I will assume that the PCAs considered here are posing lethal threats).

For example, suppose that an individual at a dive bar has been involuntarily drugged. The drug makes her far more aggressive than she would otherwise be, but not to an extent that an individual of normal fortitude would be unable to resists its effects. But this individual has always has an affinity for aggression. She fails to resist the effects of the drug, and consequently lunges at an innocent with a knife, clearly intending to kill him. The aggressor qualifies as a PCA – she bears some culpability for the lethal threat she poses, but her culpability is mitigated by the fact that she was involuntarily drugged. Suppose that I am a bystander; I know she has been drugged. (There have been a rash of such druggings, and the local community has learned to recognize the relevant symptoms). Suppose that, as an armed bystander, I have three choices: 1) I can do nothing, thereby allowing the PCA's victim to almost certainly be killed, 2) I can intervene by shooting the PCA in the head, or 3) I can intervene by shooting the PCA in the leg, which will probably stop her from killing her innocent victim. Option 2 is more likely to stop the PCA, thereby saving her innocent victim's life, but it is also more likely to kill the PCA. I might be morally required to aim for her leg, even though this puts her victim at some risk. If the aggressor were *fully* culpable, however, then I would not be required (or perhaps even permitted) to take the risk --- I would be permitted to kill the PCA. This is a claim about narrow proportionality.

But now consider an alternative version of the story. Suppose that the *only* way I can avert the threat that the PCA poses is by killing her. Merely wounding her by shooting her in the leg is not an option. Some, such as Jeff McMahan, maintain that the aggressor is morally liable *to be killed* in these circumstances, even though she is partially excused. This is because the culpable aggressor bears some blame for imposing a wrongful harm on me; it is fairer that she rather than her victim suffer the cost of

averting the wrongful harm. The reasoning does *not* permit me to aim for the aggressor's head when I have the option of aiming for her leg, because, ideally, a *partially* culpable aggressor would be liable only to the amount of defensive harm concomitant with the degree of culpability she bears. If the risk to her victim in shooting the PCA's legs is small, it would be a greater miscarriage of justice to shoot the PCA in the head than it would be to force the victim to take on the risk resulting from shooting the PCA in the leg. But where shooting her in the leg is not an option, it is a greater miscarriage of justice to allow her to kill her victim -- a non-culpable innocent -- that it would be to kill the aggressor.

I will call this the "strong culpability-sensitive account of narrow proportionality" (i.e., "the strong account"). Though the strong account purports to leave theoretical space for culpability to determine the severity of the harm to which a threat is liable, it turns out on that account that anyone who is *at all* culpable for posing a lethal threat will be liable to be killed if that is the only way to stop them. This account, in my view, is draconian -- it effectively allows us to ignore the degree to which an aggressor is culpable when the only way to stop an aggressor is to kill her.

It isn't merely a brute intuition that leads me to believe that the strong account is too strong. I think, in addition, it follows from a closer investigation of liability. Recall that to be morally liable to a harm is to have done something to forfeit your right to be harmed in that way. But what is it we must have done to forfeit such a right? There is an analogy here with *consent*. What counts as a valid token of consent varies with what the agent is consenting *to*. Suppose that I show up for my annual doctor's appointment mildly intoxicated -- I have been drinking. The doctor asks to take my blood-pressure. My acquiescence counts as valid consent despite that I am mildly intoxicated. This is because what is at stake in consenting is quite low -- at worst, I risk a mild form of battery. But now suppose the doctor discovers some medical problem and informs me that I need to decide whether to undergo a risky surgery. If I am mildly intoxicated, my ostensible expression of consent does *not* count as valid consent; that is, I cannot give valid consent to a risky surgery when I am mildly intoxicated, despite that I can indeed give consent to having my blood pressure taken. This is because the stakes are much higher with a risky surgery: performing non-consensual risky surgery on someone is a grievous harm. The general lesson here is that the more severe the harm to which I am ostensibly consenting or the more significant the right that I am waiving, the greater the quality of the consent required on my part. *If an ostensible expression of consent is to succeed in waiving an important and fundamental right, then I have to be able to critically reflect on the decision I am making.* So whether an ostensible expression of consent succeeds in waiving

a right depends on the degree to which the agent was able to critically reflect on her decision, and on the importance of the right ostensibly waived; the two generally co-vary in that the greater the importance of the right ostensibly waived, the greater the degree to which the agent must be able to critically reflect on her decision.

Now consider the conditions under which a right is *forfeited*. Unlike cases of consent, when I forfeit a right I do not intentionally alienate myself from the right in question. Rather, the alienation is an undesired consequence of something else I do, such as attacking someone else, or attempting to commit theft. But as with consent, whether an act entails the forfeiture of a right depends on the degree to which the agent was able to critically reflect on her decision to commit that act, and on the importance of the right forfeited; the two generally co-vary in that the greater the importance of the right forfeited, the greater the degree to which the agent must be able to critically reflect on her decision to commit the act in question. I need not be able to critically reflect on my action in order for it to entail the forfeiture of a *minor* right, such as the right to my place in line at the cinema. So If I am involuntarily drugged with a hallucinogen, causing me to wonder off while standing in line, I have thereby forfeited my place in line, even though I couldn't critically reflect on what I was doing. But I do indeed need to be able to critically reflect on what I am doing if that act entails the forfeiture of a *major* right, such as my right to life. This is why a PCA such as the aforementioned drugged aggressor does not forfeit her right to life when she wrongly engages in an attempt to kill.

One might raise the following objection. It seems right that whether an act entails the forfeiture of an important right depends on the agent's ability to critically reflect on what she was doing. But one might also claim that whether an act entails the forfeiture of an important right depends on the severity of harm the agent is wrongfully committing. On this view, the fact that the drugged aggressor's actions are so egregiously wrongful 'cancels out' the fact that she cannot critically reflect on what she is doing, in our assessment of whether she has forfeited her right to life. The point might be put this way: violating someone's right to life is so egregious an act, that the only way to do so *without* forfeiting your own right to life is to do so *non*-culpably.

There is some truth to this response. The more wrongful an act is, the harder it is to be excused, all things being equal. It follows that whether an act entails the forfeiture of an important right depends on the severity of harm the agent is wrongfully committing. So suffering from stress might serve as a excuse

for minor negligence, such as forgetting to fulfill a promise to walk a friend's dog, but it cannot serve as even a partial excuse for murder. But this does not yield the view that the wrongfulness of the drugged aggressor's actions 'cancels out' the fact that she cannot critically reflect on what she is doing -- rather, it yields the view that the excusing conditions for murder are more difficult to satisfy than the excusing conditions for less wrongful acts (so the drug administered to the PCA must be quite potent, for example, if its effects are to partially excuse the aggressor).

The upshot is if I am right in thinking that whether an act entails the forfeiture of a right varies with whether the agent is able to critically reflect on what she is doing, then PCAs are not liable to as severe harms as their fully culpable counterparts even in cases where the only way to stop the PCA is through the use of lethal force. (Of course, this is all compatible with the view that PCAs are liable to harms only *slightly* less severe than fully culpable aggressors. I address this shortly). In what follows, I present an alternative to the strong account; I argue that an aggressor is liable only to the amount of harm concomitant with the degree of culpability she bears for the harm she is imposing.

3.

I contrast the strong account with what I will call the "*moderate* culpability-sensitive account of narrow proportionality" (i.e., the "moderate account"). On this account, a PCA's diminished culpability diminishes the severity of the harm to which she is liable, even in cases where killing her is the only way to stop her. So even if the only way for me to stop a PCA from killing an innocent is to kill the PCA, she is nonetheless *not* liable to be killed.

At first, this might seem to have the absurd consequence that I have to stand there and allow aggressors to kill innocents when I can prevent this without risking harm to myself or the innocent . This is indeed absurd. But the moderate account does not have this consequence. Imposing any necessary harm on a PCA above the amount of harm to which she is liable might still be justifiable as the lesser evil, relative to the alternative of allowing the harm that the PCA is posing to befall her victim. This means that killing PCAs will be permissible when that is the only way to stop them, since it is better for a *partially* culpable aggressor to be killed than it is for her innocent victim to be killed. This is a case where a person who is not liable to be killed can nonetheless be permissibly killed.

It might seem strange that a lesser-evil justification can be operative in a case where exactly one person will die regardless of what I do. If I do nothing, one life is lost: the innocent victim's. If I engage in defensive interference, one life is lost: the PCA's. So how can the latter be the lesser evil? The answer is that when assessing what counts as the lesser evil, more than the total number of lives lost matters. We attached weights to these lives so that, for example, the death of a culpable aggressor counts for less than the death of an innocent. As David Rodin has noted: "it is implicit in a lesser evil justification that harm inflicted on an innocent bystander is a greater evil than an equivalent harm inflicted on a person liable to that harm" (Justifying Harm, 2012 p. 85).

Recall that I argued that whether an act entails the forfeiture of a right varies with whether the agent is able to critically reflect on what she is doing. Consequently, PCAs are not liable to as severe harms as their fully culpable counterparts, even in cases where the only way to stop the PCA is through the use of lethal force. The moderate account satisfies this principle, since it tailors the severity of the harm to which an individual is liable to the degree of culpability she bears for that harm. In this respect, it seems to me that the moderate account is superior to the strong account.

Still, given what has been said so far, it might seem that there is no practical difference between the strong and moderate account. After all, both accounts allow me to kill the PCA. But there is a significant difference between the two accounts that ultimately has profound practical implications for the morality of war. On the strong account, killing a PCA does *not* wrong her when that is the only way to save the life of the innocent she is threatening. This is because on the strong account she is liable to be killed under those circumstances. She has forfeited her right not to be killed. But because, on the moderate account, PCAs are *not* liable *to be killed*, killing them infringes (though it does not violate) their rights. Recall that a right is infringed (rather than violated) when there is an all-things-considered moral justification for wronging the victim. A PCA's rights are infringed when she is defensively killed because she is thereby subjected to a harm exceeding the degree to which she is liable. Though this wrongs her, it is permissible since wronging her is the lesser evil relative to allowing her innocent victim to be harmed.

The point can be put this way: killing a PCA involves a miscarriage of justice, in that we impose upon her a harm greater than that to which she is liable. But refraining from killing the PCA also involves a miscarriage of justice, since it allows the PCA to kill her innocent victim. So an injustice is going to occur

no matter what we do. But to allow the PCA's innocent victim to be killed is an even greater miscarriage of justice, since the innocent victim is not liable even to a lesser harm. Given these two bad options, it is less bad to choose the one in which the individual liable to more severe harms is killed. But since this lesser-evil justification for inflicting a harm is rights-infringing, the PCA has a basis of complaint when we justifiably kill her: she is harmed in a way exceeding the degree of harm to which she was liable. This has two important consequences.

The first consequence is that on the moderate account we owe compensation to the PCA or her estate for killing her. Anyone who is harmed to a degree greater than that to which she is liable is owed compensation *ex post* for that harm -- even if imposing it is antecedently permitted as the lesser evil. This is because we are in a position *ex post* to right a previous injustice: we can more justly apportion the costs of the right-infringing defensive harm. On the strong account, though, the PCA is not wronged at all when we kill her -- we do not infringe her rights. Consequently she or her estate is not entitled to compensation. This consequence will play a role in determining how we determine the relation between degrees of culpability and the degree of harm to which an individual is liable.

The second consequence is that killing *multiple* PCAs who are serially and independently attacking an innocent might end up impermissible on the moderate account. Suppose that many PCAs are lined up; each will try to kill one and the same innocent, in turn. The only way to save the innocent is for us to kill each PCA. On the strong account, we are entitled to kill *all* of them, no matter how many there are, even though all of them are only partially culpable for the threats they pose. Again, according to the strong account, each has forfeited her right not to be preventively killed, which is just to say that we do no wrong by killing her. On the moderate account, however, each time we kill one of the PCAs we infringe her rights. These rights-infringements are additive. There will come a point where they outweigh the innocent's claim to priority. That is, the aggregate badness of these rights-infringements will outweigh the badness of allowing the innocent to be killed. So on the moderate account, but not the strong account, there comes a point when you are morally prohibited from killing more PCAs.

These two consequences have significant implications for the morality of war. I turn to this next.

4.

Many unjust combatants are PCAs. The indoctrination, manipulation, and coercion of young and consequently cognitively underdeveloped unjust combatants by their culture, state, and military, serve as partially excusing conditions combining to substantially diminish their culpability. I do not believe that these considerations *fully* excuse such combatants. Instead I take the less extreme position that unjust combatants are typically not as culpable as reckless or willful murderers. The claim here is statistical; I do not maintain that all unjust combatants are partially excused. There will, obviously, be exceptions. Those who intentionally massacre civilians or POWs will almost certainly be fully culpable for their actions. But this too is a statistical claim; child soldiers, as well as adults who have been drugged or who are acting under extreme duress might be only partially culpable for these grave breaches.

If the moderate account is right, and if unjust combatants are typically only partially culpable for contributing to the war's unjust aims, then killing such a combatant infringes her rights. So each time we permissibly kill such a combatant, we are wronging her -- and these wrongs aggregate. That is, each such wrong will be included in the 'costs' column of the proportionality calculation determining whether the resort to or continuation of the aim pursued is just. Given that these rights-infringements are additive, a war against an unjust aggressor -- even one in which we kill only unjust combatants -- will likely result in massive rights-infringements. Since these rights-infringements will count in the proportionality calculation determining whether the resort to or continuation of war is permissible, it will make justifying the war even more difficult than has been appreciated. The evils averted by the war must be that much greater in order for the resort to war to be justified.

It is important to be clear on exactly how the rights-infringements affect the proportionality constraint in war. Suppose that a thousand PCAs are each separately and individually attacking a thousand innocents. The PCAs are acting in parallel. And suppose that the wrong each PCA commits or causes is limited to the wrong of killing her innocent victim. Even on the moderate account it would be permissible to kill each and every one of these thousand PCAs if necessary to prevent each one from killing the innocent she is endangering. Indeed, it would be permissible no matter how many PCAs there are, provided each is threatening a distinct innocent. This is because the evil averted by killing one thousand PCAs is greater than the evil resulting from allowing the PCAs to kill the innocents. Recall that the life of one innocent is weighed more heavily than the life of one PCA. Likewise, the lives of 1000 innocents is weighed more heavily than the life of 1000 PCAs. Increasing the number on both sides changes nothing.

If war were like this -- that is, if war consisting of n combatants attacking n innocents which could only be averted by killing the n combatants -- then the moderate account would not affect on the proportionality calculation. But obviously wars are not like this. Indeed, in most wars most combatants do not kill anyone. Rather, each unjust combatant, contributes (sometimes by killing) to the application of military force which is supposed to further the achievement of the war's unjust aims. So in assessing whether killing such a combatant satisfies the constraint of proportionality, we compare the evil averted by preventing her contribution to the war's unjust aim, with the evil of killing her. If she is fully culpable, and if her contribution is substantial, we do no wrong in killing her. But if she is a PCA, and if the moderate account is correct, then killing her might very well wrong her. It is permissible to wrong her in this way only if the good of averting her contribution to the war's unjust aims is great enough to outweigh the wrongfulness of killing her.

Suppose it works out that killing her is permissible, even though she is liable only to less serious harm. Indeed, let's suppose that the only way to stop the enemy from winning the war is to kill her (that is, killing her is necessary but not sufficient for winning the war). But now suppose there is *another* partially excused unjust combatant, who is *also* contributing the war's unjust aims, and who also must be killed to win the war. Can we kill her too? If the answer is yes, then it must be that winning the war is important enough to justify *two* rights-infringements. Now add a third partially excused unjust combatant … and so on. Each time a combatant's death is added, the moral costs of the war go up, (assuming that each combatant is a PCA and that the moderate account is correct). Add enough combatants, and at some point the aggregate of the individual rights-infringements will outweigh the good achieved by preventing them from achieving their unjust aim.

The upshot, then, is that if the moderate account is right, it's harder to satisfy the constraint of proportionality in war, because the death of partially culpable unjust combatants are factored in the 'costs column' of that war.

One might agree with all this, and with the moderate account, and yet argue that it will almost never be the case that killing unjust combatants will tip the balance in the way suggested, since PCAs are liable to only *slightly* less severe harms than to which fully culpable aggressors are liable. If so, killing a PCA

infringes her rights, but the rights-infringement is so minor that it would take a fantastically vast number of such infringements to outweigh the good achieved by winning the war.

Whether this argument has purchase depends on how the degree of culpability is related to the severity of the harms to which an individual is liable. Consider the following relations, which are only four among literally an uncountably infinite number of possible relations.
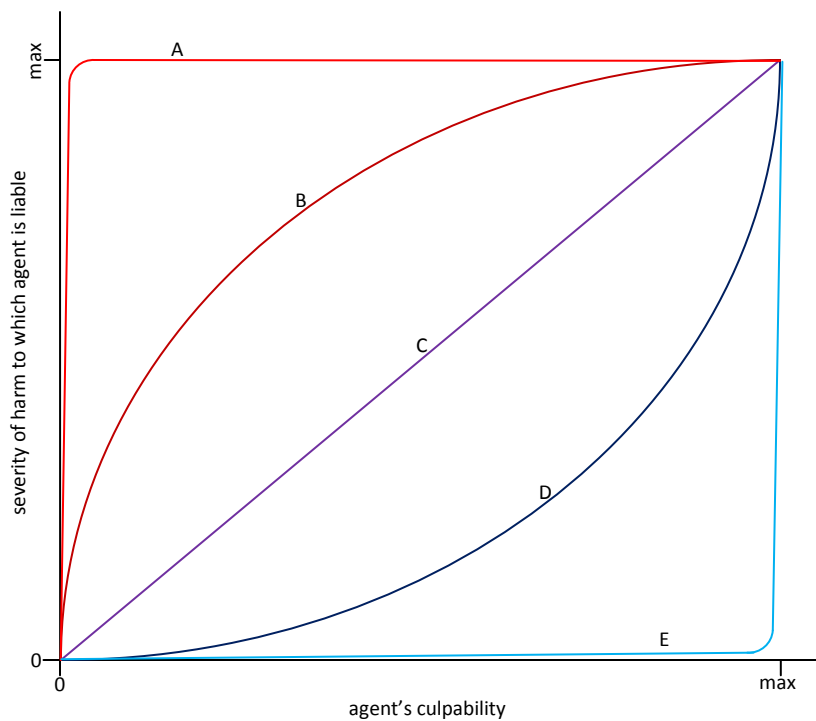
Before discussing the depicted relations in this graph, a few caveats are necessary.

Caveat 1. We might doubt that culpability and severity can be quantified to a degree of precision necessary to relate the two in a continuous function. As such, I might seem guilty of assuming a false precision. But I am not suggesting that the relation between degrees of culpability and the degree of harm to which the agent is liable will always be determinate or exact. The above functions can be thought of as depicting general ways of thinking about the relation between the two properties.

Caveat 2. The severity of the harm to which an agent is liable depends not only on the agent's culpability, but on the severity of the harm that the culpable agent would otherwise commit. Obviously, a partially culpable *killer* is not liable to the same harms as a partially culpable *kicker*, even if their

degree of culpability is the same. (This caveat might be unnecessary if we construe culpability itself as a function that takes as its inputs the agent's morally relevant mental states *and* the severity of the harm she is committing, in which case a killer can indeed be as culpable as a kicker, but only if the former is almost completely excused and the latter is not excused at all). To sidestep this issue, I will assume that the graph depicts the relation between liability and culpability for a wrongful *lethal* threat.

Caveat 3. The functions depicted are quite simple. The actual (or best) relation between the degree of culpability and the severity of the harms to which an individual is liable might be much more complex. I am assuming simple functions since my goal is not to determine the precise relation between liability and culpability, but rather to determine whether the relation (whatever it is) is one in which killing a PCA would be a substantial infringement of her rights.

Caveat 4. Though there are certainly harms worse than death, for purposes here I will assume that an individual who is liable to whatever harm is necessary to avert the threat she is posing is liable to be killed. I assume this for simplicity and ease of expression; I do not believe that anything substantive turns on this assumption. (Indeed, if it does, it adds to the absurdity of function A). I am likewise assuming that there is a limit to the degree to which an individual can be culpable. Again, I assume this for the sake of simplicity.

With these caveats, I can turn to an analysis of the sample-functions. If function A is correct, then the degree of culpability (provided it is greater than zero) does not affect narrow proportionality; if an individual is at all culpable for a lethal harm, then she is morally liable to be killed. So for all practical purposes function A collapses the distinction between the moderate and strong accounts, in that on both accounts killing a PCA will never impose a harm greater than that to which she is liable.

I find function A to be deeply implausible. Function E describes the opposite extreme; if it is correct, then an individual is liable to be killed only if she is completely unexcused for the wrongful threat she is posing. This is also absurd; it would have as a consequence that pinching a PCA as a necessary means of stopping her would infringe her rights against battery (though on the moderate view pinching her would still be the lesser evil relative to allowing her to kill the innocent).

Functions B, C, and D describe relations intermediate between the two absurd extremes. In general, the greater the area under the curve, the less severe the rights-infringement resulting from killing the PCA. The lesser the area, the lesser the rights-infringement. So as the area under the curve approaches the area under A, it becomes easier it is to satisfy the proportionality constraint in war, in that the aggregate of the rights infringements from killing PCAs are less likely to tip the balance against the war. Likewise, as the area under the curve approaches the area under E, it becomes harder to satisfy the proportionality constraint since each death constitutes a greater rights-infringement.

So what is the right function? That is well beyond the scope of this paper, assuming the question is even answerable. I think C approximates the right sort of function (though I think non-culpable threats can be liable -- a view for which I argue elsewhere). One strategy that helps demonstrate C is to is to respond to arguments that it is not sufficiently stringent in its treatment of PCAs. One might be inclined to something closer A for the following sort of reason. Suppose that a PCA is attempting to kill an innocent. There are mitigating circumstances that diminish her culpability by *a half*. That is, she is half as culpable as an unexcused reckless or willful murderer. Given C, the PCA is liable to a harm no greater than half the harm of death. Suppose the PCA is 20 years old and could be expected to live another 60 years. This means she is liable to a harm equivalent to the loss of 30 years of life (which is half of 60). Of course, when we engage in defensive violence, the harms we commit do not subtract years from the life of our targets (as does the 'life sapper' torture machine from the *Princess Bride*). Rather, we maim, injure, and kill when we defend ourselves through violence. But I suspect that we can convert the disvalue of an injury into amount of life lost, if in no other way than by asking ourselves which we would prefer: to suffer (for example) two broken legs for a year, or to subtract (for example) a month from our total life-span. By this method, we can quantify the severity of injuries, thereby enabling us to estimate what sorts of harms the PCA in question is liable to suffer.

Now, of course, we cannot expect to do these calculations 'on the fly'; when we engage in defensive violence we do so under conditions that are far from ideal. We are better situated to make such an estimate *ex post*. And such an estimate remains morally relevant *ex post* since it will help determine whether, and if so, to what extent the injured aggressor is to be compensated for her injuries. As I indicated earlier, we are morally required to compensate individual for the harms imposed upon her exceeding the severity of the harms to which she was liable.

Return, then, to the aggressor who is liable to injuries not exceeding the equivalent of 30 years of lost life. Suppose that the only way to prevent the PCA from killing the aggressor is to impose a non-lethal harm equivalent to 40 years of lost life. There is, then, a difference of 10 years between what the aggressor is liable to suffer and what we impose upon her. Now, it is better to impose a loss of 10 years of life upon someone who is not liable to suffer that loss than it is to allow her innocent victim to be killed thereby depriving her of the entirety of her life. So the moderate account would permit infringing the PCA's rights by imposing an injury equivalent to the loss of 30 years of life. But since we are infringing her rights, we have to compensate her for the amount of harm imposed upon her exceeding the severity of the harm to which she was liable -- i.e., 10 years. So *ex post*, we have to transfer goods to the PCA that are equivalent in value to a decade's worth of good life. This imposes a considerable hardship on the third-party intervener (or the PCA's victim, if she is to be held liable to compensatory deprivations). Indeed, such a burden could ruin one financially, for the foreseeably future. It seems unfair to impose this burden on a third party or the innocent, neither of whom instigated the altercation and both of whom acted permissibly.

If this is right, then it suggests that a function closer to A is correct, since it will impose substantially less compensatory burdens on the innocent party. But there is a response to this criticism. It might be that though the PCA is owed compensation, neither the third party nor the PCA's intended victim are liable to compensatory deprivations equivalent to the value of a decade's worth of life. Because they acted permissibly, we might say that the burden of compensation should be imposed on the society as a whole; it should be distributed equally among everyone. This would have the benefit of compensating the PCA whose rights, after all, were infringed, without imposing an undue burden on those who permissibly infringed the PCAs rights. This is not to say that the burden of compensation will always be placed on the society at large rather than to an individual; rather, only those compensatory deprivations resulting from Samaritan acts are justified all-things-considered would attach to the society. Where an individual acts wrongly all-things-considered, she and only she would be liable to compensatory deprivations.

This response to an argument against the function C is hardly a decisive argument for it. But I am inclined to say that we should presume a simple linear relationship between culpability and liability, unless we have reasons to think otherwise. The reason for assuming C absent contravening considerations is not that a linear function is more 'simple' than a non-linear function, nor that simplicity

is a theoretical desideratum. Rather, we should assume C absent contravening considerations because, if we assume a function like B, we need to be able to explain to someone who is half as culpable as a reckless or willful murderer why she is liable to harms that are *more* than twice that of someone who is a fourth as culpable as a reckless or willful murderer. We do *not* similarly need to explain to someone who is half as culpable as a culpable as a reckless or willful murderer why she is liable to harms that are *exactly* twice that of someone who is a fourth as culpable as a reckless or willful murderer. Put differently, when comparing the severity of harms to which different people are liable, a linear function seems interpersonally *fair*, whereas a non-linear function seems presumptively unfair (though this presumption is defeasible). I confess, though, that I am not certain *why* non-linear functions seem presumptive unfair. I am open to the possibility of an error-theory explaining away the apparent unfairness.

5.

If the moderate account and something close to function C are correct, then killing unjust combatants infringes their rights; these rights-infringements are additive in a way that makes it (non-trivially) more difficult to satisfy the proportionality constraint in war. The combination of the moderate account and a function like C can be combined thematically into a general lesson about the morality of war. A just war in which no civilians are targeted is thought to be morally different in kind from terrorism: killing civilians is terroristic partly because they are not morally liable to be killed, whereas killing unjust combatants is not terroristic because they are indeed morally liable to be killed. But the claim presumes the *strong* culpability-sensitive account of narrow proportionality. If instead the moderate version is correct, then most unjust combatants are not liable to be killed; instead they are liable to force short of death. If we can indeed permissibly kill them at the bar of the lesser evil justification, then the means that even 'clean' warfare -- i.e., warfare in which only unjust combatants are intentionally targeted -- is a lot more like terrorism than has been thought. It is like terrorism in that it means imposing harms on individual who are not liable to those harms.

One might object by pointing out that partially culpable combatants are at least liable to some harms, even if the harm isn't as severe as that of death, whereas civilians are not liable to any harms. But I as well as others have argued that civilians on the unjust side are indeed liable to *some* harms in virtue of their individually marginal contributions to an unjust war (primarily by paying taxes and contributing to the economy). Though they are not liable to be killed, they might be, for example, liable to financially

restitutionary deprivations, even if it means that the civilians have to suffer some physical hardships as a result. The difference, then, between partially culpable unjust combatants and unjust civilians, is one of degree, and not kind: both are liable, albeit to harms of differing degrees. Thus the fact that partially culpable combatants are liable to at least some degree does not constitute a difference *in kind* between killing a partially culpable combatants and killing a marginally contributing civilian. Intentionally targeting civilians who are not liable to be killed, and intentionally targeting partially culpable combatants who are not liable to be killed, is wrongful, then, for the same reason, but to differing degrees. The difference between the harm we impose on a civilian by killing her and the civilian's degree of liability is substantially greater than the difference between the harm we impose on a partially culpable combatant by killing her and the combatant's degree of liability.

Though killing partially culpable combatants is wrong for the same sort of reasons why killing non-liable civilians is wrong, this does not lead us to the problematic view that killing partially culpable combatants literally counts as terrorism. Terrorism necessarily involves *manipulative* rather than *eliminative* killing (to use Warren Quinn's distinction). That is, in acts of terrorism, we kill a non-liable target not to avert a threat that she poses but to use her death as a means of achieving some independent aim – whether it is the aim of motivating others to adopt a desired political end, or simply that of motivating them to cease threatening us. When we eliminatively kill a non-liable agent, however, we do so to avert some threat that she herself was posing or contributing to. Now, assuming that partially culpable combatants are killed to avert the threats that they themselves pose or contribute to, the killing is eliminative rather than manipulative (unlike typical instances of terrorism in which civilians are targeted into order to place political pressure on their government). Consequently, the killing of partially culpable combatants is not easily categorized as terrorism, even if they are not liable to be killed.

The moral here is that though killing partially culpable combatants does not literally count as terrorism, it shares in common with terrorism moral features that make the resort to war more difficult to justify than has been appreciated. Specifically, it makes it substantially more difficult to satisfy the constraint of proportionality. Since the lives of partially excused unjust combatants are not wholly forfeited, we should not treat them as expendable, contrary to what is suggested in the sorts of views that have been developed recently. Or, as I put it at the outset, I think the impassable gulf between combatants and civilians is not as wide as we'd like to believe.

-Saba Bazargan