

POSTWAR MORAL OBLIGATION:
THE DUTIES OF VICTORY

by

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Abstract

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Postwar Moral Obligation: The Duties of Victory

Thesis directed by Professor Alastair Norcross

In this dissertation, I aim to answer the following question: what postwar moral obligations do just war victors incur at war's end? To answer this question, I begin the project by sketching the just war framework from within which my analysis proceeds. Specifically, I present a justice-based theory of defensive wartime harming that draws heavily from Jeff McMahan's recent work on the topic. One of the key ideas underlying this justice-based approach is the claim that the moral principles governing harming in war reduce to the same moral principles governing defensive harming in domestic defense cases.

Working from the preceding reductive claim, I proceed by surveying a series of domestic self-defense cases in order to identify the possible grounds explaining why defenders sometimes incur post-conflict obligations. Through this process, I identify four such possible grounds: (1) the use of unnecessary or excessive force; (2) when victim's defensive force imperils aggressor's life and victim can save aggressor without threat to self; (3) when victim's defensive force harms or imperils bystanders; and (4) when victim's defensive force threatens future harm to innocent people.

Next, I extend these normative grounds to national defenses situations to determine whether just war victors incur analogous post-conflict duties. My conclusion is that just war victors sometimes do incur postwar obligations. These

duties potentially include (1) providing safety and security in the defeated state; (2) mitigating postwar environmental threats such as unexploded ordnance or environmental contamination; (3) paying restitution to parties wrongfully harmed during war; and (4) facilitating postwar accountability and justice. However, I also argue that a victorious state's potential postwar obligations might be mitigated or completely negated by considerations of risk, time, and expense, as well as by the fact that most of these obligations should instead fall to the defeated unjust state when possible.

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CHAPTER 1

This dissertation project lies at the intersection of two recent developments in just war theory. The first is the emergence of justice-based theories of justified defensive harming during war, and the second is the relatively recent development of a third just war category governing justice after war, or *jus post bellum*. Yet surprisingly, no advocate of the justice-based approach to war has tendered a *jus post bellum* account. I will attempt to fill part of that gap in the literature by focusing on one aspect of *post bellum* theory. Specifically, I aim to answer the following question: what postwar obligations do just war victors incur at war's end?

1. Introduction

Just war theory is a normative framework for the moral evaluation of war. Just war theory stands between pacifism (the view that war is never morally justified) and realism (the view war is not a morality-governed activity). Against pacifism, just war theory holds that war sometimes can be morally justified, and against realism, just war theory holds that morality constricts the initiation and prosecution of war.

Historically, just war theory has focused almost exclusively on the justice of initiating war (*jus ad bellum*), and the justice of how war is fought (*jus in bello*). In his 1977 classic *Just and Unjust Wars*, Michael Walzer writes:

War is always judged twice, first with reference to the reasons states have for fighting, secondly with reference to the means they adopt ... *Jus ad bellum* requires us to make judgments about aggression and self-defense; *jus in bello* about the observance or violation of the customary and positive rules of engagement.¹

¹ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 4th ed. (New York: Basic Books, 2006), 21.

Yet as Walzer now acknowledges, we actually judge war three times: we also judge war's aftermath. So, Walzer argues, we need to expand just war theory beyond *jus ad bellum* and *jus in bello*: "Now we have to add to those two an account of *jus post bellum* (justice after war)."² Just as we have normative criteria for judging the initiation and conduct of war, the argument goes, so too we need a category of normative criteria for judging postwar conduct.³ Otherwise, it's possible that a war initiated and fought justly might nevertheless result in an unjust outcome if certain conditions are not fulfilled in war's aftermath.

Although theorists have continuously debated and developed *jus ad bellum* and *jus in bello* since Augustine and Aquinas wrote on the subject, *jus post bellum* has emerged as a substantive just war category only within the past two decades.⁴ Historically, most just war theorists had little to say about justice after war.

² "Introduction," in Michael Walzer, *Arguing about War* (New Haven: Yale University Press, 2004), xiii. See also Michael Walzer, "Just and Unjust Occupations," *Dissent Magazine* (2004): 61.

³ Not all just war theorists agree that *jus post bellum* should be an independent just war category. Nicholas Rengger, for example, argues that *jus post bellum* considerations are already implicit in *jus ad bellum* and *jus in bello*. See Nicholas Rengger, "The Judgment of War: On the Idea of Legitimate Force in World Politics," *Review of International Studies* 31, no. S1 (2005): 154. Bellamy argues that there are too many unanswered questions about the relationship between *ad bellum* and *post bellum* criteria to be able to determine whether *jus post bellum* should become a third just war component. See Alex J. Bellamy, "The Responsibilities of Victory: *Jus Post Bellum* and the Just War," *Review of International Studies* 34, no. 4 (2008): 622. For broader criticism of *jus post bellum* in general, see Seth Lazar's "Skepticism About *Jus Post Bellum*," in *Morality, Jus Post Bellum, and International Law*, ed. Larry May and Andrew Forcehimes (Cambridge: Cambridge University Press, 2012), 204-222. Since my interest lies in identifying the nature and scope of postwar obligation, I won't take a stand on which of the just war categories these criteria should be included under.

⁴ Michael Schuck appears to have been the first theorist to suggest an independent category for evaluating postwar conduct, as well as the first to suggest the "jus post

Nevertheless, nascent elements of postwar justice can be traced back at least to the 16th century natural law concept of *jus victoriae* – first attributed to Vitoria, though later embraced by Gentili and others.⁵ The underlying claim behind *jus victoriae* was the requirement for just war victors to act with moderation toward their defeated adversaries. Victors were permitted to vindicate the rights violations that justified war in the first place, but prohibited from seeking any additional gains.⁶ For example, it was considered permissible for just war victors to reclaim all the wrongful losses they suffered during war or secure equivalent reparation,⁷ as well as to take reasonable action to secure against future attack.⁸ At the same time, victors were prohibited from looting,⁹ continuing to kill the enemy after war’s end,¹⁰ and from enslaving the vanquished.¹¹

Because *jus victoriae* stressed restoration of the victors’ rights, its content consisted entirely of permissible and prohibited actions. The principle aim behind this moderating principle was to reign in the excesses of victor’s justice.

bellum” terminology. See Michael J. Schuck, "When the Shooting Stops: Missing Elements in just War Theory," *Christian Century* 111, no. 26 (1994): 982-83.

⁵ Stephen Neff, "Conflict Termination and Peace-Making in the Law of Nations: A Historical Perspective," in *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace*, ed. Carsten Stahn and Jann K. Kleffner (West Nyack, NY: T.M.C. Asser Press, 2008a), 79.

⁶ *Ibid.*, 80.

⁷ Francisco de Vitoria, *On the Law of War*, in *The Ethics of War: Classic and Contemporary Readings*, ed. Gregory M. Reichberg, Henrik Syse, and Endre Begby (Oxford: Blackwell Publishing, 2006), 315; Hugo Grotius, *The Rights of War and Peace*, ed. Richard Tuck, trans. Jean Barbeyrac (Indianapolis: Liberty Fund, 2005): Book III, Chapter XX, 1558.

⁸ Vitoria, *On the Law of War*, in Reichberg, Syse, and Begby, *The Ethics of War*, 315.

⁹ *Ibid.*, 303.

¹⁰ Vitoria, *On the Law of War*, 303; Grotius, *The Rights of War and Peace*, Book III, Chapter XX, 1586; Emer de Vattel, *The Law of Nations*, ed. Bela Kapossy and Richard Whatmore (Indianapolis: Liberty Fund, 2008), Book IV, Chapter I, 654.

¹¹ Vitoria, *On the Law of War*, 327.

Accordingly, the only duties comprising *jus victoriae* were negative duties of forbearance. Obligations requiring positive action were wholly absent.

Some modern theorists have developed *post bellum* accounts largely modeled on *jus victoriae's* permissions and prohibitions. An example is that offered by Brian Orend, one of the first and most vocal advocates for an independent *jus post bellum*. Orend proposes a set of principles intended to determine “what a just state justly prosecuting a just war, *may permissibly do ...* during the termination phase of a war.”¹² With the exception of holding war criminals accountable,¹³ Orend doesn't identify postwar obligations requiring the victorious state to take positive action.

Alex Bellamy helpfully distinguishes between two broad approaches to postwar justice: minimalist and maximalist accounts.¹⁴ Minimalist theories “envisage *jus post bellum* as a series of restraints on what it is permissible for victors to do once the war is over,”¹⁵ with the aim of prohibiting any actions beyond rights vindication. So using Bellamy's terminology, we can refer to *jus victoriae* – as well modern variants such as Orend's – as minimalist theories. The common thread running through minimalist theories is that they're comprised entirely of a combination of non-obligatory permissions with prohibitions involving negative duties of forbearance.

¹² Brian Orend, *War and International Justice: A Kantian Perspective* (Waterloo, Ont: Wilfrid Laurier University Press, 2000), 223, my emphasis.

¹³ *Ibid.*, 229-31.

¹⁴ Bellamy, *The Responsibilities of Victory*, 602

¹⁵ *Ibid.*

In contrast, maximalist *post bellum* theories hold that in addition to permissions and prohibitions, victors also sometimes incur positive obligations at war's end: required actions that it would be wrong not to perform.¹⁶ Examples might include the duty to occupy a defeated state whose government has collapsed, or an obligation to help reconstruct the defeated state.¹⁷ On a maximalist account, failure to perform a postwar obligation would be a blameworthy omission.

But according to Bellamy, the problem with maximalist *jus post bellum* theories is that they lack a justification as for why victors incur positive postwar obligations in the first place.¹⁸ As Bellamy says, "maximalist ideas are almost utterly alien to classical Just War considerations."¹⁹ Perhaps Bellamy is right to say that maximalist theories are alien to traditional just war theory, but that's just to say that historical just war theory is in need of revision.

In this project, I'll defend a maximalist account; I think victorious states sometimes *do* incur positive obligations at war's end. However, I will not attempt to tender a complete *post bellum* theory, which would need to encompass the prohibited and permissible actions that comprise minimalist theories in addition to those positive actions that are morally required. Instead, I'll focus only on those actions that mark maximalist accounts off from minimalist accounts: the supposed existence of the victor's positive postwar obligations. Specifically, I aim to answer the following question: *what positive obligations do just war victors incur at war's end?* I'll argue that just war victors sometimes incur positive postwar obligations.

¹⁶ Ibid., 602, 612.

¹⁷ Ibid., 612-15.

¹⁸ Ibid., 619.

¹⁹ Ibid., 621.

And contrary to Bellamy's claim, I'll provide the normative justification for these obligations.

But before proceeding, I should clarify exactly what I mean by the expression "positive obligation." By "obligation," I mean actions that one is required to do or refrain from doing.²⁰ For purposes of this paper, I will use the words "obligation" and "duty" interchangeably.²¹

By "positive" obligations, I mean to identify those actions agents are required to perform.²² Positive obligations can be contrasted with "negative" obligations, which require refraining from performing certain actions (i.e., duties of forbearance). So in the context of war's aftermath, examples of *positive obligations* might include protecting innocent people in harm's way, and compensating wrongfully harmed parties.

1.1 Additional Context: Situating the Project

In order to determine a state's postwar obligations, an important factor to take into consideration is whether the state fought on the just side of the war. In domestic defense cases, aggressors and victims incur different post-conflict obligations given the disparity between the justness and unjustness of each party's actions. The same holds true following war. We should expect just war victors to incur different

²⁰ Joel Feinberg, "Duties, Rights, and Claims," in *Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy* (Princeton, N.J.: Princeton University Press, 1980), 136.

²¹ For some conceptual differences between these two terms, see A. John Simmons, *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1979), Ch. 1; Richard B. Brandt, "The Concepts of Obligation and Duty," *Mind* (1964): 374-93.

²² James S. Fishkin, *The Limits of Obligation* (New Haven: Yale University Press, 1982), 8.

postwar obligations (if any) than those incurred by defeated unjust aggressors. Walzer gets this point exactly right: “We need criteria for *jus post bellum* that are distinct from (*though not wholly independent of*) those that we use to judge the war and its conduct.”²³ There’s a normative connection between *jus ad bellum* and *jus post bellum*; the former importantly informs – and largely determines – the latter.

Yet we can’t determine *post bellum* obligations by considering only the *ad bellum* justness of a state’s war. Instead, we must consider the justness of a state’s war against the backdrop of the theoretical framework that justifies wartime harming in the first place. Different foundational theories of defensive harming will likely generate different responsibilities at war’s end. And the differing theoretical approaches to self-defense vary widely.²⁴ For example, many theorists advocate a rights-based approach to justify self-defense,²⁵ while others appeal to double-effect reasoning.²⁶

However, much of the recent theoretical work in the self-defense literature has focused on so-called justice-based theories of defensive harming. Most justice-based accounts of defensive harming trace back to Phillip Montague’s work in

²³ Walzer, “Just and Unjust Occupations,” 163, my emphasis.

²⁴ For a concise and helpful overview of the various theoretical justifications for defensive harming, see Tyler Doggett, “Recent Work on the Ethics of Self-Defense,” *Philosophy Compass* 6, no. 4 (2011): 220-33.

²⁵ See, among others, Judith Jarvis Thomson, “Self-Defense and Rights,” in *Rights, Restitution, and Risk: Essays in Moral Theory* (Cambridge: Harvard University Press, 1986), 33-48; Judith Jarvis Thomson, “Self-Defense,” *Philosophy & Public Affairs* 20, no. 4 (1991): 283-310; Suzanne Uniacke, *Permissible Killing: The Self-Defence Justification of Homicide* (Cambridge: Cambridge University Press, 1994).

²⁶ See, for example, Whitley R. P. Kaufman, *Justified Killing: The Paradox of Self-Defense* (Lanham, MD: Lexington Books, 2009).

forced-choice theory.²⁷ According to Montague, the underlying justification for self-defense is the claim that justice (or fairness) permits agents to redistribute unjust threats of harm to those parties responsible for creating the wrongful threats.

Drawing from Montague's forced-choice framework, some theorists have developed justice-based theories of defensive warfare.²⁸ Most of these theories tend to be individualist-reductive accounts. The individualist claim is that war is a conflict between individuals, or groups of individuals; statements about groups of people and group actions during war can be reduced to statements about individuals and individual actions. The reductive claim is that the moral principles governing war reduce to the same moral principles that govern individual defense. Thus, theorists who embrace the individualist-reductive approach argue that war can be understood and evaluated as a complex activity involving many individuals engaged in various acts of aggression and self-defense. As McMahan explains,

the justifications for killing people in war are of the same forms as the justifications for the killing of persons in other contexts. The difference between war and other forms of conflict is a difference only of degree and thus the moral principles that govern killing in lesser forms of conflict govern killing in war as well.²⁹

At root, individual defense and national defense are but two instances of self-defense, with both governed by the same moral principles.

²⁷ See especially Phillip Montague, "Self-Defense and Choosing between Lives," *Philosophical Studies* 40, no. 2 (1981): 207-19; Phillip Montague, "Forced Choices and Self-Defence," *Journal of Applied Philosophy* 12, no. 1 (1995): 89-93; Phillip Montague, *Punishment as Societal-Defense* (Lanham, MD: Rowman & Littlefield, 1995).

²⁸ Jeff McMahan, *Killing in War* (Oxford: Clarendon Press, 2009b); Phillip Montague, "War and Self-Defence: A Critique and a Proposal," *Diametros*, no. 23 (2010): 69-83.

²⁹ McMahan, *Killing in War*, 156.

In contrast, collectivists argue that war is primarily an activity between political communities, typically in the form of states. As such, the justification for killing in war cannot simply reduce to the normative principles governing individual defense. For collectivists, war is a unique activity governed by moral principles distinct from those that govern individual defense. Walzer's *Just and Unjust Wars* remains the classic modern statement of the collectivist approach to war.

For purposes of this paper, I will argue from within a justice-based theory of war that is both individualist and reductive. Among such accounts, Jeff McMahan's has proven to be the most complete and influential. Because I largely agree with McMahan's normative framework for justified defensive killing during war,³⁰ I will use McMahan's work as the jumping off point from which to begin my own analysis of postwar obligation.

Yet despite the growing influence of justice-based reductive approaches to just war theory, not a single theorist who advocates for this approach has offered an account of postwar obligation. McMahan, for example, argues that citizens on the unjust side of a war may be liable to occupation, but he says nothing about whether the victorious state is ever *obligated* to occupy the unjust state (I'll argue just states are sometimes so obligated). Similar issues remain unresolved. Do victorious just combatants have responsibilities to defuse unexploded ordnance before withdrawing from the defeated state? Does the just citizenry owe restitution to any

³⁰ For general criticism of the reductive approach to war, see David Rodin, *War and Self-Defense* (Oxford: Clarendon Press, 2002), 127-29. For rebuttal arguments against Rodin's criticism, see Helen Frowe, *The Ethics of War and Peace: An Introduction* (London: Routledge, 2011), 35-39. For specific criticism against McMahan's recent work, see Seth Lazar, "The Responsibility Dilemma for Killing in War: A Review Essay," *Philosophy & Public Affairs* 38, no. 2 (2010): 180-213.

parties collaterally harmed during war? These are pressing questions that need to be answered.

I will attempt to fill this gap in the literature by developing a broad normative framework for thinking about postwar obligation. As stated, my aim is to determine what positive postwar obligations just war victors incur at war's end. And I will analyze the subject through the theoretical lens of a justice-based, individualist-reductive account of war.

1.2 Assumptions and Methodology

I will make several foundational assumptions in order to reduce the scope of the project to a manageable size. First, I will focus on classic interstate war between nation-states. The dissertation will not discuss intra-state conflicts such as civil wars and revolutions, nor humanitarian interventions, or conflicts involving non-state actors such as terrorism. Focusing on interstate war between clear-cut aggressors and victims offers the clearest path for analyzing the topic. A separate project would be to explore whether the principles and conclusions we draw from our analysis of interstate war also extend to these other kinds of conflicts.

Second, because my focus is on *postwar* obligations, I will begin from the assumption that most of a war's active hostilities have ended, whether by cease-fire, truce, or other arrangement. One cannot meaningfully speak of the postwar period until the fighting has abated.

There's been some interesting recent work done on the issue of war termination. Some commentators advocate for an additional just war category to evaluate the morality of war termination. David Rodin, for example, argues that we

need *jus terminatio* criteria for determining “when it is obligatory to terminate a state of war and how this can be done in the morally best way.”³¹ In a similar vein, Darrel Mollendorf has advocated for a set of *jus ex bello* criteria to provide “guidance on questions such as whether and how a war, once begun, should be ended.”³² Orend, on the other hand, views the morality of war termination as embedded within the broader framework of *jus post bellum*.³³ Rodin, Mollendorf, and Orend raise interesting points regarding the issue of war termination. Yet, because my focus is on postwar obligation, I will not take a position on the termination issue. Instead, I will simply assume that the wars under consideration have been terminated in a morally acceptable way – and thus the postwar period has begun.

Third, I will assume the victorious state fought a just war in a just manner, with no culpable inducement on that state’s part leading up to the war. In other words, I will assume that the victimized state fought a self-defensive war in a morally acceptable way, thus fulfilling the requirements of *jus ad bellum* and *jus in bello*.

Finally, the project will focus only on those obligations that might fall to the victorious just state. I do so two reasons. The first reason is pragmatic: to help narrow the scope of the project to a manageable size. There’s a host of separate

³¹ David Rodin, “Ending War,” *Ethics & International Affairs* 25, no. 03 (2011): 360. See also David Rodin, “Two Emerging Issues of Jus Post Bellum: War Termination and the Liability of Soldiers for Crimes of Aggression,” in Stahn, *Jus Post Bellum: Towards a Law of Transition*, 54.

³² Darrel Mollendorf, “Jus Ex Bello,” *Journal of Political Philosophy* 16, no. 2 (2008): 131. See also Seth Lazar, “Skepticism about *Jus Post Bellum*,” 218.

³³ Orend, *War and International Justice*, 218-23.

issues surrounding the obligations that may fall to defeated aggressors or, worse still, to victorious aggressors. I intend to set those projects aside for another day.

The second reason I'll focus on the just side of the war rather than the unjust side is because doing so is more theoretically interesting. If we can determine what obligations just war victors incur, then doing so will show us what a *completely* just war would look like: from its initiation, through its prosecution, and to its just aftermath. Such an account would show us what victimized states should ideally aspire to not only in declaring and fighting a defensive war, but what they should aspire to after war ends.

Let me close with a quick note about methodology. If the individualist-reductive account of war is right – and the moral principles governing war reduce to the moral principles governing individual defense – then our intuitions and judgments about post-conflict obligation in individual defense cases should be a workable model for thinking about obligations following war. Or put slightly differently, postwar obligations should reduce to the same moral reasons that ground a victim's post-conflict obligations after successfully defending herself.

Because of the preceding reductive claim, I'll frequently present and analyze domestic self-defense cases throughout the paper. My aim in doing so is to identify the basic moral principles that underlie our judgments in more familiar domestic defense cases, and then extend those principles to help illuminate less familiar interstate war analogues.

1.3 Dissertation Structure

The dissertation will be structured as follows. In Chapter 2, I'll review McMahan's justice-based theory of defensive harming. As mentioned, McMahan's justice-based theory of war will provide the broad framework from within which my analysis of postwar obligation will proceed. But because the basic principle underlying McMahan's theory actually traces back to Montague, I'll begin with a quick look at the latter's work. Montague's key idea is to focus on the forced-choice structure inherent to self-defense situations. For example, if an aggressor unjustly attacks victim, aggressor forces victim to make a choice: either accept the unjust harm, or attempt to redistribute the harm. According to Montague, there's an important moral asymmetry between the parties; aggressor culpably created the situation, whereas victim is innocent. Montague argues that as a matter of justice (or fairness), this moral asymmetry permits victim to redistribute the harm to the aggressor.

After a quick review of Montague, the remainder of Chapter 2 surveys McMahan's theory. McMahan adopts Montague's theoretical explanation for justified defensive harming in forced choice situations, though with one crucial difference. Whereas Montague grounds a person's liability to defensive harm based on considerations of culpability, McMahan argues that moral responsibility for an unjust threat is sufficient to make a person liable to defensive harm. This move greatly widens the liability net because many people can be morally responsible for an unjust threat of harm without being culpable.

Then for the remainder of Chapter 2, we'll then look at how McMahan extends his theory of defensive harming to explain just and unjust killing during war. Because most civilians and combatants in the victim state (collectively, "just citizens") bear no responsibility for any unjust threats of harm, most just citizens are not liable to be harmed. Conversely, most aggressor state combatants ("unjust combatants") are morally responsible for contributing to objectively unjust threats of harm, and thus become liable to wartime harm. Aggressor state civilians ("unjust civilians"), on the other hand, are almost never morally responsible enough for their state's aggression to render them liable to intentional attack. However, McMahan argues they may become liable to collateral or lesser harms if they've acted complicitously to support their state's aggression, or have made significant contributions toward their state's unjust war.

While I agree with McMahan's general framework, I disagree with his position on unjust civilian liability. So in Chapter 3, I present a sustained critique of McMahan's position on this topic. My claim is that if we follow McMahan's theory to its logical conclusion, most unjust civilians should be liable to defensive and lesser harms, even if they haven't acted complicitously or made significant war contributions. The problem, I argue, is that McMahan employs a different liability criterion to unjust civilians than he does to unjust combatants. In the case of unjust combatants, the latter can be liable to harm even though they aren't culpable, and even if they make only small contributions to the war effort. But in the case of unjust civilians, McMahan argues they aren't liable unless they've acted complicitously (i.e., culpably), or have made significant contributions to the war

effort. If that's right, McMahan has done nothing to justify these asymmetric criteria for liability to defensive harm. Instead, I argue that because most civilians bear some moral responsibility for causally contributing to their state's unjust war, they should be liable to harm as well. And this conclusion naturally follows from within McMahan's own framework.

My aim in Chapter 4 is twofold. First, I'll augment my argument from the previous chapter that most unjust civilians are liable to defensive and lesser harms. But whereas in the previous chapter I argue for this conclusion from within McMahan's theory, in Chapter 4 I'll offer additional argumentation. The crux of the argument I introduce here is that most civilians who participate in, maintain, and benefit from powerful state institutions have an enforceable duty to bear harm when necessary to prevent their institutions from unjustly harming innocent others. And to have an enforceable duty to bear harm means that others can harm the unjust civilians without wronging them.

My second aim in the chapter is to explain the qualification that "most" unjust civilians are liable to defensive harm. In short, citizenship alone is insufficient to ground liability to defensive harm. Some citizens – such as children, or citizens persecuted by their own state – do not bear moral responsibility for their state's actions, and thus aren't liable to be harmed during war.

Chapter 5 begins the actual analysis of postwar obligations. I'll begin the chapter by considering a series of domestic defense cases in order to isolate the possible grounds for post-conflict obligations following the use of defensive force. Through this process, I identify four possible grounds for post-conflict obligation:

(1) the use of unnecessary or excessive force; (2) when victim's defensive force imperils aggressor's life and victim can save aggressor without threat to self; (3) when victim's defensive force harms or imperils bystanders; and (4) when victim's defensive force threatens future harm to innocent people.

Next, I begin the process of extending these four possible grounds for post-conflict obligation to wartime scenarios. Because I'll argue that most postwar obligations are grounded in considerations about harm to bystanders, I clarify who's considered a bystander during war. Then, for the remainder of the chapter, I discuss several topics surrounding the issue of who bears moral responsibility for the wartime harm bystanders suffer. I conclude that although several parties share responsibility for the bystanders' plight, most of the responsibility shifts to the parties responsible for creating the forced choice that led to the bystanders being harmed. Thus, most of the moral responsibility shifts to the aggressor state's leaders, combatants, and most unjust civilians.

Finally, in Chapters 6 and 7, I analyze the specific postwar obligations that *might* fall to the just war victors. I focus on two potential obligations in Chapter 6. The first is whether victorious just combatants are obligated to provide safety and security in the defeated state at war's end. In the aftermath of war, many people in the defeated aggressor state may be left vulnerable. Common threats include genocide, ethnic and religious persecution, looters, rapists, predation by neighboring political communities, and starvation and disease. In such conditions, are the victorious forces obligated to protect the local populace?

The second obligation I'll consider in Chapter 6 is whether the just state has a duty to mitigate postwar environmental threats. Even after the guns of war fall silent, lethal threats such as unexploded ordnance or environmental contamination continue to threaten. The question I explore is whether the just state is obligated to help mitigate the threats posed by war remnants, or whether doing so is merely a discretionary act of beneficence. I'll argue in favor of both obligations: just war victors are sometimes obligated to protect the local populace, and also to help safe the environment. But, I'll argue, these obligations may be limited by considerations of risk, time, and expense.

Then in Chapter 7, I consider four additional potential obligations. The first concerns whether the just citizenry carries any restitutive duties at war's end. Second, I examine whether the victorious state must help physically reconstruct the defeated state's infrastructure and institutions. The third issue is whether victorious states must hold parties accountable for wrongs committed during war (transitional justice). And finally, I'll consider whether a just state has any obligations to help politically reconstruct toppled or failed regimes.

Of these four potential obligations, I argue that a compelling case can be made only for postwar restitutive and transitional justice duties, though victorious states may incur some parasitic duties to help facilitate political reconstruction. Finally, we'll consider how these duties may also be limited by considerations of risk, time, and expense.

CHAPTER 2

2. Justice-Based Theories of Self-Defense

In this chapter, I aim to provide a broad overview of the justice-based theory of self- and other-defense, and its application to war. As such, the chapter forms the grounding theory for the rest of the dissertation project. The overview will aim for some comprehensiveness since the complete conceptual framework will be necessary for determining postwar obligations.

Jeff McMahan has articulated and defended the most comprehensive justice-based theory of self-defense¹, and his extension of the theory to include the moral evaluation of killing in war has proven especially influential. I find myself largely in agreement with most of McMahan's positions. Because my dissertation project will largely extend from his theoretic framework, the bulk of the chapter will be committed to a review of McMahan's theory.

Yet as McMahan and others note,² the genesis of justice-based theories of self-defense effectively trace back to Phillip Montague's forced-choice theory. Given the foundational role Montague's ideas play in McMahan's work, the chapter first will briefly review Montague's theory. The remainder of the chapter will then look

¹ For similar justice-based theories of self-defense, see George Draper, "Fairness and Self-Defense," *Social Theory and Practice* 19, no. 1 (1993), 73; Re'em Segev, "Fairness, Responsibility and Self-Defense," *Santa Clara Law Review* 45, no. 2 (2005), 383; Shlomit Wallerstein, "Justifying the Right to Self-Defense: A Theory of Forced Consequences," *Virginia Law Review* (2005): 999.

² Jeff McMahan, *The Ethics of Killing: Problems at the Margins of Life* (Oxford: Oxford University Press, 2002), 516, footnotes 122 and 123; Seth Lazar, "Responsibility, Risk, and Killing in Self-Defense," *Ethics* 119, no. 4 (2009): 704, footnote 20; Whitley Kaufman, "Torture and the 'Distributive Justice' Theory of Self-Defense: An Assessment," *Ethics & International Affairs* 22, no. 1 (2008): 95.

at McMahan's subsequent development of the justice-based theory of self-defense, with special emphasis on its extension to wartime killing.

2.1. Phillip Montague's Distributive Justice Theory of Self-Defense

Montague's forced-choice theory of self-defense traces back to his 1981 paper "Self-Defense and Choosing Between Lives," and further developed elsewhere.³

Montague begins his analysis of self-defense by focusing on the forced choice nature inherent in such encounters. Essentially, all self-defensive situations involve victims forced to make a choice: either accept the threatened harm, or attempt to redistribute the harm elsewhere.

So for illustration, imagine a scenario where Aggressor unjustly attacks Victim. By unjustly attacking Victim, Aggressor forces Victim to make a choice: accept the harm, or redistribute the harm by way of defensive force. Montague's claim is that since Aggressor culpably created the forced choice situation now confronting Victim, Victim would be justified in redistributing the harm to Aggressor rather than accepting the harm onto herself. The justification behind this claim is that as a matter of fairness, the harm should be distributed to the party who culpably created it; it would be unfair to expect Victim to bear the costs.

Montague's approach to self-defense is considered a distributive justice theory of self-defense because it views the use of defensive force as a way of fairly distributing inevitable harm. As Montague notes, although it is common to think about distributive justice in terms of benefits such as resources, opportunities, and

³ See especially Montague, *Punishment as Societal-Defense*, 175; Phillip Montague, "Self-Defense, Culpability, and Distributive Justice," *Law and Philosophy* 29, no. 1 (2010): 75; Montague, "Forced Choices and Self-Defence," 89-93.

so on, we also think there are fair and unfair ways to distribute unavoidable burdens and costs between parties such as taxes, where to build undesirable facilities such as waste plants, and so on.⁴ Along the same lines, we should think about unavoidable, culpably threatened harms by asking what is the fairest way to distribute the harm among the involved parties.

In answering the above question, Montague breaks his analysis of self-defensive situations down as follows:

(i) Individuals X_1, \dots, X_n are situated so that harm will unavoidably befall some but not all of them; (ii) that they are so situated is the fault of some but not all members of the group; (iii) the nature of the harm is independent of the individuals who are harmed; (iv) Y , who is not necessarily included in X_1, \dots, X_n is in a position to determine who will be harmed. It seems to me quite clear that, if Y does not belong to the endangered group, he is required, *as a matter of basic justice*, to direct the harm towards those whose fault it is that some will be harmed. If, however, Y is part of the threatened group but is in no way responsible for their predicament, then he is not required to direct the harm away from himself and towards those who are responsible, but he is surely free to do so. Moreover, it would be wrong for an outsider to prevent innocent members of the group from protecting themselves at the expense of those who are guilty – no matter how many of the latter are harmed as a result.⁵

Several points are worth noting about this passage. First, what's doing the justificatory work in permitting (or sometimes requiring) distributions of harm is the *moral asymmetry* between the involved parties. Because Aggressor culpably creates the forced choice situation Victim now faces, there exists a moral asymmetry between the two parties that grounds Victim's permission to harm Aggressor. Thus, culpability and innocence become the criteria for determining which possible harm distributions are justified. The underlying explanation for determining harm

⁴ Montague, *Punishment as Societal-Defense*, 43; Montague, "Self-Defense and Distributive Justice," 90.

⁵ Montague, "Self-Defense and Choosing," 215.

distributions based on moral asymmetry is the idea that harmful outcomes should be appropriately connected to an agent's behavior – this is what Montague means by his expression “as a matter of basic justice.” What makes the distribution of harm just or unjust is whether the harm falls to the innocent or the culpable party.

With its focus on culpability, Montague's is a fault-based distributive justice theory of self-defense.⁶ An agent's actions are faulty or culpable when performed in a morally defective way,⁷ and actions can be performed in a morally defective manner intentionally, recklessly, or negligently.⁸ So if a person's intentional, reckless, or negligent behavior creates a threat of harm that must fall to one of two or more parties, then as a matter of justice the harm should fall to the faulty party rather than the innocent.⁹ Or put slightly differently, justice permits an innocent person to preserve her life instead of the life of the culpable person whose faulty behavior put her in peril.¹⁰

⁶ Montague describes the distributive justice principle underlying the forced choice account of self-defense as having a necessary “blameworthiness condition.” See Montague, “Forced Choices and Self-Defence,” 92.

⁷ Montague, “Self-Defense and Distributive Justice,” 86.

⁸ Montague, “Self-Defense and Choosing,” 211.

⁹ *Ibid.*, 216. As an example of a culpably created forced choice scenario involving negligence, Montague offers a hypothetical where the owner of a chemical factory allows toxic materials to contaminate nearby fields, forcing the local ruler to decide how to distribute the associated burdens. See Montague, *Punishment as Societal-Defense*, 43-45. Regarding a culpable forced choice scenario based on recklessness, Montague discusses a case where an agent's reckless steering of a boat with passenger aboard results in an accident, forcing a passing boater to determine whether to save the passenger or reckless operator (assuming only one life can be saved). See Montague, “Self-Defense and Distributive Justice,” 85.

¹⁰ Importantly though, Montague later argues that victim's use of defensive force must be proportional in that it must not cause more harm to each culpable party than the innocent party would suffer under a different distribution. Additionally, Montague acknowledges that if distributing the harm to the culpable party would harm innocent bystanders, his distributive justice principle does not tender a

A second point worth noting is that if the imperiled party is the party in a position to distribute the threatened harm, she is permitted to do so and others would be wrong in preventing her from protecting herself – including Aggressor, who cannot claim self-defense against Victim’s use of defensive force. Thus, Victim has a *claim right* to use self-defensive force.¹¹ Relatedly, if a third party is in a position to distribute the threatened harm, then not only is she justified in distributing the harm away from the innocent party onto the culpable party if she intervenes, but she is morally required to do so. This last point has two important implications: it grounds the notion of other-defense, and it also blocks agents from intervening on behalf of the culpable party (one would not be justified in coming to the aid of an aggressor to defend him from harm).

Third, note that Montague claims that any number of culpable agents can be harmed in defense of the innocent. Another way of putting the claim is to say that harm to multiple culpable parties is not aggregated for purposes of proportionality considerations. The apparent explanation here must be that there exists a moral asymmetry between an innocent victim and *each* of any number of her culpable aggressors. Yet the moral asymmetry only exists between the victim and the culpable agent relative to the threatened harm that the culpable agent created. In other words, victim (or third party) is forced to make a choice regarding only the threatened harm. A culpable party can only be harmed when necessary to avert the threat he created; he can’t be harmed to avert a separate threat he didn’t create.

straightforward answer regarding the permissibility of acting. See Montague, *Punishment as Societal-Defense*, 45-46.

¹¹ Montague, “Self-Defense and Choosing,” 211; Phillip Montague, “Self-Defence and Innocence: Aggressors and Active Threats,” *Utilitas* 12, no. 01 (2000): 63.

2.1.1 Limitations of Montague's Theory

Montague's forced choice theory provides a compelling explanatory account for why victims may sometimes justifiably use defensive harm against culpable parties. But extending the framework to evaluate defensive killing in war isn't as compelling under Montague's hand. In brief remarks, Montague argues his distributive justice theory can make sense of defensive warfare by viewing nations "as sometimes faced with forced choices in the distribution of burdens whose existence is the fault of other, aggressor nations and then infer that the former have a right, other things being equal, to distribute the burdens in their own favor."¹² Several points can be raised against this approach, such as its reliance on a questionable domestic analogy, or the fact that it lacks important nuance in that it only leads to the broad generalization that one state is justified in using force, while the other is not.

The more telling point, however, is that Montague's framework simply can't capture the many nuances of wartime killing. Montague's original insight was to see that the broad, widely accepted ideas of distributive justice and fairness could provide an explanatory account for justified self-defensive harm. But as Montague points out, his theoretical framework only applies to situations involving *culpable* agents; his theory is non-applicable to situations involving non-culpable agents, or at least not straightforwardly.¹³ The problem is that during war only a small number of combatants are truly culpable; many have excusing conditions that

¹² Montague, *Punishment as Societal-Defense*, 60.

¹³ Montague, "Self-Defense and Distributive Justice," 86; Montague, *Punishment as Societal-Defense*, 46.

absolve or mitigate their culpability, while others yet are completely innocent. So Montague's theory appears too limited for evaluating complex wartime killing.

Relatedly, during war many people lack culpability and yet bear *moral responsibility* for the forced choice situations that innocent persons face. But given their lack of culpability, Montague's forced choice theory allows these responsible individuals to fall outside the liability net. One might think this result unfair given that such individuals bear responsibility for the threatening situation in a way that the innocent threatened victims don't. Enter McMahan's theory. McMahan's approach draws heavily from Montague's in that his theory of liability to defensive harm is also grounded in the moral asymmetry between agents. But McMahan expands Montague's basic framework by shifting the liability criterion from *culpability* for an unjust threat to *moral responsibility* for an unjust threat. He also offers a comprehensive application of his theory to wartime killing. So we turn now to an evaluation of McMahan's theory.

2.2. Jeff McMahan's Responsibility Account of War as Self-Defense

Over many years and through numerous publications, McMahan has tendered an ever-increasingly influential theory of justified defensive harm covering both individual and national defense situations.¹⁴ Given the extent of his work, a full survey is well beyond the scope of this chapter. Instead, the aim here is to give a broad overview of McMahan's theory, highlighting along the way those aspects that will later prove especially salient for analyzing postwar obligations.

¹⁴ Although McMahan's theory has garnered much support, his position is not without its critics. For some of the more challenging objections, see Rodin, *War and Self-Defense*, especially Ch. 5; Lazar, "Responsibility, Risk, and Killing," 699-728; Lazar, "The Responsibility Dilemma," 180-213.

Although he follows the general outline of Montague's forced choice theory of self-defense, McMahan nevertheless considerably broadens Montague's distributive justice theory in two important ways. First, McMahan lowers the threshold for the justification of defensive harm; whereas Montague focused on an agent's culpability in creating a forced choice situation, McMahan argues instead that moral responsibility for creating a forced choice situation is the threshold for justifying defensive harm. This move greatly expands the pool of liability because moral responsibility is more inclusive than culpability regarding unjust threats: all culpable agents are morally responsible for unjust threats, but even more agents can be morally responsible for unjust threats while lacking culpability.

Second, working from the reductive claim that the moral principles governing war reduce to the same moral principles governing self- and other-defense, McMahan extends his theory to justify defensive force during war. McMahan's symmetrical thesis is that in cases of both individual and national defense, if unavoidable harm must fall to either an innocent party or a party morally responsible for creating an unjust threat, then as a matter of fairness the harm should fall to the responsible party rather than the innocent.

2.2.1. Montague's Influence on McMahan's Responsibility Account

Before proceeding, it is worth pointing out Montague's theoretical influence on McMahan's work. Numerous passages throughout McMahan's work confirm this point. For example, in his earlier work McMahan states that "in cases in which a person's culpable action has made it inevitable that someone must suffer harm, it is normally permissible, as a matter of justice, to ensure that the culpable person

himself suffers the costs of his own wrongful action rather than to allow those costs to be imposed on the innocent.”¹⁵

In a similar vein McMahan writes:

Consider cases in which it is unavoidable that one of two people will die and in which one of the two bears a slight degree of responsibility for this fact while the other bears no responsibility at all. It seems that in cases such as this, even a slight degree of responsibility for a situation in which someone must die, and especially a very slight degree of culpability, can be sufficient to override the presumption against intentional killing.¹⁶

Elsewhere, McMahan notes that liability to defensive harm follows from “the distribution of harm in accordance with the demands of justice”¹⁷, and that “self-defense is a matter of justice in the ex ante distribution of unavoidable harm”.¹⁸ These references clearly situate McMahan’s work within the broad distributive justice framework for justifying defensive harm – a framework first articulated by Montague. In addition to extending the distributive justice theory of self-defense by focusing on moral responsibility, McMahan’s project can be seen as a nuanced elaboration and defense of Montague’s original framework.

2.2.2 McMahan’s Terminology

In order to discuss McMahan’s work more efficiently, it will be helpful to clarify some terminology. McMahan refers to his overall theory as a “Responsibility Account” of the justified use of defensive force, which applies symmetrically to both

¹⁵ Jeff McMahan, “The Ethics of Killing in War,” *Ethics* 114, no. 4 (2004): 401. See also Jeff McMahan, “Self-Defense and the Problem of the Innocent Attacker,” *Ethics* 104, no. 2 (1994): 259.

¹⁶ McMahan, *Killing in War*, 227.

¹⁷ Jeff McMahan, “Debate: Justification and Liability in War,” *Journal of Political Philosophy* 16, no. 2 (2008): 234.

¹⁸ *Ibid.*

individual and national defense situations.¹⁹ When discussing war in particular, McMahan employs the following technical terms to refer to various agents.²⁰ Individuals fighting on the just side of a war are “just combatants,” while those fighting on the unjust side are “unjust combatants.”²¹ Parallel claims hold true for civilians: “just civilians” are those within a state fighting a just war, and “unjust civilians” are those within the state fighting an unjust cause. “Neutral civilians” are civilians located in neutral states.²² Although McMahan acknowledges that “civilian” and “noncombatant” are not actually synonyms on his account, he nonetheless uses them interchangeably. The term “bystander” refers to a person not *causally* implicated in a threat, though importantly the person could still bear moral

¹⁹ In his earlier writings, McMahan referred to his theory as a “justice-based account” of self-defense. See McMahan, *The Ethics of Killing*, 402; McMahan, “Self-Defense and the Problem,” 259. Elsewhere, McMahan refers to his theory as a “liability account.” See Jeff McMahan, “The Just Distribution of Harm Between Combatants and Noncombatants,” *Philosophy & Public Affairs* 38, no. 4 (2010): 351. McMahan has more recently called his theory a “responsibility account.” See Jeff McMahan, “Who is Morally Liable to be Killed in War,” *Analysis* 71, no. 3 (2011): 545. I will follow the “responsibility account” terminology.

²⁰ McMahan, “The Just Distribution of Harm,” 345; McMahan, *Killing in War*, 212.

²¹ McMahan, *Killing in War*, 5; McMahan, “The Just Distribution of Harm,” 345. For sake of brevity, we can roughly say that McMahan’s use of the category “combatants” includes men and women in uniform during times of war, as well as a small number of civilians who either pose a threat during war, or provide the materials that make warfighters dangerous – such as munitions workers.

²² Because McMahan doesn’t discuss connections between citizenship and civilian status, his tripartite civilian classification could seem misleading. For instance, a neutral state citizen who happens to be located within an unjust state during war (suppose she was traveling through when war broke out) is by definition an “unjust civilian” rather than a “neutral civilian.” I think the more natural way to read McMahan on this point is that unjust civilians are citizens of the state lacking a just cause. Citizens of other states who happen to be located within the unjust state and who aren’t otherwise implicated by supporting the unjust threat would be considered neutral bystanders (or perhaps neutral third parties).

responsibility for the threat.²³ Finally, McMahan refers to foreseeable but unintended harm to civilians resulting from military operations as “side-effect harm.”²⁴ I will follow McMahan’s terminology with the exception of “side-effect harm,” for which I will use the more traditional expression “collateral harm.”

2.2.3 McMahan’s Criteria for Liability to Defensive Harm

McMahan’s Responsibility Account is a forfeiture theory of self-defense, working from the foundational assumption that everyone has a presumptive right not to be harmed by others – a right that can be forfeited through one’s actions. As McMahan notes, “to attack someone who is liable to be attacked is neither to violate nor to infringe that person’s right, for the person’s being liable to attack *just is* his having *forfeited* his right not to be attacked, in the circumstances.”²⁵ Forfeiting the right not to be harmed just is to become liable to be harmed, and if one is liable to be harmed, then one is not wronged when harmed.

The expression “in the circumstances” in the previous quote is important. One can forfeit the right not to be harmed, but such forfeiture doesn’t entail a forfeiture of rights in general; it is not the case that any person can harm a liable party for any reason. Rather, harming a liable party must be necessary in order to protect the threatened party. For illustration, imagine a scenario where Aggressor unjustifiably attacks Victim. In this case, Aggressor has forfeited his right not to be harmed in a very specific way relative to Victim. Specifically, two conditions must be met: harming Aggressor must be absolutely necessary to prevent the wrongful

²³ McMahan, *Killing in War*, 172.

²⁴ McMahan, “The Just Distribution of Harm,” 345.

²⁵ McMahan, *Killing in War*, 10, original emphasis.

harm to Victim for which Aggressor is responsible, and the amount of harm to Aggressor must not be excessive relative to the averted harm to Victim.²⁶ McMahan refers to these two conditions using the traditional just war terms “necessity” and “proportionality.”

In a novel move breaking from traditional just war literature, McMahan distinguishes between two proportionality requirements: narrow proportionality and wide proportionality.²⁷ Narrow proportionality requires that the harm to potential liable parties not be excessive relative to the threat the liable parties pose. So if Aggressor threatens to bruise Victim, Victim’s use of lethal force against Aggressor would be narrowly disproportionate. Wide proportionality, on the other hand, requires that unintended harm to non-liable parties not be excessive relative to the act’s intended goal. Suppose Aggressor attacks with a knife; if Victim’s use of defensive force would kill several bystanders in addition to Aggressor, then Victim’s use of defensive force would be disproportionate in the wide sense.

McMahan claims that liability’s necessity and proportionality restrictions are “internal” to liability itself.²⁸ So if harming Aggressor would either prove unnecessary or cause a disproportionate amount of harm to Aggressor or non-liable parties, then Aggressor would be non-liable and Victim’s use of defensive harm would be unjustified.

Note the completely pragmatic nature of the necessity requirement: the justification behind harming a liable party is that the harm is necessary for the

²⁶ McMahan, *Killing in War*, 10.

²⁷ *Ibid.*, 20-21.

²⁸ *Ibid.*, 10.

instrumental purpose of protecting the victim.²⁹ On the Responsibility Account, harming a liable party is not judged as good in and of itself. But if harming a liable party can help protect the threatened party, then such harm is justified; if justified, then the threatened party can harm the liable party in self-defense. And since the reasons for harming the liable party are grounded in the agent-neutral notion of fairness, such reasons also justify others in distributing the harm to the liable party (commonly called “other-defense”). Because self- and other-defense are justified harming, others cannot prevent the harm.

With this understanding of liability in place, we can now examine the crux of the Responsibility Account. McMahan’s criterion for liability to defensive harm is:

In both individual and national defense, an individual is liable to defensive harm if he is morally responsible for an objectively unjust threat, or a threat of wrongful harm.³⁰

So if an Agent is morally responsible for creating a forced choice situation where harm is threatened to innocent Victim, then as a matter of fairness, Agent is liable to necessary and proportionate defensive harm for purposes of averting harm to Victim. Importantly, one can be morally responsible for an unjust threat of harm without being the party who actually threatens the harm.³¹ For example, if Agent hires Thug to murder Victim, Agent bears moral responsibility for the unjust threat even though Thug is the agent who poses the threat (Thug of course bears moral responsibility as well). In such a case, Agent is liable to defensive harm if harming

²⁹ McMahan, *Killing in War*, 8, 19.

³⁰ McMahan, “Debate: Justification and Liability,” 227, 234; McMahan, *Killing in War*: 35, 157.

³¹ *Ibid.*, 157, 207.

Agent would avert the harm to Victim – even though Agent doesn't directly pose a threat to Victim. Thug would be liable to defensive harm as well.

It's worth underscoring the objective nature of McMahan's approach. On the Responsibility Account, whether a threat of harm stands as just or unjust is an all things considered objective determination. The threatening agent's subjective viewpoint does not determine the objective permissibility of her action; rather, the wrongness of an act hinges on whether the threatened party is liable to the threatened harm. The key point for liability purposes is that an agent can act subjectively permissibly but objectively impermissibly.³² The objective nature of a threat is what grounds liability to defensive force; the threatening agent's subjective assessment can at best excuse her blameworthiness regarding the threat for which she is responsible.

2.2.4 Moral Responsibility for an Objectively Unjust Threat

Both Montague and McMahan ground their accounts of defensive harm on the moral asymmetry between the involved parties. But whereas Montague focuses on an agent's culpability in creating a forced choice situation, McMahan shifts the focus to an agent's *moral responsibility* for creating the forced choice. Importantly, one can be morally responsible for a wrongful harm without being blameworthy.

For McMahan, there are two necessary and jointly sufficient conditions that entail moral responsibility for an unjust harm. For an agent to be morally responsible for unjust harm *x*, agent must (1) voluntarily act in a way that (2) foreseeably poses a risk of wrongful harm *x* to a non-liable party. If agent meets

³² McMahan, *Killing in War*, 164.

both of these conditions and wrongful harm x materializes, then agent can be liable to defensive force to prevent harm x . According to McMahan “a person cannot become liable to defensive action without having engaged in some form of voluntary action that had some reasonably foreseeable risk of creating a wrongful threat.”³³

The idea that foreseeability is a necessary requirement for moral responsibility is a common sentiment, echoed here by Peter Vallentyne:

Suppose someone flicks on a light switch and, unbeknownst to her, sets off a bomb. Setting off the bomb is an unforeseen outcome of her choice. It’s relatively uncontroversial that, where agents do not foresee an outcome and are not responsible for the failure to foresee it, they are not responsible for that outcome. Such unforeseen outcomes play no role in choice deliberations and agents are thus not responsible for them.³⁴

In a similar vein, William Rowe writes:

When a person does something that results in a state of affairs obtaining that would not have obtained had he not done what he did, it is clear that the person *causes* (or causally contributes to) the obtaining of that state of affairs. Moreover, if the person could have avoided doing what he did, thus preventing the state of affairs from obtaining, the person is *responsible* for the state of affairs provided he foresaw (or ought to have foreseen) that it would result from his action.³⁵

Both Vallentyne’s and Rowe’s remarks encompass two important claims. First, an agent (A) can be morally responsible for causing unjustified harm x if A chooses to act while foreseeing that her act might cause x . Second, A can be morally responsible for x if A acts in a way that causes x and A *should* have foreseen the possibility that her act might cause x . In the former case, A knowingly puts others at

³³ McMahan, *Killing in War*, 177.

³⁴ Peter Vallentyne, “Responsibility and False Beliefs,” in Carl Knight and Zofia Stemplowska, *Responsibility and Distributive Justice* (Oxford: Oxford University Press, 2011), 178.

³⁵ William Rowe, “Causing and Being Responsible for What Is Inevitable,” in John Martin Fischer and Mark Ravizza, *Perspectives on Moral Responsibility* (Ithaca, NY: Cornell University Press, 1993), 310, original emphasis.

risk of x , while in the latter case, A 's moral responsibility hinges on her blameworthiness in failing to foresee the risk she should have foreseen (i.e., A is epistemically negligent).

McMahan captures the forgoing conception of moral responsibility for an unjust threat in the following example:

The Conscientious Driver. A person who always keeps her car well maintained and always drives carefully and alertly decides to drive to the cinema. On the way, a freak event that she could not have anticipated occurs that causes her car to veer out of control in the direction of a pedestrian.³⁶

Driver bears moral responsibility for the objectively unjust threat she poses to pedestrian because driver meets the necessary and jointly sufficient conditions. Driver's threat is objectively unjustified because pedestrian did nothing to make himself liable to harm; if run over, pedestrian would be wrongfully harmed. Additionally, driver's action was voluntary because she could have chosen otherwise. It was also reasonably foreseeable that operating a 2,000-pound vehicle could wrongfully harm an innocent person – even if the vehicle is well maintained and driven carefully. So for McMahan, driver is morally responsible for an unjust threat and therefore liable to necessary and proportionate defensive harm to protect pedestrian – up to and including deadly force.

If one shares the intuition that pedestrian would be justified in using defensive force to preserve her life, then clearly culpability is not a necessary condition for liability to defensive harm. *Driver* highlights the crucial fact that even a slight moral asymmetry between parties based on moral responsibility for an

³⁶ McMahan, *Killing in War*, 165. McMahan previously presented a version of this hypothetical titled "The Inadvertent Attacker." See McMahan, "The Ethics of Killing in War," 403.

unjust threat can ground liability to defensive harm. As a matter of distributive justice, if unavoidable harm must fall to one of two parties, the harm should fall to the party responsible for creating the forced choice situation, even if that level of responsibility is quite low and unintentional. Driver's moral responsibility is in fact low: she carefully drove a well-maintained car. But driver voluntarily chose to engage in a foreseeably risk-imposing activity and, through bad luck, the foreseeable harm materialized. As a matter of fairness, pedestrian should not be expected to bear the lethal harm that driver created.

Perhaps more applicable for purposes of evaluating liability during war, McMahan offers the following example that includes intent to harm:

The Resident. The identical twin of a notorious mass murderer is driving in the middle of a stormy night in a remote area when his car breaks down. He is nonculpably unaware that his twin brother, the murderer, has within the past few hours escaped from prison in just this area, and that the residents have been warned of the escape. The murderer's notoriety derives from his invariable modus operandi: he violently breaks into people's homes and kills them instantly. As the twin whose car has broken down approaches a house to request to use the telephone, the resident of the house takes aim to shoot him, preemptively, believing him to be the murderer.³⁷

Resident's action is objectively wrong because he intends to kill an innocent person who isn't liable to be killed. Resident acts voluntarily in that he chooses to shoot twin; he could have chosen instead to run the risk of being harmed, or attempted evasion, and so on. Moreover, it's reasonable to foresee that choosing to shoot someone runs the risk of harming an innocent person. Mistaken identity is a genuine possibility, which turns out to be the case here. On McMahan's analysis,

³⁷ McMahan, *Killing in War*, 164.

resident is morally responsible for posing an objectively unjust threat to an innocent person. Accordingly, resident is liable to defensive harm.

At this point the natural reaction is to point out that resident's actions are reasonable given the situation. He seems epistemically justified in believing that twin is the murderer given his identical likeness, coupled with resident's ignorance that murderer had a twin. Moreover, resident clearly acts in what he reasonably perceives as a life-threatening situation and so acts under duress. Both of these points gesture toward the important issue of excuses and the role they play in the Responsibility Account.

McMahan's discussion of excuses is extensive, running a whole chapter in *Killing in War*.³⁸ McMahan identifies three general types of excuse: epistemic limitation, duress, and diminished responsibility,³⁹ though only the first two are generally applicable during war.⁴⁰ The conceptual claim underlying an excuse is the judgment that although an agent performs a wrongful act, she shouldn't be considered blameworthy because of some special excusing condition. Excuses vary in strength, running from partial to full. Whereas partial excuses can mitigate an agent's culpability for wrongdoing, a full excuse can completely absolve an agent's culpability.

In the case at hand, resident seemingly has an excuse of epistemic limitation given his justifiable but mistaken belief that twin is the murderer. Epistemic

³⁸ McMahan, *Killing in War*, Ch. 4.

³⁹ *Ibid.*, 116.

⁴⁰ The third is sometimes applicable in cases of child soldiers. *Ibid.*, 200-02. But even in the case of child soldiers, McMahan thinks most still bear some moral responsibility for the threats they pose because children as young as ten are still able to make moral assessments.

limitation can excuse an agent if his act would not have been wrongful had his mistaken belief been true. In this case, resident would not have acted wrongly had it been true that he was about to be slain by murderer. Additionally, although resident is mistaken about his reasonable belief that he is in a life-threatening situation, his perceived situation also raises the excuse of duress. The root claim underlying duress is that some threats of harm or coercive force can so overwhelm an agent's will that she can't help but respond in a given way.

Yet importantly, McMahan thinks resident is still liable to defensive force. Unfortunately for resident, excuses only defeat culpability, *not moral responsibility*.⁴¹ The explanation is straightforward; neither epistemic mistake nor duress negate the fact that an agent has voluntarily chosen to engage in an activity that foreseeably risked harming innocent people. In the case of epistemic mistake, it was foreseeable that resident's intended victim might in fact be innocent, but resident still chose to employ deadly force.

Regarding the claim of duress, it is almost never the case that an agent couldn't have chosen otherwise; acting under duress is not the same as involuntariness. As McMahan points out, "duress is never literally irresistible."⁴² The fact that others can resist the coercive pressures of most duress situations establishes the possibility of choice, even if the number is small.⁴³ A person's will is almost never overwhelmed to the point of literally not being able to make a choice, and so duress almost never absolves an agent of moral responsibility. If an agent

⁴¹ McMahan, *Killing in War*, 162.

⁴² *Ibid.*, 175.

⁴³ *Ibid.*, 162.

could have chosen otherwise, then the act is still his.⁴⁴ Thus, agents possessing partial and full excusing conditions for the unjust threats they pose are nevertheless liable to defensive harm given their moral responsibility. As a matter of distributive justice, it would be unfair to expect an innocent victim to bear a threatened harm rather than the agent who created it – even if the latter acted under duress or mistaken belief.

Finally, for sake of completeness, let's revisit the foreseeability condition of moral responsibility by contrasting *Resident* and *Driver* with *Cell Phone Operator*:

A man's cell phone has, without his knowledge, been reprogrammed so that when he next presses the "send" button, the phone will send a signal that will detonate a bomb that will then kill an innocent person.

Operator neither chooses to harm (unlike resident), nor engages in an activity that reasonably poses a foreseeable risk of harm (unlike driver). It is unreasonable for operator to foresee that his act of pressing the send button might result in a lethal threat to someone; such anticipation would be bizarre. If one engages in an activity that eventuates in a completely *unforeseeable* forced-choice scenario, then one isn't morally responsible for the unjust threat. So on the Responsibility Account, even though operator poses an objectively unjust threat, he lacks moral responsibility for the threat he poses because the threat wasn't reasonably foreseeable (he's a "non-responsible threat"). Accordingly, operator isn't liable to defensive harm; the potential victim or someone acting on her behalf would be unjustified in preemptively killing operator.

⁴⁴ Arthur Ripstein, *Equality, Responsibility, and the Law* (Cambridge: Cambridge University Press, 1999): Ch. 5.

2.2.5 McMahan's Responsibility Account Applied to War

According to the reductive account of war, the moral principles governing war reduce to the same moral principles governing individual defense. The difference between individual and national defense thus comes down to the increased complexity and scope of war. Yet if the reductive account of war and McMahan's justice-based theory of defensive harm are both true, then the Responsibility Account should extend to provide justification for defensive harming during war.

One crucial aspect for understanding McMahan's analysis of killing in war is the objective rightness or wrongness of the war itself. Whether a state is the aggressor or defender profoundly impacts the liability determinations of its combatants and civilians. This approach is at odds with traditional just war theory, which holds that combatants on both sides of a war are morally justified in killing each other,⁴⁵ while noncombatants on both sides lack liability altogether. The differences between the traditional theory and McMahan's revisionist approach will readily become apparent.

2.2.6 McMahan's Responsibility Account Applied to Just Combatants

Applying the Responsibility Account to combatants who fight on the just side of a war is straightforward. Just combatants have positive moral reason to harm parties who've made themselves liable, and so just combatants harm with objective justification. Given that they harm with justification, just combatants have done nothing to forfeit their rights not to be harmed and are thus not liable to defensive harm during war. Additionally, because just combatants are justified in using

⁴⁵ The classic statement of the traditional view can be found in Walzer, *Just and Unjust Wars*, esp. Ch. 3.

defensive force in self- and other-defense, others would be wrong in attempting to prevent their use of force. Thus, all killing of just combatants by unjust combatants is unjustified and wrongful.⁴⁶ McMahan writes,

Those who fight solely to defend themselves and other innocent people from a wrongful threat of attack, and who threaten no one but the wrongful aggressors, do not make themselves morally liable to defensive attack. By engaging in morally justified self- and other-defense, they do nothing to forfeit their right not to be attacked or killed.⁴⁷

A combatant is liable to be killed if he poses or contributes to an unjust threat. Since just combatants do not pose unjust threats, they are not liable to be killed.

2.2.7 McMahan's Responsibility Account Applied to Unjust Combatants

As should be obvious, there is a profound moral asymmetry between just and unjust combatants on the Responsibility Account. Whereas just combatants fight with objective justification and do not forfeit their right not to be harmed, the same can't be said of unjust soldiers. By fighting in an unjust war, unjust combatants engage in objective wrongdoing because the people they harm aren't liable to be harmed. Specifically, unjust combatants harm just combatants and just civilians – people who lack liability to be harmed.⁴⁸

But as previously noted, posing an objectively unjust threat of harm isn't sufficient for liability to defensive harm. One must be morally responsible for the unjust threat. As we saw in Section 2.2.4, to be morally responsible for an unjust

⁴⁶ The possible exception to this general prohibition occurs when just combatants pursue their just aims by unjust means, which happens when they violate *in bello* requirements of necessity and proportionality. Because one of my beginning assumptions is that the victim state fights a just war in a just manner, I won't pursue this possible complication here.

⁴⁷ McMahan, *Killing in War*, 14.

⁴⁸ *Ibid.*, 16, 155.

threat of harm, an agent must (1) voluntarily engage in an activity that (2) reasonably poses a foreseeable unjust harm to a non-liable party. Drawing from the earlier analyses of *Driver* and *Resident*, we can see how unjust combatants meet both these criteria for moral responsibility.

The issue of determining whether unjust combatants *voluntarily* pose an unjust threat takes us back to the issue of duress. Driver's liability follows from her earlier choice to drive;⁴⁹ she could have chosen differently. Similarly for McMahan, unjust combatants either chose to join the military, or chose to allow themselves to be conscripted into the military;⁵⁰ either way, unjust combatants have voluntarily chosen to become deadly state agents. It's true these men and women may have faced economic or social pressures prompting them to join the military, or coercive pressures in the case of forced conscription. But as noted earlier, duress is never literally irresistible. The fact that some agents resist in these types of situations establishes the possibility of choice. Because unjust combatants have acted voluntarily, duress claims can at most absolve their culpability, not their moral responsibility.⁵¹

2.2.8 The Foreseeability of Posing an Unjust Threat

Even if one agrees that unjust combatants act voluntarily, one might still wonder why unjust combatants bear moral responsibility for the threats they pose. Suppose unjust combatants are subjectively justified in believing their state's claim that they

⁴⁹ McMahan, "Debate: Justification and Liability," 231.

⁵⁰ McMahan, *Killing in War*, 183.

⁵¹ That's not to say that unjust soldiers' excuses aren't important; by mitigating or absolving unjust combatants' culpability, excusing conditions explain why unjust soldiers generally should not be *punished* at war's end.

fight with justice on their side. Does this fact not absolve them of responsibility should their threats eventually prove unjust?

McMahan's answer is that unjust combatants are morally responsible for the unjust threats they pose because when they joined the military ranks they foresaw – or *should* have foreseen – the possibility that their future threats might be objectively unjust. Consider again *Conscientious Driver*. Driver justifiably believes that she won't pose an unjust threat to others because she carefully drives a well-maintained car. But nonetheless she foresaw the possibility of harming others through bad luck. Similarly, and more analogous to the situation of unjust combatants, resident's use of violence foreseeably runs the risk of harming an innocent, non-labile person (such as in the case of mistaken identity).

Because *Resident* involves the uncommon occurrence of mistaking an innocent person for a culpable threat, McMahan acknowledges it is a bit contrived.⁵² However, the problem of mistake is likelier in cases of war, where unjust combatants can reasonably be mistaken about their enemy's liability status. Still, just as driver and resident participate in activities that pose a reasonably foreseeable threat of unjust harm, so too combatants voluntarily participate in an activity that reasonably and foreseeably risks harming non-labile parties. Unfortunately for combatants who believe their state's war is just, it may turn out instead that they kill innocent people.

Additionally, combatants have reason to be skeptical of their government's claim to just war. As McMahan points out, at least 50 percent of wars are unjust for

⁵² McMahan, *Killing in War*, 185.

one side, and perhaps even higher given that states on both sides of a war could lack just cause.⁵³ Also, most combatants can see that combatants on the other side also believe their cause to be just – and yet both sides can't be right. Soldiers tend to believe their governments, and historically governments have often lied or misled their troops.⁵⁴ For all these reasons, combatants should foresee the possibility that they may end up fighting an unjust war and, in the process, unjustly threaten innocent people. If combatants fail to consider and foresee this possibility, then given the grave nature of their profession they stand negligent for failing to fulfill their epistemic duties.⁵⁵ If combatants are negligent then they are culpable, in which case their moral responsibility for their unjust threats is grounded in their blameworthiness.

At this point, one might object by pointing out that many unjust combatants don't actually pose a threat because they perform support functions, or are stationed in the rear, and so on. Only a very small percentage of combatants actually kill, the claim goes. But if they don't personally pose a threat, how could such combatants be morally responsible for an unjust threat?

The reply to this objection is threefold. First, although many unjust combatants aren't stationed at the front, nonetheless they are trained and prepared to kill. These soldiers are potential killers who as a matter of luck haven't yet been pressed into action – but they stand ready to. Given that they will simply backfill

⁵³ McMahan, *Killing in War*, 142, 185.

⁵⁴ *Ibid.*, 185.

⁵⁵ *Ibid.*, 186.

their fallen peers, it becomes necessary to kill both frontline troops as well as those in the rear.

Second, unjust combatants in support roles enable the frontline troops to kill, thus making significant contributions to unjust threats. As McMahan puts it, “in both their support role and their potential combat role, they [unjust combatants] substantially increase the objective risk that innocent people will be killed.”⁵⁶

Third, unjust combatants contribute to unjust threats by their mere presence on the battlefield. Even if some unjust combatants have no intention to kill (imagine conscripted pacifists), their just counterparts can’t discern this fact. Unfortunately, the docile unjust combatants will draw fire away from their deadlier comrades who do intend to kill, the effect of which is to increase the possibility that some of the deadly unjust combatants will live to fight on for their wrongful cause.⁵⁷ Simply by being on the battlefield dressed as an enemy combatant, non-threatening unjust combatants are responsible for inducing just combatants to believe they pose a threat to innocent people.⁵⁸ Thus, even unjust combatants who intend no harm still contribute to unjust threats, or are responsible for appearing to intend to kill innocent people; either way, non-threatening unjust combatants bear liability to defensive harm.

For all these reasons, the foregoing analysis establishes that unjust combatants hold moral responsibility for the objectively unjust threats they pose. Although McMahan thinks most unjust combatants possess at least partial excuse

⁵⁶ McMahan, “Who is Morally Liable,” 549.

⁵⁷ *Ibid.*, 556.

⁵⁸ *Ibid.*, 555-56.

for their unjust threats,⁵⁹ they still remain morally responsible for their unjust threats and are thus liable to defensive harm. McMahan argues, “the basis for their liability is simply that they know they are intentionally harming, or foreseeably harming, or imposing a risk of harm, and also know that it is possible that those they harm may be innocent.”⁶⁰ Accordingly, unjust combatants are liable to defensive harm.

2.2.9 McMahan’s Responsibility Account Applied to Just Civilians

Applying the Responsibility Account to just civilians is simple. Just civilians do nothing during war to make themselves liable to either intentional or collateral harm. Any harm to just civilians during war is unjustified and wrongful.

2.2.10 McMahan’s Responsibility Account Applied to Unjust Civilians

McMahan’s analysis of unjust combatant liability is fairly straightforward; less straightforward is his analysis of unjust civilian liability. Specifically, I argue that McMahan’s analysis of unjust civilian liability misses the mark based on his own liability account. Given the importance of this issue for purposes of determining postwar obligations, the issue will be vigorously pursued in the next chapter. For now, I’ll sketch what I take to be the broad contours of McMahan’s position on unjust civilian liability.

2.2.11 Unjust Civilian Liability to Intentional Attack

Civilians who directly pose a threat during war are combatants. So the issue of unjust civilian liability to attack focuses on whether unjust civilians can be sufficiently morally responsible for the unjust threats of others, which includes both

⁵⁹ McMahan, *Killing in War*, 186, 193.

⁶⁰ *Ibid.*, 182.

the initiating of unjust war, and supporting unjust acts of war. In general, unjust civilians are almost never sufficiently responsible for unjust threats to non-labile parties, and therefore are almost never liable to intentional attack.⁶¹

McMahan does cite a couple of rare cases where civilians bear sufficient moral responsibility for unjust threats, such as when United Fruit Company executives induced the Eisenhower administration to overthrow the Guatemalan government in 1954, or the claim that Israeli settlers in the West Bank threaten to dispossess Palestinians of their ancestral lands via long-term occupation.⁶² In both cases, McMahan thinks the civilians are sufficiently responsible to ground liability to intentional attack if doing so would have averted the harm to the non-labile parties. Yet as McMahan acknowledges, both cases are highly anomalous.

Although it's unlikely that unjust civilians hold a high level of moral responsibility for an unjust threat, they likely bear some responsibility for their state's aggression. For example, most unjust civilians participate in the local economy and pay taxes, the effects of which enable the state to bankroll its unjust war. Some unjust citizens may have voted the warring regime into power, and others may have failed to protest their state's aggression.

McMahan's reply is to point out that for each citizen considered individually, these activities make but a negligible contribution to the initiating and fighting of unjust wars – too low an amount to ground liability to intentional attack.⁶³ Unjust

⁶¹ Interestingly, McMahan doesn't address the topic of unjust civilian politicians' moral responsibility for initiating unjust wars, and what their liability to attack or assassination might be.

⁶² McMahan, *Killing in War*, Ch. 5.

⁶³ McMahan, "Who is Morally Liable," 549-51; McMahan, *Killing in War*, 225.

citizens are also likely justified in performing these activities, which is to say that they have positive moral reason for doing what they do.

Pragmatic considerations also speak against intentionally targeting civilians. Even if one could identify significantly responsible unjust civilians, they tend to be located within large groups of innocent unjust civilians, which raises wide proportionality issues. Moreover, even when one is able to isolate and target highly responsible civilians, rarely does doing so prevent any future harm since their contributions lie largely in the past. If killing a person won't actually help avert an unjust threat, then doing so is unjustified for failing to satisfy liability's internal necessity requirement. All of these reasons point to the conclusion that unjust civilians are almost never liable to intentional attack.

2.2.12 Unjust Civilian Liability to Lesser Harms

Most unjust civilians lack sufficient moral responsibility to render them liable to intentional attack. But on the Responsibility Account, liability isn't an all or nothing concept. Rather, because moral responsibility comes in matters of degree, so too does liability. There is thus a correspondence claim between an agent's level of moral responsibility for an unjust threat and her liability to defensive harm.

Whereas a significantly high level of moral responsibility for an unjust threat might make one liable to intentional attack, lower levels of moral responsibility might make one liable to lesser harms, which include liability to occupation, payment of

reparations, economic sanctions, property destruction, and sometimes being collaterally harmed.⁶⁴

The primary basis for liability to lesser harm that McMahan highlights is *complicity* in unjust state aggression. The root idea underlying complicity is that one can be derivatively liable for another agent's wrongdoing if the complicit party intentionally induces, aids, or abets the wrongful act. So if unjust civilians induce others to initiate unjust war, or aid or abet unjust acts of war, they can become liable to harm lesser than intentional attack.

McMahan mentions two historical examples of such complicity: he thinks most adult Germans during the Second World War were complicit,⁶⁵ as well as a large number of Serbian civilians during the persecution of Albanians in 1999.⁶⁶ Both groups bore responsibility for the culture from which such evil acts emerged, to include the citizenry's apparent pro-attitude toward the unjust aggression. For McMahan, their complicitous behavior was sufficient to ground lesser harm liability.⁶⁷ Unfortunately, McMahan doesn't clarify exactly which lesser harms the Germans and Serbs were liable to, nor the extent of their liability.

Elsewhere, McMahan stipulates that unjust civilians who make significant contributions to unjust wars can become liable to collateral harm.⁶⁸ Unfortunately,

⁶⁴ McMahan, "The Just Distribution of Harm," 345, 356-58; Jeff McMahan, "The Morality of Military Occupation," *Loyola of Los Angeles International and Comparative Law Review* 31, no. 1 (2009): 103-04; McMahan, *Killing in War*, 218-21.

⁶⁵ McMahan, "The Morality of Military Occupation," 114.

⁶⁶ McMahan, "The Just Distribution of Harm," 375.

⁶⁷ My personal view is that McMahan's appeal to complicity here is problematic; I'll return to and elaborate on this claim in the next chapter.

⁶⁸ Jeff McMahan, "The Just Distribution of Harm," 351.

McMahan doesn't specify exactly what the necessary conditions are for such liability. This issue will be substantively revisited in the next chapter.

2.2.13 The Lesser Evil Justification for Harming Unjust Civilians

In the absence of significant moral responsibility or complicitous behavior, most unjust civilians aren't liable to be harmed during war. Yet during most wars unjust civilians inevitably will be killed. If most unjust civilians aren't liable to be killed, and yet many civilians will be killed during war, then one might ask whether just combatants engage in massive unjustified wrongdoing when fighting a self-defensive war. The answer is generally they do not.

Just combatants can be *all things considered justified* in collaterally harming non-liable unjust civilians by way of a lesser evil justification. The criterion for a lesser evil justification is that the harm to non-liable parties must avert a significantly greater harm.⁶⁹ In the case of foreseeable but unintended collateral harm during war, the importance of the military objective necessary for averting harm to just combatants and just citizens must significantly outweigh the harm to innocent unjust civilians. In such cases, the rights of the harmed non-liable parties are neither forfeited nor waived, but rather are *overridden*, resulting in what is referred to as a justified rights infringement.⁷⁰ Importantly, such collaterally harmed unjust civilians are wronged in the process because their rights are infringed. This last point is crucial for purposes of determining postwar obligations

⁶⁹ McMahan, "The Just Distribution of Harm," 377; McMahan, "The Morality of Military Occupation" 108.

⁷⁰ David Rodin, "Justifying Harm," *Ethics* 122, no. 1 (2011): 86.

because rights infringements generally give rise to obligations of restitution (this topic will be discussed later in Chapter 7).

2.3 Chapter Summary

Phillip Montague was the first to articulate a justice-based account of defensive harm. By drawing on the widely embraced distributive justice notion of fairness, Montague's forced choice theory ably provides an explanatory account of why it is sometimes justifiable to harm others defensively. One shortcoming, though, is that the account isn't especially adept at evaluating wartime killing given the theory's culpability criterion for liability.

Jeff McMahan further develops Montague's framework in two important ways. First, McMahan greatly expands the scope of liability to defensive harm by changing the liability criterion from culpability to moral responsibility for an unjust threat. Second, McMahan shows how on the reductive account the theory extends to include the moral evaluation of killing during war.

Applying the Responsibility Account to war yields the following broad conclusions. Because their state fights with justice on its side, just combatants and just civilians do nothing to make themselves morally liable to defensive harm. Conversely, unjust combatants are morally responsible for posing or contributing to their state's unjust threats, thus rendering them liable to necessary and proportionate defensive harm. On rare occasion, unjust civilians can bear enough moral responsibility for their state's unjust threats to make themselves liable to intentional attack. More commonly, unjust civilians either bear no responsibility, thus making them non-liable to defensive harm, or they bear a minimal level of

responsibility such as to make them liable to harms lesser than intentional attack. As indicated, I disagree with McMahan's analysis on the issue of noncombatant liability to lesser harm. The next chapter will pick up with a sustained analysis of this disagreement.

CHAPTER 3

3. Unjust Civilian Liability

As stated in the first chapter, I think McMahan's Responsibility Account is the most compelling normative framework yet offered for evaluating wartime killing. But although I agree with the broad framework of the theory, I ended the previous chapter by noting my disagreement with McMahan's position on unjust civilian liability to defensive and lesser harms. McMahan seemingly thinks that unjust civilians should be liable to harm only when they've acted complicitously or made significant contributions to their state's aggression. I disagree. I think that if we follow the Responsibility Account to its logical conclusion, we should conclude that most unjust civilians are liable to wartime harm. That is a conclusion McMahan seems unwilling to embrace.

Therefore, my aim in this chapter is to establish the claim that most unjust civilians bear liability to defensive and lesser harms. The chapter will proceed by first trying to pin down McMahan's exact position on the topic, which in my view can at times be somewhat opaque. Specifically, the focus will be on clarifying the criterion he uses for determining unjust civilian liability. The natural way to read McMahan on this point is that he employs a different liability criterion to unjust civilians than he does to unjust combatants. If so, this asymmetry of liability criteria would be a troubling inconsistency for the Responsibility Account.

Throughout the chapter, I'll consider and respond to two different types of objections against my position. One set of objections is aimed at undermining the claim that unjust civilians share moral responsibility for their state's unjust wartime

threats. The second set of objections holds that even if most unjust civilians share some moral responsibility for their state's aggression, the civilians nevertheless shouldn't be liable to defensive harm. My claim is that all the objections can be overcome.

Ultimately, I'll argue that a consistent application of the responsibility framework entails the conclusion that most unjust civilians are liable to defensive and lesser harms. Yet apparently unlike McMahan, I don't see that conclusion as one to avoid. More importantly, the implications of this conclusion will profoundly affect the determination of postwar obligations in subsequent chapters.

3.1 Unjust Civilian Liability to Defensive and Lesser Harms

As briefly discussed (2.2.12), McMahan clearly thinks unjust civilians can make themselves liable to the possibility of being collaterally harmed, as well as to harms lesser than intentional attack, including liability to occupation, payment of reparations, economic sanctions, and the destruction of personal property.¹ The underlying idea behind this claim is that one's liability should correspond with one's level of responsibility for an unjust threat. Only highly responsible persons should be intentionally killed; lesser responsible persons should only be liable to harm lesser than intentional attack. Call this the 'correspondence claim' between responsibility and liability. McMahan nicely summarizes the correspondence claim here:

For proportionality in defensive action is sensitive to the degree to which an individual is morally responsible for an unjust threat, which depends in part

¹ See McMahan, *Killing in War*, 218-19; McMahan, "The Morality of Military Occupation," 103-04; McMahan, "Who is Morally Liable," 548; McMahan, "The Just Distribution of Harm," 345, footnote 3.

on the degree to which that individual has causally contributed to the existence of that threat. Civilians seldom make significant individual causal contributions to an unjust war; hence while they may bear sufficient causal and moral responsibility to be liable to suffer the effects of economic sanctions, or perhaps even to suffer certain side effects of military action, they are rarely sufficiently responsible to be liable to intentional military attack.²

For McMahan, moral responsibility and liability are scalar concepts that go hand and hand; as one's level of moral responsibility for an unjust threat increases, one's liability to defensive harm correspondingly increases also. The more liable an agent is, the more she can be intentionally harmed without being wronged. Additionally, McMahan thinks that at some threshold level of moral responsibility, just combatants may foreseeably but unintentionally impose significant side effect harm on unjust civilians. Although I do think there is something right about the correspondence claim, my interpretation is different – a point I'll return to later in the chapter at 3.8.

What's clear is this: McMahan thinks unjust civilians can make themselves liable to lesser and collateral harms. What is less clear is identifying the precise criterion used to establish such liability. What exactly must unjust civilians do to render themselves liable to collateral and lesser harms?

3.2 Complicity as the Unjust Civilian Liability Criterion

Perhaps the most natural way to read McMahan on the issue of unjust civilian liability is to conclude that *complicity* is the criterion used to determine the threshold for establishing civilian liability to harms other than intentional attack. McMahan's repeated statements about unjust civilian liability support such a

² McMahan, "The Morality of Military Occupation," 103-04.

reading. A brief sampling of his comments on this subject proves illuminating (all emphases are mine):

They [unjust civilians] can be *Culpable Causes* of unjust wars and of unjust acts of war. They can be *instigators* of unjust wars, or *aiders and abettors* who share responsibility for unjust acts of war perpetrated by unjust combatants.³

I have suggested that there are ways in which civilians can be *accessories* to the fighting of an unjust war, *and in that way share responsibility* for the war.⁴

Those in *collusion* with the government waging an unjust war might be liable to economic sanctions.⁵

Civilian complicity might render one liable to destruction of civilian property.⁶

Civilian *complicity* in an unjust war may also be relevant to the justification of the intentional destruction of civilian property.⁷

Some civilians, *by virtue of being complicit* in responsibility for the unjust war their country is fighting, can be liable at least to certain risks of being harmed as a side effect of attacks against legitimate military targets.⁸

The common denominator found in all of these claims is some variation of complicity: unjust civilians can be liable to various lesser and collateral harms because they have acted as culpable causes, aiders, abettors, accessories, or otherwise acted in some type of collusion with their state's unjust aggression.

In addition to his statements on the topic, McMahan's use of examples also supports the conclusion that he views complicity as a necessary condition for unjust civilian liability to lesser harm. In fact, *every* unjust civilian liability example that

³ McMahan, *Killing in War*, 208.

⁴ *Ibid.*, 218.

⁵ *Ibid.*

⁶ *Ibid.*, 219.

⁷ *Ibid.*, 219.

⁸ McMahan, "Debate: Justification and Liability," 232, footnote 3.

McMahan offers involves complicitous civilian behavior. Consider the following examples.

McMahan argues that most Serbian civilians were complicit in Milosevic's attempted expulsion of the Albanians from Kosovar given the Serbians' widespread support for the unjust persecution, and accordingly made themselves liable to suffer collateral harm stemming from justified military strikes aimed at defending the Albanians.⁹

In a similar vein, McMahan offers a hypothetical aimed at determining whether a victim state should collaterally harm unjust civilians or bystander civilians in a neighboring neutral state.¹⁰ The choice is whether to opt for a military strike against an aggressor state village known to harbor 200 civilian supporters of the unjust war who have contributed to and benefitted from the aggression, or striking targets in a neutral state village with 150 civilians present. Crucially, the justification for risking collateral harm to 200 unjust civilians rather than 150 neutral civilians is that the former were complicit in the wrongdoing whereas the latter were not.

Elsewhere, McMahan discusses Hezbollah's firing of thousands of rockets from southern Lebanon into Israel in 2006. Because many of the rockets were launched from Lebanese villages, Israeli counterstrikes against the launch sites killed several Lebanese civilians. Suppose, McMahan says, that the villagers could have prevented the rocket launches by protesting, but chose not to because they approved of the attacks on Israel. If so, then because they contributed to the unjust

⁹ McMahan, "The Just Distribution of Harm," 375; McMahan, *Killing in War*, 220.

¹⁰ McMahan, *Killing in War*, 219-20.

attacks by allowing the rockets to be launched from their neighborhoods, McMahan concludes that the villagers would have had no justified complaint against being collaterally harmed by Israeli strikes against the launch sites.

Finally, consider McMahan's analysis of German aggression during WWII. He argues that most German civilians were responsible for the culture from which Nazi aggression emerged, as well as for popularly supporting the war.¹¹ Resultantly, the majority of adult Germans "were therefore complicit to a greater or lesser degree in Germany's unjust war"¹² and that "by being active or passive accessories to Nazi aggression, made themselves morally liable to suffer the burdens of occupation."¹³

From the statements about unjust civilian liability previously cited, as well as from the examples he employs, it is natural to conclude that McMahan views complicity as the unjust civilian criterion for lesser and collateral harm. This conclusion should give us pause. The troubling part of the conclusion is not the judgment that unjust civilians can be liable to lesser harm; they most often should be. Rather, the problem is the implied suggestion that complicity is a necessary condition for unjust civilian liability to lesser harm.

3.2.1 The Problem with Complicity as the Liability Criterion

Complicity is a type of derivative liability where a secondary agent is derivatively liable for the wrongdoing of a primary agent, generally conceived of as "participation in guilt."¹⁴ The underlying idea behind complicity is that the secondary agent acts wrongfully by inducing or contributing to the primary agent's

¹¹ McMahan, "The Morality of Military Occupation," 104, 114.

¹² *Ibid.*, 114.

¹³ *Ibid.*

¹⁴ Black's Law Dictionary, 6th ed., s.v. "Complicity."

wrongdoing. Importantly, a *necessary condition* for complicity is that the secondary agent must act with the *intent* to induce, advance, or somehow further the primary agent's culpable action.¹⁵ Complicity can therefore be of two broad kinds: (1) intentionally attempting to influence a primary actor to commit a wrong, or (2) intentionally assisting a primary actor's wrongful action. Additionally, one can assist a primary actor's wrongful action by failing to prevent it – so long as the secondary agent's abstention was done with the intent to promote or facilitate the wrongful act's commission.¹⁶ Complicity is also known as aiding and abetting, or as accessorial liability; note that all of these cognates are found in McMahan's quotes cited above.

So if we return to McMahan's complicity examples, the Serbian civilians, German civilians, civilians in the hypothetical case, and the Lebanese villagers all engaged in complicitous behavior given that they acted with the intention of inducing or furthering the unjust acts of others, or failed to prevent the unjust acts of others with the intent to facilitate their commission. On the Responsibility Account, their complicitous behavior made them liable to collateral and lesser harms.

Now as a minor point, one might first question McMahan's descriptive claims of complicity given the intent condition. For example, go back to the claim that most adult Germans were complicit in Nazi aggression. Even in a case such as this – one involving massive state-sponsored wrongdoing – one might nevertheless balk at the

¹⁵ Sanford Kadish, "Complicity, Cause and Blame: A Study in the Interpretation of Doctrine," in Jules Coleman, *Crimes and Punishments* (New York: Garland Pub., 1994), 428.

¹⁶ Black's Law Dictionary, 6th ed., s.v. "Accomplice."

claim of widespread civilian complicity (McMahan's claim is that *most* German civilians were complicit).

It seems questionable to claim that most adult German civilians acted with the intention of producing a culture for purposes of invading neighboring states or exterminating the nation's Jewish population. It's possible that many Germans might have intended to support a strong, resurgent German state without intending war or genocide. Certainly there's a distinction between nationalism and war mongering; one can intend the former without intending the latter. Many adult Germans might have embraced nationalism (in the sense of deep national pride) without wishing for war. For McMahan's complicity claim to hold, it must actually have been the case that the majority of adult Germans *intended* to induce or further Nazi aggression.

But suppose we grant the point that most Germans were somehow complicit in Nazi aggression.¹⁷ This adjudication simply leads us to the main problem. *If complicity is a necessary condition for unjust civilian liability to lesser harm, then McMahan is employing two different criteria for liability to defensive harm: one criterion for unjust combatants, and a separate criterion for unjust civilians.*

McMahan has consistently argued that the criterion for liability to defensive harm is moral responsibility for an objectively unjust threat. One can be morally

¹⁷ A more reasonable claim might be to accuse most German civilians of *connivance*, which involves the intentional ignoring of another's wrongdoing because one is sympathetic to the wrongdoer's chosen end. See Black's Law Dictionary, 6th ed., s.v. "Connivance"; Chiara Lepora and Robert Goodin, *On Complicity and Compromise* (Oxford University Press: Oxford, 2013), 44. Still, the connivance model would be problematic for the same reasons as the complicity model given that both require an element of blameworthiness.

responsible for an unjust threat she directly poses, and one can be morally responsible for an unjust threat posed by another agent. And as discussed, one can be responsible for an objectively unjust threat without being blameworthy or culpable – this is the very point McMahan drives home in *Conscientious Driver*.

But if complicity is the criterion for unjust civilian liability to lesser harm, notice what has subtly happened. Complicity requires the intent to induce or advance someone else's wrongdoing, which is to say that complicity requires *culpable* action on the secondary agent's part. So an appeal to complicity smuggles in a culpability requirement: unjust civilians would have to be blameworthy in order to become liable.

Yet as McMahan has already argued for at great length, culpability is not a necessary condition for liability to defensive harm. McMahan consistently applies that standard to unjust combatants. Recall from the previous chapter that unjust soldiers are liable to defensive harm even if their excusing conditions of duress and epistemic limitation render them non-culpable. So if unjust combatants can be liable to harm in the absence of culpability, the same should hold true for unjust civilians. If that's true, then complicity cannot be a necessary condition for unjust civilian liability.

But to say that unjust civilians can make themselves non-culpably liable to lesser harms is not to say that complicity plays no role in liability determinations. Complicitous behavior increases one's amount of moral responsibility for an unjust threat of harm, and thus correspondingly increases the amount of harm to which

one becomes liable.¹⁸ For example, instead of *Conscientious Driver*, imagine that reckless driver knowingly drove her car in the snow with bald tires or, worse still, culpable driver spitefully intended to run down pedestrian. In these cases, driver's blameworthiness increases her level of moral responsibility: if pedestrian doesn't defend himself and is killed, reckless driver might be subject to a wrongful death action, and culpable driver to murder charges, whereas conscientious driver wouldn't be liable to any criminal charges.

The point is further underscored by that fact that culpable driver would be liable to intentional killing even if the likelihood of successfully achieving his goal remained low, whereas in the original case conscientious driver is not liable to defensive harm until his driving poses a high probability of wrongful harm.¹⁹ What this shows is that *moral responsibility for a wrongful threat can be sufficient to ground liability to defensive harm*. If the morally responsible agent is also culpable, then the agent bears an increased level of moral responsibility and, for McMahan, a subsequent increase in liability. As McMahan puts it, "liability ... is sensitive to culpability."²⁰ So while culpability can increase an agent's liability, an absence of culpability doesn't absolve liability for an agent who is morally responsible for an unjust threat. Conscientious driver is still liable to defensive harm.

If the foregoing analysis is correct, we seem left with two options. The first option is to read McMahan as introducing a culpability-based liability criterion for

¹⁸ Rodin refers to culpability as an 'aggravating condition' that can increase a morally responsible agent's liability to defensive harm. See Rodin, "Justifying Harm," 89.

¹⁹ McMahan, "Debate: Justification and Liability," 231.

²⁰ Ibid.

unjust civilians, which would be a separate and unique criterion from that used to judge unjust combatant liability. Such a move on McMahan's part seems unlikely. He has systematically argued for many years that the liability criterion for defensive harm is moral responsibility for an objectively unjust threat. It seems improbable that McMahan would inadvertently shift the liability criterion, and even more doubtful that he'd purposely introduce a culpability-based criterion in order to minimize unjust civilian liability.

Instead, we are left with a second option, which is to read McMahan as arguing that complicity is a *sufficient but not a necessary condition* for unjust civilian liability – a move that would avoid the asymmetry charge. This would be the more charitable reading, and the one I will follow. However, an important implication of this interpretation is that it opens the possibility that unjust civilians can be non-culpably liable to defensive harm.

3.3 Significant Contribution as the Unjust Civilian Liability Criterion

At the end of the last section, I suggested that if we wish to apply McMahan's liability criterion consistently, then we should conclude that complicity does not exhaust the grounds for unjust civilian liability to collateral and lesser harms. In other words, we should expect there to be non-complicitous ways for unjust civilians to share responsibility for their state's aggression, just as there are ways for unjust combatants to bear liability even in the absence of culpability.

While most all of McMahan's statements and examples suggest that complicity is the threshold for civilian liability, he very briefly notes elsewhere that making a *significant contribution* to an objectively unjust threat can make one liable

to collateral harm. McMahan notes that “some civilians who are responsible for making significant contributions to an unjust war may be liable to suffer certain harms – for example, harms that result as side effects of necessary military action by just combatants.”²¹ So the suggestion is that if unjust civilians have significantly contributed to an unjust war, they can make themselves liable to be collaterally harmed.

Unfortunately, McMahan offers no further analysis regarding the ‘significant contribution’ claim just quoted. That’s unfortunate, because the significant contribution threshold seemingly goes a long way toward absolving most non-complicitous unjust civilians of liability. To see how, consider a concern raised by several theorists: unjust civilians causally contribute to their state’s aggression by participating in the state’s economy, paying taxes, and failing to protest their state’s unjust war.²²

McMahan acknowledges that such actions *do* contribute something toward their state’s unjust war,²³ and that unjust civilians can make such contributions both intentionally and unintentionally.²⁴ For example, war cannot be fought unless civilians finance them through taxes.²⁵ On its face, such an admission might seem sufficient to ground a claim of unjust civilian liability. Yet for McMahan that is not the case.

²¹ McMahan, “The Just Distribution of Harm” 351.

²² See, for example, Victor Tadros, “Duty and Liability,” *Utilitas* 24, no. 2 (2012): 273-76; Lazar, “The Responsibility Dilemma,” 192.

²³ Jeff McMahan, “Individual Liability in War: A Response to Fabre, Leveringhaus and Tadros,” *Utilitas* 24, no. 02 (2012): 297.

²⁴ McMahan, *Killing in War*, 214-15.

²⁵ *Ibid.*, 215.

On McMahan's analysis, even though many unjust civilians contribute to their state's aggression, their contributions tend to be *negligible*. After surveying the numerous actions unjust civilians perform that contribute to their state's aggression (such as voting, paying taxes, and so on), McMahan concludes that "none of these activities makes more than a negligible causal contribution to the prosecution of an unjust war,"²⁶ elsewhere referring to such actions as "comparatively trivial sources of responsibility."²⁷

If most unjust civilians' contributions were merely negligible, they would fall below the significant contribution liability threshold.²⁸ So apparently, most non-complicitous unjust civilians aren't liable to collateral and lesser harms. This last point is supported by McMahan's judgment about the status of Iraqi civilians during their state's 1980 unjust invasion of Iran. After discussing popularly supported wars of aggression such as WWII Germany's, McMahan contrastingly notes that there are

unjust wars of aggression that are not the product of a society and its culture, but are initiated within an undemocratic country by a dictatorial elite whose commands it would be virtually suicidal to defy or oppose. The war fought by Iraq against Iran in the 1980s was such a war. The civilian citizens would bear little or no responsibility for a war of this sort and thus would not be liable to occupation following its defeat.²⁹

Although McMahan's focus in the passage is on the postwar lesser harm of occupation, his broader judgment regarding unjust civilian responsibility remains

²⁶ McMahan, "Who is Morally Liable," 549.

²⁷ McMahan, *Killing in War*, 225.

²⁸ For an analysis concluding that most unjust civilians make only marginal causal contributions toward their state's unjust war, see Cécile Fabre, "Guns, Food, and Liability to Attack in War," *Ethics* 120, no. 1 (2009): 36-63.

²⁹ McMahan, "The Morality of Military Occupation," 106.

illuminating. Because most Iraqi civilians acted neither complicitously with Saddam's regime, nor made significant contributions to their state's aggression, they bore little to no responsibility for the unjust invasion.³⁰

Two points are worth making here, one minor and one substantive. The minor point concerns McMahan's suggestion that the difficulty of opposing a state's unjust war somehow plays a role in absolving unjust citizens' moral responsibility. We have good reason to discount such a claim. As previously noted, McMahan thinks most German civilians shared responsibility for their state's aggression during WWII. Yet the prospects for defying Hitler's Gestapo and SS forces were no less daunting than the prospects Iraqi civilians faced in opposing Saddam's Mukhabarat directorate. Most Germans stood impotent in the shadows of Hitler's iron-fist regime, just as most Iraqis also did in the shadows of Saddam's regime.

So if most German civilians bore moral responsibility for their state's aggression whereas most Iraqi civilians didn't, the difficulty of resisting their respective governments can't be doing much work in distinguishing between the two. Moreover, even if most Iraqis faced a daunting task in pushing back against Saddam's Iranian aggression, such a fact would only support a claim of duress. Yet as McMahan has persuasively argued (2.2.4), a duress excuse would only absolve the Iraqis of culpability; the excuse would not nullify their moral responsibility for contributing to an unjust threat.

³⁰ There is of course a significant difference between bearing *some* (even minimal) responsibility, and bearing *no* responsibility – a point to be revisited later in the chapter.

So if there exists a liability difference between the Germans and the Iraqis, the difference must hinge on something other than the viability of resisting their regime's unjust aggression. Somehow, it must be the case that the Iraqi contributions to their state's aggression were negligible, whereas most Germans' contributions were significant. But what establishes the supposed line of demarcation between significant and negligible contributions? Returning to McMahan's passage cited above, the difference hinges on the fact that most Germans made significant contributions given their responsibility for the culture from which WWII emerged, whereas most Iraqis' contributions such as paying taxes were merely negligible (apparently assuming the Iraqi invasion of Iran had nothing to do with Iraqi culture writ large).

But this supposed qualitative difference between the German and Iraqi contributions is puzzling, which brings us to the substantive point. Even if one were to agree with McMahan that most German civilians engaged in some kind of complicity, their individual complicitous acts considered in isolation seemingly had no effect on Germany's aggression. Supposedly, their complicity derives from the fact that they bore responsibility for their culture. But what kind culture act(s) did each German individually perform such that each civilian made a *significant* contribution to the war effort?

3.3.1 The Problem of Aggregation

The only way to establish that most Germans were morally responsible for their culture in a way that made them liable to collateral and lesser harms is by *aggregating* their individual actions. We can't say that for each German civilian, his

or her cultural contributions were somehow significant for bringing about the Blitzkriegs or the Holocaust. Considered in isolation, few individual Germans could have made more than a negligible cultural contribution to Nazi aggression. Instead, it is only by aggregating the individual negligible contributions of most German civilians that we can meaningfully speak of their shared responsibility for the culture from which Nazi aggression emerged and their subsequent liability to lesser harms. But if that is true, the conclusion we should walk away with is that less-than-significant causal contributions can ground liability to defensive harm.

But if we're going to aggregate the negligible contributions of most Germans and conclude that they shared responsibility for their culture and thus significantly contributed to Nazi aggression in a way that makes them liable to lesser harms, then as a matter of analytic consistency we should similarly aggregate the negligible causal contributions made by most other unjust civilians. For example, we should also aggregate the negligible contributions of Iraqi civilians and conclude that they shared some responsibility for the invasion of Iran. Most unjust civilians should share moral responsibility for their state's aggression based on their aggregated causal contributions such as paying taxes, voting, failing to protest their state's unjust war, participating in their state's institutions and economy, and so on.

It is clear that McMahan does not aggregate most non-complicitous unjust civilian contributions:

It is ... doubtful that an individual civilian's vote makes a causal difference at all; for in virtually every case the outcome would have been exactly the same had that individual voted differently or not voted at all. Similar remarks apply to the payment of taxes. The proportion of an individual's tax payment that is devoted to war is usually small. ... A citizen's failure to protest an unjust war is an improbable basis of liability to be killed. ... Each citizen

knows, moreover, that nothing that he or she does can make more than a tiny, probably negligible, contribution to ending the war.³¹

McMahan is right to conclude that when considered *in isolation*, an individual citizen's contributions such as paying taxes or failing to protest likely make no significant difference in his or her state's unjust war. The problem is, their aggregated minor contributions result in significant contributions to the unjust killing of innocent people. But just because unjust civilians individually make only minor contributions, it doesn't follow that each citizen therefore doesn't share moral responsibility for their state's aggression.³²

3.3.2 Aggregated Contributions can Ground Moral Responsibility

Aggregation is a common phenomenon when analyzing moral responsibility for jointly created harmful outcomes. For example, consider a case in which thousands of people unjustly stone to death an innocent person.³³ Imagine that each stone is fairly small, capable of delivering only a tiny amount of harm. The contribution of each stone doesn't make a significant contribution to the lethal outcome. But clearly the aggregate harm of all the rocks thrown is significant: their combined synergistic effect kills an innocent person.

Without factoring aggregation into the analysis of cases like this, we'd be left with a counterintuitive conclusion. Considered in isolation, each agent made only a tiny contribution that was neither necessary nor sufficient for the harmful outcome.

³¹ McMahan, "Who is Morally Liable," 550.

³² In fairness to McMahan, the two statements quoted above were embedded in a discussion about civilian liability to intentional attack. Still, regardless of whether one is analyzing civilian liability to intentional or collateral harm, the issue of unjust civilian liability still hinges on morally responsible for unjust threats.

³³ I borrow this example from Cécile Fabre, *Cosmopolitan War* (Oxford: Oxford University Press, 2012), 76. Fabre in turn attributes the example to Jon Quong.

So the conclusion would seem to be that each agent lacks moral responsibility for the death given each agent's miniscule contribution. But the obvious reply is that *all* the participating agents share moral responsibility for the unjust death, even though none of the agents made an individually significant contribution. Small causal contributions can ground moral responsibility for an unjust harm when it is foreseeable that the aggregated effect of the small contributions foreseeably risks wrongful harm to innocent people.

In response, some readers might be quick to point out that the stone-throwers each made a small but *culpable* contribution to the death, and it is their culpability that grounds their moral responsibility for the killing (just as it might have been most German citizens' culpability that made them morally responsible for Nazi aggression). Additionally, the stoning example involves coordinated intentional acts. Maybe the combination of these factors explains why each stone thrower is morally responsible for the unjust harm to the victim, whereas the lack of these three factors explains why most unjust civilians lack moral responsibility for their state's unjust threats.

But I think even in the absence of culpability, small causal contributions can still ground moral responsibility for a wrongful harm, and even when the contributions are uncoordinated and the resultant harm unintended. Consider global warming. Most people acknowledge that the driving of automobiles emits emissions that foreseeably contribute to global warming threats. For the vast majority of drivers, their negligible contributions that risk future harmful outcomes (assuming it hasn't yet sufficiently eventuated in harm to non-labile parties) are not

coordinated, nor are the harmful outcomes intended. And even if one thinks that much driving is justified, such as commuting to work or taking someone to the hospital, most all drivers would have to admit to driving even when they lacked positive moral reason for doing so, or when they could have taken alternate transportation such as walking or biking.

For most drivers it was foreseeable that the aggregation of their minimal causal contributions along with all other drivers' contributions together risked unjust harm to non-liable parties. As with the stoning example, the conclusion to draw in the global warming case is that most drivers *share* moral responsibility for threatened global warming harms. Given their individual moral responsibility, most drivers would have no legitimate complaint against being specially taxed in order to fund a solution deemed necessary and effective for protecting against the impending unjust harms. Stated slightly differently, most drivers have made themselves liable to be specially taxed (a type of harm), and their liability is grounded in their moral responsibility for the unjust threat to which they contributed – even though their individual contributions were small, non-culpable, uncoordinated, and the wrongful harm unintended.

One might flag an important difference amongst the preceding examples: the drivers and the stone-throwers could have fairly easily avoided contributing to their unjust threats, whereas the German and Iraqi civilians faced significant costs to avoid contributing. Although true, this excusing condition of duress only lowers the civilians' level of moral responsibility, it doesn't absolve it. We can still conclude that all the parties in these examples are morally responsible for contributing to

unjust threats while granting that they hold varying degrees of responsibility compared against one another.

Also, some readers might resist the global warming example by arguing that instead of contributing to a risk of future unjust harm, the drivers contributed to a known future unjust harm. If so, then the drivers actually acted recklessly, and thus culpably. For sake of argument, let's grant that point. The stone throwers harmed intentionally and the drivers harmed recklessly, with the result being that both groups acted culpably. Let's further grant McMahan's claim that most German citizens acted complicitously (Germany's war enjoyed "popular support"), and thus also acted culpably.

The suggestion now might be that only culpable causal contributions should be aggregated for liability purposes. Thus, the stone throwers, the drivers, and most German citizens would share responsibility for their respective wrongful threats. Conversely, the actions of agents who make non-culpable causal contributions to wrongful harms should not be aggregated for liability purposes. Thus, most non-complicitous unjust civilians (like the Iraqis) wouldn't be morally responsible given their negligible contributions toward their state's aggression.

The problem is that this suggestion (that culpable contributions should be aggregated whereas non-culpable contributions should not) seems entirely ad hoc. What's necessary for liability to harm is moral responsibility for an objectively unjust threat, and what's necessary for moral responsibility for an objectively unjust threat is that one voluntarily acted in a way that foreseeably risked posing an unjust threat to a non-labile party. Considerations such as culpability and intent can surely

affect the level of one's moral responsibility for an unjust threat, but culpability is not a necessary condition for moral responsibility – as established in *Conscientious Driver*. Thus, culpability can't be a necessary condition for liability to harm.

So there is no principled reason for not aggregating all civilian actions that causally contribute to a threat of wrongful harm for purposes of determining moral responsibility. If both the German and Iraqi citizens voluntarily acted in ways that causally contributed to their state's aggressions in ways that foreseeably risked unjust threats to others, then all the members of each group share some moral responsibility. (We'll return to the foreseeability condition in the next section)

McMahan is right to say that most German civilians bore moral responsibility for Nazi aggression. But as a matter of analytic consistency, he should also have said that most Iraqi civilians bore *some* level of moral responsibility for the 1980 invasion of Iran. Although it might be true that most Iraqis made comparatively small contributions, the sum of their actions causally and foreseeably contributed to unjust violence against innocent others. Their moral responsibility hinges not only on the significance of what they contributed as individuals, but also on the significance of their jointly created harms. Given that their contributions are individually small, they correspondingly bore only a small level of responsibility. But in forced choice cases involving indivisible lethal harm, small moral asymmetries between parties can be decisive. (This last point will be revisited shortly.)

To be clear, the intended takeaway from the foregoing analysis is *not* to suggest that moral responsibility is an all or nothing concept. Rather, moral

responsibility is a scalar concept with varying degrees of responsibility.³⁴

Importantly, the line of demarcation between significant and minimal causal contributions explains why it is generally impermissible to *intentionally* attack civilians. Because most unjust civilians make only minimal causal contributions to their state's unjust threats, intentionally attacking such civilians tends to be an ineffective means for eliminating the unjust threats. If targeting civilians doesn't effectively avert unjust aggression, then the civilians can't be liable to intentional attack based on considerations of necessity.³⁵

Instead, the intended takeaway from the preceding analysis is to show that *significant contribution, like complicity, is a sufficient but not a necessary condition for moral responsibility for an unjust threat*. While McMahan is surely right to say that unjust civilians who make significant contributions to their state's unjust war are liable to defensive and lesser harms, that statement should not be read as prohibiting similar liability for unjust civilians who've made lesser contributions. If we carefully read a couple of his statements, McMahan appears to acknowledge as much:

*Many ... civilians have been actively complicit in the waging of the [unjust war], and most of them share some responsibility for it.*³⁶

The 'many' and 'most' language is telling: the claim is that *most* unjust civilians share responsibility for their state's aggression even though only *many* are complicit. It

³⁴ Jeff McMahan, "The Basis of Moral Liability to Defensive Killing," *Philosophical Issues* 15, no. 1 (2005): 395.

³⁵ McMahan, "Who is Morally Liable," 550.

³⁶ McMahan, *Killing in War*, 96, my emphasis.

follows that unjust civilians can be morally responsible even in the absence of complicitous behavior. McMahan elsewhere observes that

it is rare for any civilian to bear a significant degree of responsibility for an unjust war, or for any of the particular acts of war of which the war is composed.³⁷

Reading this quote in conjunction with the first, we can conclude that if most unjust civilians bear some responsibility for their state's unjust war (first quote), and if most unjust civilians aren't complicit (first quote) and don't make significant contributions (second quote), then many unjust civilians must bear responsibility based on less than complicit and significant contributions to their state's unjust war. So neither complicity nor significant contribution is necessary for unjust civilian liability. Instead, both types of actions should be read as sufficient for grounding liability to defensive and lesser harm, while also allowing for unjust civilian liability grounded in non-complicitous and less than significant causal contributions.

3.4 The Foreseeability Objection to Unjust Civilian Liability

Assuming aggregation, we can conclude that most unjust civilians share *some* responsibility, even if not complicit and even if their individual contributions were small. Some may be hesitant to embrace such a conclusion, and might do so by pointing to the foreseeability condition for moral responsibility.

Recall that on the Responsibility Account, a necessary condition for moral responsibility for an unjust threat is that it must have been foreseeable to the agent that her action risked creating an unjust threat. The foreseeability condition is underscored in McMahan's *Cell Phone Operator* (2.2.4), where it wasn't reasonably

³⁷ McMahan, *Killing in War*, 225.

foreseeable to operator that his pressing of the 'send' button would detonate a bomb. Accordingly, operator is not morally responsible for the ensuing harm. Along the same lines, one might object that unjust civilians aren't morally responsible for their state's aggression because it wasn't reasonably foreseeable that their actions (such as paying taxes) would contribute to an objectively unjust war.

The reply to this objection is straightforward. By choosing to maintain citizenship in state *S*, paying state *S* taxes, and participating in *S*'s economy, unjust civilians help fund and sustain *S*'s state institutions. Additionally, doing so reasonably and foreseeably risks wrongfully threatening others given that all modern states maintain standing armies. Kant and the *Federalist Papers* long ago warned of the dangers standing armies pose.³⁸ Every war necessarily involves the unjustified use of military force by at least one state's armed forces. One cannot feasibly claim that it was unforeseeable her state institutions might wrongfully threaten harm to others.

It is worth pointing out that to say that one's voluntary actions reasonably pose a foreseeable risk of unjust harm is not to say that the likelihood of the risk materializing must be high. As McMahan argues, "voluntary engagement in an activity known to impose a risk of wrongful harm, even if the *ex ante* risk is very low, is a basis of liability to defensive action if the probability of wrongful harm becomes unexpectedly high."³⁹ An agent can be morally responsible for an unjust harm even though the harm was not likely to materialize (i.e., the *ex ante* risk is very

³⁸ Immanuel Kant, "Toward Perpetual Peace," Section I, in Immanuel Kant, *Practical Philosophy*, ed. Mary J. Gregor, trans. Mary J. Gregor (Cambridge: Cambridge University Press, 1996), 668; "Federalist No. 41."

³⁹ McMahan, "Debate: Justification and Liability," 231.

low). The necessary condition for moral responsibility for an unjust harm is that the harm was reasonably foreseeable, which is to say that the unjust threat was within the realm of being a normally foreseeable possibility. That's why cell phone operator isn't morally responsible for the unjust threat he poses: the everyday use of a cell phone poses no foreseeable risk of detonating a bomb.

So return to the case of the Iraqi civilians. The Iraqi civilians' decisions to remain within Iraq, maintain citizenship, pay state taxes, and participate in the state economy all contributed toward supporting state institutions. Their doing so helped fund and maintain one of the world's largest standing armies – with a dictator at the helm no less. Their actions contributed to the reasonably foreseeable risk that Iraqi state institutions would unjustly harm others. When that foreseeable risk eventuated, most Iraqi civilians were implicated by their contributions and thus shared some moral responsibility for the aggression. The claim that such harm wasn't foreseeable is belied by the historical facts: Iraq's invasion of Iran in 1980, its genocidal campaign against the Kurds from 1986 – 1989, and its subsequent invasion of Kuwait in 1990.

3.5 Moral Responsibility as the Unjust Civilian Liability Criterion

As McMahan has repeatedly argued throughout his writings, the criterion for liability to defensive harm is moral responsibility for an objectively unjust threat. Most unjust civilians meet this criterion. They causally contribute to their state's unjust threats by remaining within its territory, participating in its culture and economy, maintaining citizenship, paying taxes, and so on – all actions that help support and sustain state institutions that foreseeably run the risk of unjustly

threatening others. When such threats materialize, unjust civilians share moral responsibility for those ensuing threats.

The fact that most unjust civilians bear some responsibility for the lethal forced choice situation that the innocent victim state citizenry faces establishes a crucial moral asymmetry between the parties. Although unjust civilians' level of responsibility is minimal given their small individual causal contributions, in aggregate their small contributions eventuate in significant lethal threats to others. This small moral asymmetry between the unjust civilians on the one hand and the just civilians and just combatants on the other is sufficient to ground the former's liability to proportionate defensive harm when necessary to protect the latter.

Before preceding, I should point out that if unjust civilians have made themselves liable to defensive harm, then they have also made themselves liable to lesser harms such as suffering the effects of economic sanctions, or being taxed for purposes of paying war reparations to the victim state. Because the focus of this paper is on obligations that fall to the victor state, the issue of collateral harm will play a more crucial role in determining postwar obligations. So for the remainder of the chapter, I will focus on establishing unjust civilian liability to collateral harm. The reader should understand that if through their actions unjust civilians become liable to be collaterally harmed, then I think they have also made themselves liable to the various lesser harms.

But to which kinds of harms should unjust civilians be liable? Since most unjust civilians make only negligible causal contributions to their state's unjust war, intentionally attacking them is almost never an effective defensive means of

defending against aggression.⁴⁰ If harming someone can't reasonably be expected to avert a wrongful threat, then liability's internal requirement of necessity prohibits harming that party.

So a natural conclusion to draw at this point is that the Responsibility Account prohibits physically harming most unjust civilians. Perhaps unjust civilians should be liable only to non-physical harms such as paying reparations or suffering the effects of economic sanctions. Yet such a conclusion would be too quick. While it might be true to say that *intentionally* harming civilians almost never operates in an effective and proportionate defensive manner, the same cannot be said about foreseeably but unintentionally harming unjust civilians while striking justified targets.

Although McMahan doesn't offer a sustained analysis of collateral harm, it is easy to see how side effect harm against unjust civilians can be justified. Consider the following passage:

Suppose that some great harm is unavoidable. It will befall one or the other of two people; it cannot be divided between them. For example, one person will kill another unless the other kills him in self-defence. Suppose that there are no relevant differences between the two except that the threatener bears a very slight degree of responsibility for the fact that one of them must die. He is not culpable but permissibly chose to act in a way that involved a tiny risk that he would become a threat to another. Through bad luck alone, he now threatens a person who bears no responsibility at all for the fact that one of them must be killed. ... In these circumstances, the minimally responsible threatener is liable to be killed.⁴¹

Drawing from this claim, McMahan acknowledges that in principle the same line of reasoning could justify intentionally killing civilians if doing so would *effectively*

⁴⁰ McMahan, "Who is Morally Liable," 548; McMahan, *Killing in War*, 225.

⁴¹ McMahan, "Who is Morally Liable," 551; see also McMahan, *Killing in War*, 227.

help avert the threatened harm. But killing minimally responsible civilians during war almost never operates in an effective defensive way. Intentionally killing them does nothing to stop the unjust aggression because their contributions are minimal and mostly lie in the past. If harming civilians doesn't effectively contribute toward the good of protecting innocent victims, then the unjust civilians aren't liable to be harmed. Thus, McMahan concludes, unjust civilians are almost never liable to intentional attack.⁴²

Unfortunately, McMahan doesn't systematically pursue the possibility that just combatants can attack military targets in a defensive manner while foreseeing that doing so risks harming nearby unjust civilians. While it is true that intentionally killing civilians isn't defensive harming, it is also true that just combatants defensively harm unjust civilians as foreseen but unintended consequences of striking necessary military targets during defensive warfare. According to McMahan, killing civilians almost never operates in a defensive manner. But the opposite seems true: the widespread collateral harming of civilians *just is* defensive harming.

⁴² McMahan also considers whether the intentional non-defensive killing of civilians (i.e., terroristic killing) might be justifiable: McMahan, "Who is Morally Liable," 553; McMahan, *Killing in War*, 226. Drawing from Warren Quinn's work, McMahan argues that because terrorism involves opportunistic rather than defensive harming, the justificatory burden is especially stringent. Such killings are opportunist because they involve the intentional exploitation of innocent people. Nonetheless, McMahan concedes that in theory, terrorist tactics might be justified as a last resort in pursuit of a just cause if the consequences of not achieving the just cause would be considerably worse. See McMahan, *Killing in War*, 22, 231-35.

3.5.1 The Defensive Nature of Collateral Harm

The claim that collaterally harming unjust civilians is defensive in nature hinges on their shared responsibility for the forced choice confronting the victim state. If the arguments up to this point are sound, we can conclude that most unjust civilians causally contribute to their state's aggression and thus share some moral responsibility for it. If true, then they share responsibility for the forced choice situation that now threatens indivisible harm to innocent people. During war, the violence must fall to someone. And as McMahan rightly points out in the previous quote, in such situations slight moral asymmetries between parties can be decisive when distributing the inevitable harm. As a matter of fairness, the non-responsible parties are justified in shifting the harms to the responsible parties, even if the latter are non-culpably, minimally responsible. As a matter of justice, it would be unfair to expect the innocent victims to bear the harms that the responsible parties foreseeably created.

So consider the plight of the victim state citizenry. Assuming the aggressor state unjustly attacks victim state with no culpable inducement or provocation on the latter's part, it follows that all just citizens (both combatant and civilian) are morally non-responsible. Conversely, all combatants and most civilians in the aggressor state share various degrees of moral responsibility for their state's aggression. These conditions create moral asymmetries between just and unjust citizens and, most importantly, moral asymmetries between just combatants on the one hand, and most unjust citizens on the other.

Now imagine the situation just combatants face. Few modern wars can be won only by striking targets that run zero risk of harm to civilians. Instead, the vast majority of targeting options carry some risk of harming unjust civilians. As a result, just citizens are often forced with a stark choice: either accept military defeat by the aggressor state, or attempt to avert the harm by intentionally attacking military targets while risking harm to unjust civilians in the process. Given the forced choice nature of war and the inevitable harm it threatens, just combatants are *fully justified* in choosing to risk collateral harm to civilians, with the justification grounded in the moral asymmetries between the parties. To say that just combatants are justified in foreseeably harming unjust civilians is just to say that *unjust civilians are liable to be collaterally harmed given their shared moral responsibility*. Because unjust civilians are liable to be collaterally harmed, they are not wronged when collaterally harmed. Put slightly differently, unjust combatants and unjust civilians have no valid complaint against being harmed either intentionally (in the case of combatants) or collaterally (in the case of most civilians). McMahan comes close to making a similar claim. He writes that

a fixed degree of responsibility for a wrong may be sufficient for a person to be liable to suffer a certain harm as a side effect of the means of preventing that wrong even if it is not sufficient to make him liable to the intentional infliction of the same harm as a means of preventing the same wrong.⁴³

The problem with this passage is that the expression “a fixed degree of responsibility” is vaguely qualified. As previously argued, McMahan’s collective statements on unjust civilian liability suggest the “fixed degree of responsibility” is either complicity or significantly contributing to an unjust threat. But as a matter of

⁴³ McMahan, *Killing in War*, 219.

consistency, McMahan should have dropped the “fixed degree” qualification and simply have written that the threshold for liability to side effect harm is moral responsibility for an unjust threat, which in fact most unjust civilians share.

3.6 The Justification Objection to Unjust Civilian Liability

In response to my liability claims, one could argue that although unjust civilians’ actions do contribute toward their state’s unjust war, their contributory actions are morally justified and thus preclude liability to defensive harm. McMahan himself runs this argument. He notes that civilians have positive moral reason to pay their taxes given the worthwhile aims toward which the funds are used; thus, taxation can’t be a source of liability to defensive harm.⁴⁴ Civilians are similarly justified in working and participating in the economy, even though doing so contributes to the economic strength of the state and provides the wealth necessary for waging war.⁴⁵

The critical point here is the claim that justification defeats liability. McMahan notes “while responsibility for posing a threat of wrongful harm is normally a basis of liability to defensive harm, it is not when the responsible agent is morally justified in doing what threatens to inflict the harm.”⁴⁶ For an act to be morally justified the act must be permissible in the situation and the agent must have positive moral reason to perform the act.⁴⁷ In such situations, moral justification precludes liability. So according to the objection, because unjust civilians are both permitted to pay their taxes and participate in the state’s

⁴⁴ McMahan, “Who is Morally Liable,” 550.

⁴⁵ Ibid., 550; McMahan, “Individual Liability in War,” 297.

⁴⁶ McMahan, “Debate: Justification and Liability,” 231. See also McMahan, “Individual Liability in War,” 297; McMahan, “Who is Morally Liable,” 550; McMahan, *Killing in War*, 42.

⁴⁷ McMahan, *Killing in War*, 43.

economic institutions, and have positive moral reason for doing so, these actions are justified and thus don't render civilians liable to defensive harm. This objection has much prima facie plausibility.

Yet surprisingly, McMahan has already provided the response to this objection when he argues that "justification provides exemption from liability only when it is *objective*."⁴⁸ For an act to be objectively justified, the reasons that ground the act's justification must be independent of the agent's subjective beliefs about the act. So when unjust civilians participate in the economy and pay their taxes and so on, their doing so must be objectively justified regardless of their beliefs about whether their tax money and economic contributions will be used for good or ill.

But when considered impartially from an objective perspective, unjust civilians would *not* be objectively justified in paying their taxes and economically bankrolling their state if they knew that doing so would enable their state's unjust killing during a war of aggression. Just as the conscientious driver would be unjustified in driving *if* he knew the car would careen out of control toward an innocent pedestrian,⁴⁹ so too *if* the unjust civilians knew in advance that their actions would contribute to the killing of innocent people, they would be unjustified in contributing. The wrongful killing of innocent people during war will almost always outweigh the public goods funded by taxes.

The explanation for the preceding claim hinges on the moral asymmetry between harming and allowing harm to occur or, more specifically for the cases at hand, between killing and letting die. McMahan has long recognized and invoked

⁴⁸ McMahan, *Killing in War*, 43, original emphasis.

⁴⁹ McMahan, "The Basis of Moral Liability," 395.

this distinction, which holds that it is more morally objectionable to kill than to let die, other things being equal.⁵⁰ If the killing/letting die distinction is valid, and if the number of people harmed by war would be close to the number of needy people whose lives would be saved by tax-funded programs, then it would be morally worse to contribute to the positive killing of innocent people than to refrain from actions that contribute to helping fellow citizens. Because tax payments would contribute both to the funding of an unjust war and to the funding of state projects that help people in need, objectively speaking one should be prohibited from contributing to the killing of innocent people at the expense of funding the beneficial programs. The unjust civilians would lack objective justification for causally contributing to their state's unjust aggression in a way that negates their liability.

3.6.1 Liability & Lesser Evil Justifications

One might argue against the last conclusion by pointing to the qualification of the distinction: killing is morally worse than letting die, *other things being equal*. But suppose things were drastically unequal, such as a case in which the number of lives saved by tax-funded unjust state programs would *significantly outnumber* the innocent lives lost as a result of the unjust war. For example, imagine that a wealthy state with a vast social safety net, extensive vaccination and medical research programs, etc., decides to invade a nearby moderately inhabited island nation. The question now is whether the civilians would be objectively justified in paying their taxes in a way that would exempt them from liability to collateral harm from the islanders' defensive war.

⁵⁰ McMahan, *The Ethics of Killing*, 378-92; McMahan, "The Just Distribution of Harm," 369-71; McMahan, *Killing in War*, 94, 113-14.

One might argue that if the unjust civilians knew all this information, they would still be objectively justified in paying their taxes because they would have a lesser evil justification for doing so: if they didn't pay their taxes, significantly more people would suffer compared to the smaller number of islanders who would be imperiled by the unjust war. And since the unjust civilians would be objectively justified in their causal contributions to the aggression, they would not be liable to defensive harm by the island community.

I think this argument fails. It might be true that in the case as described, the unjust civilians would be objectively justified in causally contributing to their state's aggression because doing so would be the lesser evil. But because they act with a lesser evil justification, they nonetheless causally contribute to the wrongful harm against the islanders whose rights would be infringed.⁵¹ The problem is the islanders have done nothing to make themselves liable to be harmed; they are innocent victims in every sense. It seems clear that the Islanders should not be expected to roll over and accept the invasion. Surely they are justified in defending themselves. Thus, even if the unjust civilians are all things considered objectively justified in paying their taxes and thus contributing to their state's aggression, their justification does not block their liability to the islanders' defensive force.

McMahan at least partially agrees on this last point, which he acknowledges in the somewhat analogous case of the tactical bomber. The tactical bomber is a just combatant who threatens to collaterally harm innocent civilians while attacking a

⁵¹ Technically, the unjust civilians would infringe the islanders' rights, and the unjust combatants would violate the islanders' rights. This is because the civilians have a justification for contributing to the unjust harm, whereas the combatants lack justification for harming the islanders.

military target. Because the civilians have done nothing to make themselves liable to the bomber's harm, bomber threatens them with wrongful harm. The issue is whether the civilians could justifiably defend themselves by shooting at the bomber using a nearby anti-aircraft gun. McMahan concludes:

Innocent civilians have a right not to be killed. Just combatants who threaten to kill innocent civilians as a side effect of military action will infringe those civilians' rights even if their action is morally justified, or even morally required. Unless what is at stake is so important that the civilians are morally required to sacrifice themselves for the sake of the just combatants' mission, they are entitled to protect their rights against infringement.⁵²

I disagree with McMahan's finer point in this example because I think most unjust civilians are liable to necessary collateral harm. And if the civilians are liable to the bomber's collateral harm, they aren't justified in fighting back. But I agree with McMahan's broader point: if the imperiled victims *were* non-liable, then they *would* be permitted to defend themselves even though the party who endangers them acts with justification (in this case the bomber). So if instead we imagine that while striking a target near the border the bomber threatens to collaterally harm innocent civilians in a bordering neutral state, then I agree with McMahan that the innocent citizens justifiably could defend themselves.

With that agreement noted, I depart from McMahan's further claim that if the civilians shoot at the bomber, bomber is permitted to *intentionally* kill the civilians. Because the bomber acts with justification, McMahan concludes that he threatens wrongful harm to the innocent civilians *without making himself liable* to their defensive harm. And since the civilians now threaten him with wrongful harm, bomber is permitted to preemptively kill the civilians. Neither party is liable, and

⁵² McMahan, *Killing in War*, 47.

both are permitted to intentionally kill the other. McMahan refers to such situations as “symmetrical defense cases.”⁵³

My take on the bomber example is this: when one acts with a lesser evil justification that threatens wrongful harm to both liable and non-liable parties, the *justification only blocks liability to defensive harm from the parties who were liable to be harmed*. If one’s objectively justified action threatens to infringe the rights of a non-liable victim, victim can justifiably use defensive force to protect her rights – to include harming the parties responsible for the rights infringement when necessary. In such cases, one’s justification doesn’t defeat liability against the infringed victim’s defensive harm.⁵⁴

The reason I disagree with McMahan on this issue is because I deny his claim that one can be morally required to act on a lesser evil justification for defensive purposes. This is an important point, so I will quote McMahan at length here (all emphases are mine):

⁵³ McMahan, “Debate: Justification and Liability,” 236; McMahan, *Killing in War*, 180. For a compelling argument that McMahan’s Responsibility Account potentially grounds several different kinds of wartime symmetric defense cases, see David R. Mapel, “Moral Liability to Defensive Killing and Symmetrical Self-defense,” *Journal of Political Philosophy* 18, no. 2 (2010), 198. My own view is that because most unjust civilians are liable to necessary collateral harm, the only symmetric defense cases that arise involve threats of wrongful harm to neutral state citizens (though the latter may be located both in the aggressor state and the surrounding warzone).

⁵⁴ My terminology here does not quite follow McMahan’s. Although McMahan says the civilians would be justified in shooting at tactical bomber, he does not think the civilians have a liability justification for doing so because the bomber has done nothing to make himself liable. Effectively, McMahan introduces a fourth justification for harming (in addition to liability, lesser evil, and consent justifications). He does not, however, name the fourth justification. See McMahan, *Killing in War*, 47-8. Because bomber’s actions provide the unjust civilians with a justification for harming him, I prefer to say that bomber has made himself liable.

An act that is morally justified may be morally required or it may instead be optional. The claim that justification defeats liability may seem more compelling in the case of justified acts that are morally required. If so, and if acts of war by just combatants that kill innocent people as a side effect are optional rather than required, this would weaken the case for the claim that those who engage in such acts do not thereby become liable. Yet contemporary wars cannot be effectively fought without killing innocent people, and *if there are wars that are morally necessary or imperative to fight, then morality does often require just combatants to conduct attacks that will foreseeably kill the innocent. I believe that there are wars that countries are morally required to fight, and therefore that some individuals are morally required to participate in – for example, a war of defense in which innocent people in a country that has been the victim of unjust aggression will suffer significantly greater harm if their army does not fight than innocent people in the aggressor country will suffer as a side effect if the army does fight. In this kind of case, there will be some attacks that will foreseeably kill innocent civilians but that just combatants are nevertheless morally required to conduct.*⁵⁵

McMahan's claim in this passage is that one can be *morally required* to engage in self- and other-defense, and that during war this moral requirement entails that just combatants will be required to act in ways that foreseeably threaten wrongful harm to non-labile persons.

Given that just combatants do not collaterally harm non-labile parties with a liability or consent justification, combatants can only do so with a lesser evil justification in order to defend themselves or others. The problem, however, is that lesser evil justifications that threaten to kill innocent people generally are only permitted, not required. For example, in the standard trolley problem, bystander is permitted to switch the track from the five imperiled people to the one, but I don't think he is required to do so. And even if one were sympathetic to the idea that the bystander would be required to flip the track, certainly the five imperiled people on the tracks would not be morally required to switch the track if they had the ability

⁵⁵ McMahan, "Debate: Justification and Liability," 234-35.

to do so themselves. They would be morally permitted to allow themselves to be killed (suppose they all agreed). But McMahan apparently denies this last claim, arguing instead that self- and other-defenses are at least sometimes morally required, even if doing so foreseeably will kill innocent people in the process. On my view, self-defense is a justified permission, not a moral requirement.

One might reply by pointing out that there is an important difference between the tactical bomber and the trolley problem bystander. In the trolley problem, bystander is permitted but not obligated to switch the track.⁵⁶ But one might think the bomber pilot has a role-based obligation to protect his fellow citizens. If we assume the just citizenry refuses to consent to the aggressor state's unjust threats, and if the pilot has a role-based duty to defend those citizens, then it's reasonable to think the pilot should not be liable to defensive harm since he's only doing what he's obligated to do.

The problem with this suggestion is that the pilot's role-based obligations are agent-relative reasons that matter only amongst the just citizenry. If the just citizenry decides to defend, the pilot's role in society provides agent-relative reasons for singling him out as a party obligated to go to war. But surely those reasons aren't agent-neutral considerations that should matter to the wrongly imperiled civilians. It would be odd of the pilot to say to them, "You see, I'm

⁵⁶ Some consequentialists may deny this claim by arguing that one is morally required to switch the track. For sake of brevity, I will not attempt here to argue against this consequentialist suggestion, other than to assume that morality *generally* does not require one to intervene on lesser evil grounds if one foresees that her intervention will kill innocent people. And even if there is a threshold level at which intervention is required, I don't think it follows that the required intervention necessarily defeats the wrongly imperiled party's right to attempt to defend her life.

obligated by my role in our society to protect these people, and thus you must not interfere with my mission; instead, you must allow me to infringe your rights so that I can fulfill my obligation to my fellow citizens.” So although we might grant that the pilot is obligated to engage in other defense, he’s not obligated in a way that precludes the civilians from protecting themselves.

The broader point is that one cannot choose a lesser evil justification that imperils an innocent person and in the process become exempt from defensive harm when that person tries to defend her life. One is permitted to choose the lesser evil and risk killing innocent people in the process, but by doing so one makes oneself liable to the innocent peoples’ defensive harm. Moreover, because one makes oneself liable to the innocent victim’s defensive harm, one cannot use her attack as a justification for intentionally harming her in return.

So in the bomber case, bomber chooses to act on a lesser evil justification for collaterally harming the innocent neutral civilians as a side effect of his military action. Against McMahan, I think bomber thus does something to make himself liable: he chooses to act in a way that foreseeably threatens wrongful harm to innocent people. Accordingly, bomber makes himself liable to the civilians’ defensive harm, and the civilians in turn have a liability justification for defensively shooting at bomber. Because the civilians do not wrong the bomber when they shoot at him, he has no justification for intentionally shooting back at them. In sum, bomber may continue with his mission to strike the original target, but he’s prohibited from strafing the innocent civilians with his machine guns while en route, whether preemptively or defensively.

The upshot of this analysis for the original taxpayer case is as follows. The taxpayers are permitted to choose the lesser evil,⁵⁷ which is to pay their taxes to fund the life-preserving social programs while foreseeing that doing so will result in wrongful threats to the innocent islanders. But the taxpayers are not required to choose the lesser evil because morality generally doesn't require agents to intervene in the world in a way that will foreseeably kill innocent people – just as bystander is not required to flip the track in the trolley problem. Because the unjust civilians choose to act on a lesser evil justification that foreseeably causally contributes to their state's unjust war, their justification does not exempt them from liability to the islanders' defensive harm.

Moreover, because the unjust civilians are not wronged when collaterally harmed by the islanders' defensive action, the unjust civilians have no justification to harm the islanders defensively, nor do the unjust combatants on their behalf. The islanders would be justified in collaterally harming the unjust civilians who share moral responsibility for infringing their rights, and to intentionally harm the unjust combatants who violate their rights.

The foregoing analysis is intended to show that unjust civilians don't possess an objective justification for causally contributing to their state's unjust war in a way that exempts them from liability to defensive harm as McMahan had claimed. They would be objectively unjustified in paying their taxes, for example, if they knew they would be funding the killing of innocent people. And even if they had a

⁵⁷ McMahan also points out that taxes are coercive, but the reply to this point is the simple refrain repeated throughout these first two chapters: duress is an excuse capable of absolving only culpability, not moral responsibility.

lesser evil justification for doing so, a lesser evil justification would not absolve the unjust civilians from liability to be collaterally harmed by the just combatants' use of defensive force.

3.7 The Proportionality Objection to Collaterally Harming Civilians

Some might object to the claim that most unjust civilians are liable to collateral harm by arguing that even if unintended, the killing and maiming of unjust civilians is disproportionate relative to their minimal responsibility. Such objectors might mean one of two different things. First, they might be claiming that the physical harming of each *individual* unjust civilian is disproportionate relative to his or her minimal causal contribution. Second, they might be claiming that even if collaterally harming each unjust civilian were justified, the *aggregate harm* to many unjust civilians would make the unintended harming disproportionate. Each objection will be considered in turn.

Before proceeding, however, it is worth clarifying that the issue here is one of what McMahan calls narrow proportionality. There are two types of narrow proportionality considerations, both of which address harm to *potentially* liable persons.⁵⁸ The first category of narrow proportionality evaluates intentional harm to potentially liable persons, whereas the second category evaluates foreseen but unintended harm to potentially liable persons. In both cases, the harm to the potentially liable person must not be excessive when weighed against the expected instrumental good to be achieved by harming that person. So in the case of

⁵⁸ Recall that proportionality is internal to liability itself; if the harm to a potentially liable person is disproportionate, that person is not liable to be harmed.

collateral harm to potentially liable civilians, this section will be concerned with the second category of narrow proportionality.

In contrast to narrow proportionality, wide proportionality evaluates harm to potential non-liable parties. Similarly, it is comprised of two categories: one concerned with intentional harm, the other with foreseen but unintended harms. Because most just war theorists believe that unjust civilians are innocent in the non-liable sense, their proportionality discussions of collateral harm tend to focus on this last category. However, if I am right in claiming that most unjust civilians share some moral responsibility for their state's aggression and thus are potentially liable to defensive harm, then the topic of proportionate harm shifts from wide to narrow proportionality. (The issue of harm to non-liable neutral citizens will be addressed in Chapters 5 and 6.)

3.7.1 The Excessive Individual Harm Objection

So returning to the first objection, the claim is that the amount of harm *each* unjust citizen might suffer is excessive relative to his or her low level of moral responsibility. Even though the harm is unintended, it still kills and maims. This kind of harm, the objection goes, is surely excessive relative to the minimal contributions that each civilian makes. This is a challenging objection, and one that merits a somewhat lengthy response.

To help illustrate this objection, we can draw from a case McMahan introduces as an example of a wartime narrow proportionality violation. He imagines a situation in which ten innocent civilians are unjustly imprisoned by 500

military guards.⁵⁹ On McMahan's analysis, each guard is individually liable to be killed in an attempted rescue mission, and the rescuers would be justified in executing the mission if they had to kill only one of the guards. But, McMahan argues, if we knew that the guards were reluctant conscripts, and if it were necessary to kill *all* 500 guards in order to save the ten, he concludes that the killing of each guard would be narrowly disproportionate and thus prohibited. The reason is because each guard only minimally contributes to the imprisonment, and so

killing him would make only a small contribution to the release of the prisoners. The good that would be produced by killing him alone is therefore insufficient for the harm he would thereby suffer to be narrowly proportionate – that is, proportionate in relation to his potential liability.⁶⁰

Essentially, one must kill a minimally contributing person whose death makes only a small contribution to the prisoners' release. So, McMahan concludes, the killing of each guard individually would be narrowly disproportionate.

This is a surprising conclusion. As McMahan himself points out, the problem is to explain how the number of individually liable guards can affect narrow proportionality since that concept concerns only *individual* liability – and thus aggregation can play no part in the equation. So to reach his conclusion, McMahan must establish that the individual killing of each guard is wrong. His move is to argue that killing each guard is excessive given the small instrumental role his death would play in the goal of rescuing the prisoners.

Toward that end, McMahan interjects several factors into the case. Notice that the 500 guards are reluctant conscripts, which presumably is meant to

⁵⁹ McMahan, *Killing in War*, 23.

⁶⁰ *Ibid.*, 24.

introduce an excusing condition to negate their blameworthiness. Also, because the 500 guards are holding just ten prisoners, each guard only minimally contributes to the wrongful harm. The combined result is that each guard is apparently something like a non-culpable, minimally responsible agent. In other words, their moral status isn't too far removed from that of most unjust civilians during war. So if McMahan can establish that it is narrowly disproportionate to kill the guards in the rescue operation, then that might go a long way toward establishing that killing most civilians during wartime will also likewise be narrowly disproportionate.

My last point was a bit too quick, for the prisoner scenario involves *intentionally* killing the guards. This last fact places the example in the other narrow proportionality category that evaluates intentional harm to potentially liable parties.⁶¹ But the only difference between the two categories of narrow proportionality is that the justification burden for intentionally killing a liable party is more demanding than the justification burden for foreseeably but unintentionally killing a liable party.⁶² If that's true, then if we can establish that it's narrowly proportionate to intentionally kill the 500 guards, it necessarily follows that it would be narrowly proportionate to collaterally kill the guards during the rescue attempt.⁶³ So the hope is that we can benefit from this loosely analogous case and

⁶¹ An interesting question is whether McMahan would think it proportionate if the rescue involved *collaterally* harming the 500 guards. Presumably he would not.

⁶² McMahan, *Killing in War*, 21, 113; Rodin, "Justifying Harm," 95.

⁶³ Importantly, establishing that it would be narrowly proportionate to harm the 500 guards does not entail that the intervening forces would be all things considered justified in the rescue mission. See the lesser evil discussion in the next section.

shed some light on the broader issue of collateral harm to minimally responsible, potentially liable parties.

Before proceeding, it is worth wondering whether the under-described nature of the scenario might skew some intuitions in this case. Specifically, it might be important that the future plight of the prisoners is unknown. When adjudicating the narrow proportionality of the rescue mission, we're left weighing the clear magnitude of killing the guards against the somewhat uncertain magnitude of being held captive with an unknown future. Obviously the magnitude of the latter threatened harm pales in comparison to being killed. So to help clarify the magnitudes, let us suppose instead that the ten prisoners are awaiting execution.

Now the issue becomes one of whether each guard would have a valid complaint against being killed for the instrumental purpose of saving the soon to be executed prisoners. Even in this variant scenario, McMahan's reasoning still suggests we should judge the killing of each guard as narrowly disproportionate. According to his analysis, the killing of each guard makes only a small contribution toward the good of saving the prisoners – an amount of harm that seems excessive given their minimal level of moral responsibility for the threatened wrongful harm.

But in response to McMahan's reasoning, it is difficult to see what the supposed moral difference is between killing driver in *Conscientious Driver* (which is proportionate), and killing a prison guard (which supposedly is disproportionate). The killing of driver is necessary to save pedestrian's life, as is the killing of each guard to save the prisoners' lives. Additionally, killing driver is instrumentally effective in saving an innocent party, and likewise killing each guard is

instrumentally effective in doing the same (so long as all 500 are killed). So why should it matter how much of a contribution the killing of each guard makes? In the case of both the pedestrian and the ten imprisoned civilians, innocent victims are wrongly threatened with impending death, and the only way to avert those wrongful threats is by killing the minimally responsible parties.

My claim is that McMahan cannot explain the supposed moral difference between killing the driver and killing a guard. As I see it, the only difference McMahan points to between the two cases is the amount of contribution each death will make toward averting the wrongful harm. But on what *principled basis* is it determined that there exists a contribution threshold amount that decides whether killing a morally responsible party is narrowly proportionate? This threshold requirement seems very ad hoc.

Unfortunately, McMahan doesn't elaborate on this important threshold claim; instead, he appears simply to take it for granted, perhaps on intuitive appeal. If so, I don't share that intuition. I think each guard *is* liable to be killed, regardless of how significant of a contribution his death will make toward the prisoners' release. The explanation why is as follows, and should sound familiar.

3.7.2 Forced Choices, Indivisible Harm, and Narrow Proportionality

The structure of the prisoner case closely parallels that of the conscientious driver. What justifies killing the driver is the slight moral asymmetry between driver and pedestrian, coupled with the fact that killing the driver will be instrumentally effective in saving the innocent pedestrian's life. But the same holds true in the

prisoner case: there's a moral asymmetry between each guard and each prisoner – and an even larger asymmetry between each guard and all ten prisoners.

In the prisoner case, the just combatants are confronted with a forced choice scenario involving inevitable, indivisible harm: either the guards must be killed, or the ten civilians must be left to execution. Because narrow proportionality is concerned with individual liability, the killing of each guard is considered in isolation. So guard₁ bears some moral responsibility for the unjust lethal threat to the ten civilians, whereas the ten civilians are completely innocent. As a matter of fairness, the just combatants would be justified in distributing the harm to guard₁ rather than allow the harm to fall to the civilians; this fairness justification is grounded in the moral asymmetry between the parties. The same holds true for guard₂, guard₃, up through guard₅₀₀.

It is true that the killing each guard makes only a small contribution toward the prisoners' rescue, but in each case that fact can't trump the combined weight of: (1) the necessity of killing each guard to save the ten innocent lives, and (2) each guard's moral responsibility for the unjust lethal threats to the civilians. *From a liability perspective*, it is of no moral consequence that killing a guard makes only a small contribution toward saving the innocent victims. So long as there is a moral asymmetry between the parties, that fact should be decisive. Accordingly, the killing of each guard would be narrowly proportionate, and thus each guard is liable.

To deny the last claim would be to argue that, as a matter of fairness, the inevitable harm should fall instead to the civilians. But that can't be right. The civilians have done nothing to make themselves liable to be harmed, whereas the

guards are morally implicated in the wrongful imprisonment and pending executions. Although the guards may be reluctant conscripts and thus minimally responsible, the moral asymmetry between them and the civilians is decisive in determining that the harm should fall to each of them. Considered individually, each guard has no justified complaint in being killed in order to save the lives of the innocent civilians.

Many readers might still be put off by this conclusion. In response, let me point out two things. First, even if each guard is *individually liable* to be killed, the just combatants still might lack an all things considered justification for killing *all* 500 guards. This possibility will be considered in the next section, which focuses on the aggregate harm objection.

Second, some readers might think that the guards simply don't deserve to die given their individually small contributions, and thus that it would be narrowly disproportionate to kill each of them. But as McMahan rightly points out, the concept of liability is distinct from the concept of desert.⁶⁴ We can say that the fair distribution of the inevitable and indivisible harm should fall to the guards without claiming that they deserve to be killed. In fact, since the guards are reluctant conscripts and the civilians are innocent, *neither of the parties deserves to die*. But the prisoner example isn't a problem about desert; it is a problem about liability. And the liability problem is about determining who should bear the inevitable harm – an adjudication based on considerations of fairness grounded in the moral asymmetries between the involved parties.

⁶⁴ McMahan, "Who is Morally Liable," 552.

3.7.3 Excessive Harm Objection Applied to Unjust Civilians

The prison guards are non-culpable, morally responsible agents who make only small contributions to unjustified threats against innocent people. Nevertheless, it would be narrowly proportionate for just combatants to intentionally kill each guard even though doing so would make only a small contribution toward saving the ten innocent lives. Thus, each guard is liable to be killed. Assuming the truth of the claim that the justification burden for intentionally killing a potentially liable person is more stringent than the justification burden for foreseeably but unintentionally killing a potentially liable person, it follows that the prison guards would also be liable to be collaterally harmed during the rescue mission (assuming all else is equal). In other words, the narrow proportionality objection can be overcome.

If I am right in arguing that most unjust civilians are non-culpable, morally responsible agents who make small contributions toward their state's unjust threats against innocent people, then by the same reasoning involved in the prison guard example, the unjust civilians are *individually liable* to collateral harm during war when necessary to protect the lives of the innocent victims. I previously argued that the structure of the prison guard case closely parallels that of the conscientious driver. My claim now is that the structure of civilian liability to collateral harm during war closely parallels that of the prison guard case (and in turn of the conscientious driver).

During war, significant harm must fall to someone. As a matter of fairness, the harm should fall to the parties morally responsible for the unjust aggression. Unfortunately for the unjust civilians, they are implicated in the unjust threats and thus share moral responsibility for the impending harm in a way the victim state

citizens do not. If some unjust civilians must be collaterally harmed in order to distribute the wrongful harm away from the innocent victims, then doing so would be narrowly proportionate. As with the guards, the fact that the killing of any one individual unjust civilian will make only a miniscule contribution toward halting the unjust aggression does not exempt him or her from liability to be collaterally harmed.

In fact, there is good reason to think that McMahan's contribution threshold claim doesn't apply to unintended harms to potentially liable parties; otherwise, liability to collateral harm wouldn't be a possibility as McMahan thinks it is. If harming or killing a person had to make more than a small causal contribution toward achieving the desired good of a military strike, then no collateral harming could rise above that threshold. In most situations, the reason a foreseen harm would be unintended presumably is because the harming of that person makes *no causal contribution* toward the expected good of the military strike.⁶⁵ It's true that the collateral harm is causally necessary: the target cannot be destroyed without also killing the civilians. But the civilian deaths don't causally contribute as a means to bringing about the target destruction. We can see this by the fact that if the

⁶⁵ I use the expression "in most situations" because due to mistake of fact, the just combatants could intend to kill the civilians as a means toward their good end even though the civilian deaths would not causally contribute toward that end. On this point, one should recall that McMahan's account of justification is objective. Although the combatants would be subjectively justified in acting if their mistake of fact were reasonable, they would still be objectively unjustified in killing the civilians. But for McMahan, their epistemic limitation would excuse their wrongdoing. Also, it's possible that the just combatants might merely foresee harm to civilians without realizing that their deaths will in fact causally contribute toward the intended good end. Still, I don't think that possibility undermines the broader point I'm making against McMahan's contributory threshold claim.

civilians weren't present near the target, the just combatants would have no reason to alter their mission. In cases of collateral harm, the foreseen but unintended harming is not instrumentally necessary to destroy the target because the unintended harm causally makes no contribution; it is an incidental harm that merely accompanies destruction of the target.

If liability to collateral harm weren't a possibility, then the only justification just combatants would have for collaterally harming unjust civilians would be a lesser evil justification. But to return to a previous quote, McMahan expressly says that "some civilians, by virtue of being complicit in responsibility for the unjust war their country is fighting, can be liable at least to certain risks of being harmed as a side effect of attacks against legitimate military targets."⁶⁶ So it seems the only conclusion to draw is that the contribution threshold requirement only applies to the intentional harming of liable parties.⁶⁷

It might be pointed out that by the reasoning I've provided, we should conclude not only that most unjust civilians are liable to collateral harm just as the 500 guards are, but also that most unjust civilians are liable to intentional attack the way that the 500 guards can be intentionally killed. In general, I deny that claim. The difference is that killing the guards is instrumentally effective in averting the unjust harm, whereas that is almost never true about intentionally killing unjust civilians during war.

⁶⁶ McMahan, "Debate: Justification and Liability," 232, footnote 3.

⁶⁷ But as argued above, my view is that there is *no* contribution threshold requirement for narrow proportionality, which explains why I think each of the 500 guards is liable to be killed.

But if it were contingently true that it would be both (1) necessary to intentionally kill unjust civilians to halt an unjust war, and that (2) killing the civilians would be instrumentally effective, then at that point I do think each unjust civilian would be liable to intentional attack.⁶⁸ But in such an extreme scenario, I don't see that conclusion as a vice.⁶⁹

3.8 The Aggregate Harm Objection

Whereas the previous objection focused on excessive harm to the individual, the second objection centers on excessive aggregated harm. The claim is that instead of focusing on the amount of harm that each individual unjust civilian suffers, we should be concerned with the aggregate harm to unjust civilians. So even if we grant the reply to the first objection and conclude that each unjust civilian is individually liable to be collaterally harmed, still one might think that collaterally harming a large enough number of unjust civilians can become disproportionate.

The response to this objection is the traditional view that harms to liable parties are not aggregated for proportionality considerations – a view McMahan and many theorists endorse.⁷⁰ In other words, if each individual unjust civilian is liable to necessary collateral harm, then the numbers of collaterally harmed civilians aren't aggregated for proportionality purposes. So long as the collaterally harmed civilians are individually liable to be collaterally harmed (which assumes the first objection can be overcome), then the collateral harming of each civilian will be weighed individually against the expected good of harming that person. Assuming

⁶⁸ McMahan embraces the same conclusion. See McMahan, "Who is Morally Liable," 552.

⁶⁹ McMahan, *Killing in War*, 227-28.

⁷⁰ *Ibid.*, 19; Rodin, "Justifying Harm," 99.

just combatants are collaterally harming the unjust civilians because doing so is instrumentally necessary toward their just cause, most collateral damage will be narrowly proportionate.⁷¹ Thus, if the traditional view is right – which I think it is – then the second objection is vacuous and easily defeated.

However, even supposing the traditional view is right, there is another possible explanation for why the aggregate harm to large numbers of liable civilians might be morally prohibited. David Rodin raises an interesting possibility. In evaluating McMahan's prisoner example, Rodin grants that each of the 500 guards is in fact individually liable to be killed. Nonetheless, he argues that the killing of each guard still produces a residual bad effect.⁷² If that claim is true, then the residual badness of killing each additional guard begins to add up. Rodin's conclusion is that

⁷¹ Though to be clear, just combatants still have compelling moral reason to minimize collateral harm as much as possible. But if minimizing collateral harm endangers the just combatants' lives (such as flying at lower altitudes), then the just combatants are not required to do so. They are, after, all innocent people. McMahan disagrees, arguing that just combatants have role-based obligations to take on additional risk so as to minimize collateral harm to unjust civilians. However, McMahan's argument is apparently premised on the assumption that in those situations, most unjust civilians are innocent, which I deny. See McMahan, "The Just Distribution of Harm," 342-379.

⁷² As Rodin points out, McMahan agrees with this claim regarding the residual badness of harming even liable parties. McMahan writes, "Harms to which people are liable are bad not only for those who suffer them but also from an impersonal point of view. Although their weight is discounted in proportionality calculations, they are never of merely neutral or positive value." See McMahan, *Killing in War*, 8. More recently, McMahan has suggested that these "moral remainders" can sufficiently add up so as to outweigh the defender's justification for harming. But McMahan qualifies this claim by noting that the moral remainders only apply in cases of harming minimally responsible liable parties; there is no such remainder when harming fully culpable parties. See McMahan, "Who is Morally Liable," 554.

the aggregated harm of killing all 500 guards would actually be a greater evil than keeping the ten civilians captive.⁷³

Moreover, that conclusion apparently would hold true whether the guards would be killed intentionally or collaterally. Either way, considered impartially there would be a lesser evil justification for continuing the unjust imprisonment. Or, more precisely, there would be a lesser evil restriction against the rescue mission. If one shares the intuition that killing all 500 guards seems excessive in order to release the civilians, the lesser evil restriction might explain why.

For sake of brevity, I won't argue directly against Rodin's suggested lesser evil restriction. Instead, I'll argue that even if one agrees with his reasoning in the guard example, it is not clear how applicable his point is to the broader issue of wartime collateral harm to unjust civilians.

We can start by realizing that for Rodin's lesser evil restriction to gain traction against excessive harm to unjust civilians, the aggregate amount of collateral harm would have to be *extreme* in order to render the harm as the greater evil (and thus prohibited). For example, in the prisoner scenario the ratio of guards who must be killed is exceptionally high relative to the number of innocent people who will be saved. Specifically, the example involves a ratio of harming fifty minimally responsible guards for the rescue of each innocent person. Suppose we grant that this fifty-to-one ratio of killed guards to rescued prisoners would be the greater evil. Still, it is not clear how much bearing that judgment has on the broader issue of collateral harm.

⁷³ Rodin, "Justifying Harm," 99-100.

On this point, it is worth returning yet again to *Conscientious Driver*. That case involves a one-to-one ratio of a harmed minimally responsible party to a defended innocent party. If McMahan is right that pedestrian is justified in intentionally killing driver, and the justification burden is higher for intentionally killing a liable party than to do so foreseeably but unintentionally, then the collateral harming of minimally responsible unjust civilians should be justified assuming a one-to-one ratio of harmed unjust civilians to defended innocent parties.

In actuality, I think the ratio of harmed responsible parties to protected victims could be much higher than one-to-one. Imagine a variant of *Conscientious Driver*, where passenger prompts driver to go for a joy ride and puts gas in driver's car. Unfortunately, driver's car experiences a freak mechanical problem and veers uncontrollably toward innocent pedestrian. In this case as described, I think pedestrian is justified in defensively killing *both* car occupants if necessary. If that's true, then even in cases involving the intentional killing of minimally responsible agents and a two-to-one harmed/defended ratio, unjustly threatened victims could still kill without violating a greater evil restriction.

The same ratio should hold true for exponentially larger numbers of people. Just combatants would be justified in intentionally killing 500 minimally responsible guards in order to save 250 innocent civilians awaiting execution, and perhaps to kill even more collaterally.

If Rodin's claim about lesser evil restrictions on aggregate harm to liable parties is valid, it is not clear at what ratio the principle kicks in to preclude unjustly imperiled victims from using defensive force against otherwise liable parties. But

that problem doesn't need to be solved here. The reason why is because just combatants do not harm merely in defending themselves; they harm for the instrumental purpose of achieving their just cause, which is to defend the just state's citizenry.

In Rodin's analysis of the prisoner example, the aggregated evil of killing the 500 guards is weighed only against the evil of allowing the ten civilians to remain captive. His point about the prisoner example might hold because the operation seems uniquely isolated from the broader war itself. But suppose the civilians were high-ranking defense officials, or possessed vital intelligence knowledge. In these cases, killing the 500 might be the lesser evil because of the role the rescued civilians might play toward bringing the unjust war to an end. But now we're back in the realm of standard narrow proportionality considerations. Given that Rodin acknowledges that the 500 guards are individually liable, coupled with the fact that there is no longer a lesser evil justification precluding the rescue, it seems the just combatants would be justified in killing the guards. And if the guards could be intentionally killed to free the civilians, then it certainly follows that the intervening forces could collaterally kill the guards.

Let us assume the ten civilians possess no special knowledge or position that would affect the war effort. In that case, Rodin might be right that the guards should not be killed. But the guard example is an exception. Generally during war, just combatants collaterally harm unjust civilians for the instrumental purpose of achieving their just cause, which is to defend their state's citizenry. But if their state's citizenry counts as protected victims, then their numbers must also be

factored into the broader proportionality equation. Needless to say, their large numbers will weigh heavily toward justifying the just combatants' missions. This is what McMahan must have in mind when he argues, "because the military action of just combatants supports a just cause, a particular act of war by just combatants may be justified even if the number of innocent civilians it kills on the other side exceeds the number of innocent people it saves on their own side."⁷⁴ So even though each particular act of war may threaten moderate collateral harm, each act will most often be justified if it is reasonably expected to contribute toward the victim state's just cause.

Moreover, we must also take into account the hoped for synergistic effects of destroying numerous targets. Imagine just combatants begin attacking from among target set $\{A, B, \dots, Z\}$. Suppose striking each target risks considerable harm to nearby civilians. As the attacks continue, the aggregate amount of collateral harm begins to appear excessive relative to the small impact each strike makes on the overall war. However, if it's reasonably believed that the eventual synergistic effect of striking some number of targets from the target set $\{A, B, \dots, Z\}$ will be sufficient to halt the unjust war and protect hundreds of thousands of innocent lives,⁷⁵ then

⁷⁴ McMahan, "Debate: Justification and Liability," 232.

⁷⁵ Some might object that in most wars, the entire victim state citizenry isn't threatened with deadly force; thus, the total number of just citizens shouldn't factor into proportionality calculations. A reply to this objection is to point out that in addition to lethally threatening many lives, war also threatens paramount values such as communal integrity, political autonomy, and a secure and stable national life – values of such importance that their defense merits weight in proportionality considerations. This line of argument tracks similar domestic analogues such as home invasion and rape. Although these latter acts might not necessarily threaten their victims' lives, the values they do threaten (a secure home life, bodily integrity) are so important that their defense is factored into narrow proportionality

just combatants would be subjectively justified in continuing with the attacks. Their actions would violate neither narrow proportionality nor lesser evil restrictions. Should the just combatants' efforts result in winning the war, they actions would have been both subjectively and objectively justified. However, should their efforts fail, they still would have been subjectively justified in continuing with the additional strikes, and thus would be excused for the unnecessary collateral harm caused.

It is not clear what the threshold limit of collateral harm to potentially liable parties is. Recall the discussion above about the ratios of harmed responsible parties to defended innocent victims. If just combatants are justified in collaterally causing *at least* a one-to-one ratio of harmed minimally responsible parties (unjust civilians) to defended innocent parties (just citizens), and the just citizenry numbers count in favor of the defended innocent parties, then just combatants would be objectively morally justified in collaterally killing a sum of unjust civilians equal to the just state population.⁷⁶ Yet it is almost unimaginable to think of a modern war where the number of potentially collaterally harmed unjust civilians would approach that number. The result is that just combatants will likely never face a lesser evil restriction that prohibits their wartime missions against liable parties.

Instead, lesser evil restrictions likely will restrict only wartime acts against liable parties where the proposed act doesn't factor into the broader just cause of

calculations – as evinced by the fact that deadly force tends to be both morally and legally justified in both cases.

⁷⁶ But as previously stated, even though just combatants are justified in collaterally harming many unjust civilians, the just combatants still have compelling moral reason to minimize the collateral killings.

the war. The original prisoner scenario is an example of this, but such examples are rare. For most wartime collateral harm, lesser evil restrictions won't play a prohibitory role.

3.9 McMahan's Correspondence Claim, Revisited

McMahan's claim is that a person's liability should correspond with his or her level of moral responsibility for an unjust threat (3.1). I called this the correspondence claim. Unless they've acted culpably or made significant contributions to their state's unjust war, McMahan thinks most unjust civilians are not liable to collateral or lesser harms.

But if my arguments up to this point are right, I've established that most unjust civilians *are* generally liable to collateral and lesser harms – even when they don't act culpably or contribute significantly to their state's aggression. And if most unjust civilians are liable to collateral harm, and collateral harm includes the possibility of being killed, then it follows that most unjust civilians are liable to being killed during war. Yet considered individually, most unjust civilians make only small contributions to their state's war aggressive war. Thus, it must be the case that small contributions can ground liability to defensive harm – to include death, when necessary. And if that's right, then McMahan's correspondence claim must be wrong.

That said, I do think there's something fundamentally right about the correspondence claim in lethal forced choice situations. My interpretation of the correspondence claim is this. Although an agent's level of moral responsibility for an unjust threat doesn't straightforwardly set limits to the total amount of harm she

might be liable to as McMahan suggests, it is a weighty consideration when one is able to distribute harm among liable parties. In other words, moral responsibility levels give us positive reason to shift more harm to more highly responsible parties when possible, and less harm to lesser responsible parties. Moreover, I think this consideration applies both during and after war.

For example, suppose just combatants were choosing between striking two military communication targets: *A* or *B*. Striking each target foreseeably risks killing ten people; ten culpable unjust combatants are located near *A*, and ten minimally responsible unjust civilians are present at *B*. Assuming only one of the two targets needs to be destroyed (the military advantage will be the same), the difference in moral responsibility among the unjust parties favors striking target *A*.

The same correspondence consideration holds at war's end. When possible, just victors should steer greater amounts of postwar harm toward more highly responsible unjust parties, and less postwar harm toward less responsible citizens. For example, highly responsible unjust political and military leaders might be subjected to postwar punishment and the seizure of personal assets, whereas most unjust civilians might be subjected to endure the inconveniences of occupation or to help pay restitution or reparations at war's end.⁷⁷

So although I think there's an important role for something like a correspondence claim, it doesn't perform the precise function McMahan thinks it does. It's a consideration for distributing harm among liable parties; it doesn't determine threshold harm limits.

⁷⁷ These potential postwar obligations will be discussed in Chapters 6 and 7.

3.10 Chapter Summary

In this chapter, I've reviewed McMahan's position on unjust civilian liability. As discussed, his writings seem to suggest that unjust civilians must act either complicitously or make significant contributions to their state's aggression in order to become liable to collateral or lesser harms. But if that were the case, then McMahan would be establishing asymmetric liability criteria for unjust combatants on the one hand, and unjust civilians on the other. Such a move would threaten the broad appeal and explanatory power of the Responsibility Account.

Instead, I argue that as a matter of consistency the same liability criterion should be used to establish unjust civilian liability as that used to establish unjust combatant liability: moral responsibility for an objectively unjust threat to non-liable persons. Most unjust civilians meet this threshold by remaining in the unjust state, participating in the economy and paying taxes, contributing to the culture, and so on – all of which causally contribute to their state's aggression.

It is true that the civilians' contributions are often small. But when minimally contributing agents act in ways that in aggregate foreseeably pose unjust threats of harm to innocent others, then all the contributing agents share some moral responsibility for the harm. And in forced choice situations involving inevitable and indivisible harm, small moral asymmetries between minimally responsible unjust civilians and innocent victim state citizens can be decisive in rendering the unjust civilians liable to defensive and lesser harms.

Against this conclusion, we looked at several objections arguing that either the unjust civilians are not morally responsible (the foreseeability objection), or if

they are morally responsible, nonetheless they should not be liable to harm (the justification, proportionality, and lesser evil objections). I think all these objections can be overcome. Thus, most unjust civilians are liable to defensive and lesser harms when necessary to protect wrongfully imperiled innocent victims.

3.10.1 Unjust Civilian Liability: What's Really at Stake

The important takeaway from this chapter is that if most unjust civilians are liable to defensive harm, then the moral evaluation involved is one of narrow rather than wide proportionality. If collaterally harming unjust civilians is narrowly proportionate, then they are not wronged when so harmed. McMahan's position apparently is that in the absence of complicity or significant contribution (or some "fixed degree of responsibility"), defensively harming unjust civilians is justified as a lesser evil justification rather than a liability justification. So returning to Iraq's invasion of Iran, since McMahan thinks that most Iraqi civilians bore little to no responsibility for their state's unjust invasion, apparently he would claim that the Iranians had a lesser evil justification for collaterally harming Iraqi civilians.

This interpretation of McMahan is supported by the following passage, where he notes that

it is virtually impossible now to fight wars without killing significant numbers of innocent people. But when just combatants are justified in attacking a military target even though they foresee that their action will harm or kill innocent civilians as a side effect, their action, though justified, nonetheless threatens those civilians with wrongful harm.⁷⁸

So even though it is inevitable in most modern warfare that just combatants will collaterally kill significant numbers of unjust civilians, the just combatants have a

⁷⁸ McMahan, *Killing in War*, 38-9.

lesser evil justification for doing so given the weighty value of the just cause for which they fight.

In contrast, the position I've argued for holds that most Iraqis shared some moral responsibility for their state's aggression. When this fact is coupled with the forced choice situation that confronted the imperiled Iranians, my position entails that the Iranian combatants had a *liability justification* for collaterally harming most Iraqi civilians (assuming the military strikes were reasonably expected to contribute to halting the unjust war).

It is difficult to overstate the substantive difference between McMahan's position and mine own regarding the topic of civilian liability to collateral harm. At first, one might be tempted to think there is little practical difference between our positions because whether just combatants possess a lesser evil or liability justification, the result appears to be the same: just combatants would be all things considered justified in acting in ways that foreseeably but unintentionally harm unjust civilians. But that conclusion would be mistaken.

The reason why is that when just combatants harm civilians with a lesser evil justification, the just combatants *wrong the civilians* even though doing so is all things considered justified. Conversely, when just combatants have a liability justification for harming unjust civilians, the just combatants *do not wrong the civilians*. Given that wronging a person normally carries a prima facie obligation of redress to the wronged party (most often in the form of compensation), it follows that much is at stake depending on which justification just combatants have for

collaterally harming unjust civilians. The distinction between these two justifications for collaterally harming will figure prominently in following chapters.

CHAPTER 4

4. Unjust Civilian Liability, Continued

My aim in this chapter is twofold. First, given the contentious nature of the conclusion in the preceding chapter, I'll attempt to augment and strengthen my claim that most unjust civilians are liable to defensive and lesser wartime harms (collectively, "defensive harm" for short). Second, because I qualified my claims in the previous chapter by stating that "most" unjust civilians are liable, I'll explain the reasoning behind that qualification.

Spending a second chapter on the issue of unjust civilian liability might seem like overkill, especially for a project focused on postwar obligation. However, I think doing so is warranted because the issue of unjust civilian liability carries profound implications for determining a victor's obligations at war's end. Many post-conflict obligations in individual defense cases are grounded in unintentional harm to bystanders. I think the same holds true in national defense situations. Thus, it will be crucially important to determine whether most aggressor state civilians are liable to the just state's defensive force, or whether they are instead innocent bystanders. I will argue for the former.

Much of the following discussion will touch on issues at the intersection of moral and political theory. Given obvious limitations of scope, I will not attempt to offer a foundational theory of political morality here. Instead, what follows is a brief sketch of a theoretical grounding for unjust civilian liability.

4.1 The Basis of Unjust Civilian Liability

Unjust civilian liability is grounded in the fact that most unjust civilians causally contribute to their state's unjust war. Although they may vote or provide moral support for their troops, the primary contributions most unjust civilians make are financial. By participating in their state's economy and paying taxes, citizens generate the wealth necessary to fund state institutions, which in turn enables their country's war-fighting ability. This contribution should not be underestimated. Without a citizen tax base, few states (if any) could wrongly kill innocent people during aggressive warfare.

In turn, the citizens normally benefit from their state's institutions. They accept the presumptive goods of safety and security from threats internal and external to the state, and also enjoy the benefits that such security enables, such as coordinated economic activity and public infrastructure. In short, states generally provide those things necessary to live a minimally decent life, and citizens sustain the institutions that make those goods possible. My claim is that by maintaining residency and citizenship, and by participating in, funding, and benefitting from their state institutions, citizens know (or *should* know) that the state will use those funds to act in the citizens' names and ostensibly on their behalf. Each citizen who meets the forgoing criteria effectively creates and sustains a normative relationship with his or her state – a relationship that carries moral implication.

Although the contribution each citizen makes toward maintaining state institutions may seem relatively small, the aggregate of these individual contributions creates powerful institutions that – especially in the case of military

institutions – wield incredible power. And unsurprisingly, such power can be used justly or unjustly. As previously discussed, it’s completely foreseeable that powerful institutions such as standing armies might threaten wrongful harm to others (3.4). And even if citizens do not actually foresee this possibility, they *should*.¹ So by voluntarily acting in ways that foreseeably risked threats of wrongful harm to others, most citizens share moral responsibility for the unjust threats their institutions pose.

Jeffrey Reiman perfectly captures this notion of institutional responsibility: “Since the state’s power is dangerous, and since citizens play roles that create and maintain that power, it follows that citizens are morally responsible for the actions by means of which they create and maintain the state’s power.”² Iris Young echoes Reiman’s claim, noting that citizens are not morally independent from their state institutions. She writes: “We ought to view the coercive and bureaucratic institutions of government as mediated instruments for the coordinated action of those who share responsibility for structures, rather than as distinct actors independent of us.”³ When state institutions act, most citizens are not isolated from those actions; rather, most citizens share responsibility for those state actions, especially in cases where the institutions pose threats of wrongful harm to others.

¹ As Erin Kelly says, “we have a responsibility as members of larger groups to explore the implications of our participation.” Erin Kelly, “The Burdens of Collective Liability,” in *Ethics and Foreign Intervention*, ed. Deen K. Chatterjee and Don E. Scheid (Cambridge: Cambridge University Press, 2003), 126.

² Jeffrey Reiman, “A Moral Equivalent of Consent of the Governed,” *Ratio Juris* 26, no. 3 (2013): 367.

³ Iris Marion Young, *Responsibility for Justice* (Oxford: Oxford University Press, 2011), 112.

4.2 An Enforceable Duty to Avert Wrongful Harm

The importance of citizens' institutional responsibility is this. Given that most citizens bear responsibility for their state institutions, then if those institutions threaten wrongful harm to innocent others, most citizens have an enforceable duty to bear the costs necessary for averting the wrongful harm. Because most unjust citizens are co-responsible for the aggressor state's threat of unjust harm, they have an enforceable duty to prevent that harm from eventuating. Returning to Young, I think she gets this point partially right when she argues that

we cannot avoid the imperative to have a relationship with actions and events performed by institutions of our society, often in our name, and with our passive or active support. The imperative of political responsibility consists in watching these institutions, monitoring their effects to make sure that they are not grossly harmful ... to prevent suffering.⁴

As Young says, we are politically responsible for ensuring that our institutions don't harm others because "we participate in and usually benefit from the operation of these institutions."⁵ Yet in my view, the problem with Young's position is the conclusion she draws from this notion of institutional responsibility:

If we see injustices or crimes being committed by the institutions of which we are a part, or believe that such crimes are being committed, then we have the responsibility to try to speak out against them with the intention of mobilizing others to oppose them, and to act together to transform the institutions to promote better ends.⁶

Although I agree with Young's reasoning in these passages, I think she draws too weak of a conclusion – at least in situations where the institutions are waging unjust

⁴ Young, *Responsibility for Justice*, 88. For a similar claim, see James Childress, "Just War Criteria," in *Moral Responsibility in Conflicts: Essays on Nonviolence, War, and Conscience* (Baton Rouge: Louisiana State University Press, 1982), 68.

⁵ Young, *Responsibility for Justice*, 92.

⁶ *Ibid.*

war. When our state institutions threaten wrongful lethal harm to others, our responsibilities extend far beyond trying to agitate campus protests or writing op-ed pieces to influence institutional reform. Although we may incur such long-term obligations toward institutional reform, the more pressing duty is to protect the innocent people currently threatened.

I think Victor Tadros, on the other hand, gets this issue exactly right.

According to Tadros:

Citizens who causally contribute to the might of the unjust state and benefit from it have a duty to prevent the wrongful actions of the state, and in virtue of that duty they are liable to be harmed to some degree as a means of altering its policies.⁷

And specifically on the topic of aggression, Tadros notes that “citizens have enforceable duties to avert the threats that result from the unjust war that their state perpetrates.”⁸ So by causally contributing to and maintaining their state’s institutional military power, citizens have an enforceable duty to prevent that power from wrongfully harming innocent others.

The duty to prevent institutional harm is grounded in considerations of fairness. As previously discussed, all agents have a prima facie duty to ensure their conduct does not wrongfully harm others. This is also true in cases where the actions of multiple agents are mediated through state institutions. If a group’s aggregated actions threaten wrongful harm to innocent people, and that harm was reasonably foreseeable, then as a matter of fairness the individuals responsible for the threat should have to shoulder the costs and burdens of that harm rather than

⁷ Tadros, “Duty and Liability,” 274. See also Gerhard Øverland, “Dividing Harm,” *Journal of Moral Philosophy* 8, no. 4 (2011): 555.

⁸ Tadros, “Duty and Liability,” 275.

the innocent parties. When a state's institutions malfunction in this way, the threatened harm can be traced back to the individuals who participated in, sustained, and benefitted from those institutions.

To deny this claim would require embracing some kind of asymmetric claim: if one's state institutions produce goods such as safety and security, then one can enjoy those good effects, but if one's state institutions produce bad or harmful effects, then one need not share in the costs or burdens of preventing those harms. Or maybe one is tempted to think that in cases of institutional harm, citizens do not have a duty to prevent their institutions from harming innocent others, but might have a duty to compensate for any wrongful harm after the fact should it eventuate. But why think this? If the harm hasn't yet been distributed, wouldn't it be fairer to redirect the harm to the people who share moral responsibility for creating the harm than to the innocent parties?

Kai Draper captures the underlying principle of fairness at play in these kinds of situations:

Suppose that someone justifiably and for his own benefit creates a situation in which he or another innocent person must sustain a cost. Other things being equal, it seems to me that fairness prefers that the cost should fall on the individual who created this situation.⁹

My suggestion is that we can extend Draper's claim about individuals to situations involving mediated group actions. Similar to Draper's description, unjust citizens who justifiably maintain their state institutions for personal benefit may create a situation in which either the unjust citizens or the just citizens in the victim state must sustain serious costs. As a matter of fairness, the unjust citizens should not be

⁹ George Draper, "Fairness and Self-Defense," 84.

able to displace the associated negative costs of their institutions onto others, especially when those costs are lethal. One cannot possibly expect wrongfully threatened victims to accept the harm rather than redirect the harm toward those individuals responsible for the institutions that now pose a deadly threat. If the latter are responsible for the harm in a way that the former are not, then the harm should be redirected toward the latter.

Interestingly, McMahan articulates pretty much the exact position I've just presented; it's worth quoting at length:

When the malfunctioning of political or military institutions that are fundamentally just results in unjust war, some people will have to suffer the costs of that malfunctioning. Who, as a matter of justice, ought they to be: those who are being unjustly warred against, or those whose institutions have gone off the rails? It seems that when an institution malfunctions in a harmful way, those who designed, direct, participate in, and normally benefit from it are liable to pay the costs. They are responsible for the functioning of the institution by virtue of having established and administered it as a means of furthering their purposes. It would be unjust if they were to impose the costs of its malfunctioning on others.¹⁰

The context for these comments is whether combatants might be justified in fighting in an unjust war so as to uphold and preserve an otherwise just institution that happens to be malfunctioning in this instance. McMahan's conclusion is that it would be impermissible for the combatants to fight in the unjust war because doing so would impose wrongful harm on innocent parties. That seems right.

What's surprising, however, is that McMahan doesn't follow this very same line of reasoning and conclude that – as a matter of fairness – most unjust citizens should have to shoulder the costs of their malfunctioning institutions rather than

¹⁰ McMahan, *Killing in War*, 74. See also Jeff McMahan, "On the Moral Equality of Combatants," *Journal of Political Philosophy* 14, no. 4 (2006): 385-86.

the victim state's citizenry. Why, we might wonder, should the unjust citizens who "participate in, and normally benefit from" the malfunctioning institution that is now waging unjust war be allowed to sit idly by and let their military institution "impose the costs of its malfunctioning on others?" Instead, shouldn't we think the unjust citizens have an enforceable duty to avert the harm from befalling the innocent victims?

4.3 Enforceable Duties

Thus far, I've argued that most unjust citizens have an enforceable duty to prevent or avert their state's unjust war from harming innocent people. But in what sense is this duty 'enforceable'? Following Tadros, we can say that an enforceable duty is a duty that an agent can be permissibly coerced to fulfill.¹¹ The underlying idea here is that one can force the duty-bearer to perform an act that she is required to do. And when one permissibly coerces an agent to perform an act she has a duty to do, that agent is not wronged: she is liable to be harmed in that way.

Erin Kelly argues that in order to avert unjust threats of harm to innocent parties, the costs of averting those threats may be imposed on those persons "who are together causally responsible for the crisis than on persons who are not."¹² To reframe Kelly's point using Tadros's language, we can say that threatened innocent victims may permissibly impose the costs of defending themselves onto the parties responsible for the situation because the latter have a duty to bear those costs.

¹¹ Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), 131, 188.

¹² Erin Kelly, "The Burdens of Collective Liability," 124.

McMahan concurs with Tadros's general position. After acknowledging that agents can have the kinds of enforceable duties to bear costs and harms as Tadros claims, McMahan writes:

When a person is willing to fulfill a duty to incur a harm, it is only in the comparatively rare cases in which he cannot do it on his own that it is permissible for third parties to impose the harm on him. Except in such rare cases, only when a person resists her duty to incur a harm does it become permissible for third parties to enforce the duty by imposing the harm. ... In refusing to fulfill his duty to incur a harm, the person has forfeited his right against third party intervention. His duty is enforceable and, by refusing to fulfill it himself, he makes himself liable to proportionate harm when that is necessary to enforce his compliance.¹³

As McMahan points out in this passage, there are two situations in which third parties may permissibly impose harm on agents who have an enforceable duty to bear such harm: either when the duty-bearer refuses to fulfill her duty, or when the duty-bearer is unable to fulfill the duty on her own.

To illustrate the foregoing points, it might be helpful to consider some examples. The first comes from Tadros, summarized here:

Culpable Dog Owner. Dog owner culpably unleashes his dangerous dog and sets dog to attack innocent victim. The only way to prevent victim from being harmed is by pushing someone else in between the dog and the victim.¹⁴

According to Tadros, the dog owner has an enforceable duty to protect victim from the dog. Because owner created the threat of wrongful harm, then as a matter of fairness he must bear the costs of averting that threat rather than allowing it to fall to the victim. So let's suppose that owner chooses not to place himself in the dog's path. Given that owner has an enforceable duty to accept the harm necessary to

¹³ McMahan, "Individual Liability in War," 294.

¹⁴ Tadros, *The Ends of Harm*, 53.

avert the attack but refuses to fulfill his duty, victim is permitted to push owner into the on-coming dog. Moreover, a bystander would also be permitted to push owner into the dog's path. The owner has a duty to bear the costs of protecting the victim, and others can coerce owner into fulfilling his duty should he refuse to do so on his own.

Culpable Dog Owner is an example of a situation in which a duty-bearer who refuses to fulfill his duty can be coerced into doing so. Now let's look at an example in which one is permitted to harm a duty-bearer who cannot fulfill her duty on her own. To illustrate, I'll offer a variant on Tadros's original example:

Wheelchair Dog Owner. Wheelchair-bound dog owner culpably sets his vicious dog onto victim. The only way to protect victim is by pushing someone into the path of the charging dog. Even if wheelchair dog owner decides to avert the attack, he cannot wheel himself quickly enough to intercept the dog.

Wheelchair dog owner is morally responsible for an unjust threat and thus has an enforceable duty to prevent the harm from befalling victim. However, once the threat is set in motion, owner cannot fulfill his duty even if he wishes to do so. In this case, I think victim (or a bystander) would be justified in pushing the owner's wheelchair into the dog's path so that owner gets attacked rather than victim.

Again, owner has an enforceable duty to bear the harm necessary to avert the burden from befalling innocent victim. If owner is unable to avert the threat, others may harm him to prevent the unjust threat he is responsible for and, importantly, this harm does not wrong him.

It's important to note, however, that *Culpable Dog Owner* and *Wheelchair Dog Owner* both involve agents who are culpably responsible for unjust threats of harm.

Because we're interested in the possibility of unjust civilian liability in the absence of culpability, we need to look at cases involving agents who are morally responsible for unjust threats, but in non-culpable ways. Continuing with a variant on the first example, consider:

Non-Culpable Dog Owner. Non-culpable dog owner owns a vicious dog. Owner takes due diligence to prevent the dog from getting loose by installing a sturdy high fence. Inexplicably, a strong zephyr blows down a portion of the fence and the dog rushes to attack a passerby. The owner is in the front yard, and the only way to prevent the attack is to push the owner into the charging dog.

The difference in this example is that the owner isn't culpable; he neither commands the dog to attack, nor does he act recklessly or negligently. He takes reasonable effort to prevent an attack from occurring. Still, owning a dangerous dog is an inherently risky activity. It's foreseeable that the dog could somehow get loose and threaten serious wrongful harm to innocent people. If that threat should materialize, then, as a matter of fairness, the owner should have to suffer the harm rather than an innocent passerby who bears no moral responsibility for the situation. Thus, once again, I think either victim or a bystander would be justified in pushing owner into the dog's path so that the owner suffers the harm rather than victim. And this is true even though owner isn't culpable or blameworthy.

At this point, one might be tempted to think that what's doing much of the justificatory work in the previous examples is that dog owners bear sole responsibility for owning their dogs, and thus each owner bears a high level of moral responsibility for any threat his or her dog poses. Their high level of moral responsibility, in turn, is what permits others to harm the owners to prevent the threatened harm. But I don't think that's right. Although the sole dog owners may

bear more moral responsibility, that doesn't preclude any one of several joint owners from becoming liable to necessary defensive force. Here's an example:

Apartment Dog Owners. After a string of recent nearby assaults, a group of renters in an apartment complex decides to keep a vicious dog for security purposes. Each renter chips in to pay for the dog's food, veterinarian bills, and general upkeep. One day the dog gets loose and charges toward a bystander walking on the public sidewalk in front of the apartment complex.

Let's assume the apartment renters are permitted to own the dog, and have positive moral reason for doing so. Although they may be justified in keeping the dog, they cannot do so with moral impunity. As already noted, the keeping of a vicious dog foreseeably poses a threat of unjust harm to others. Thus, should that harm eventuate, each of the renters has a duty to bear harm to prevent the unjust attack given each renter's moral responsibility for contributing to the unjust threat. Once again, I think victim would be permitted to push any one of the renters (and perhaps several) into the dog's path in order for victim to protect herself.

Even if the foregoing claim is right, one might wonder how helpful the *Apartment Dog Owners* case is supposed to be for the topic of unjust civilian liability during war. Although the case involves multiple parties who jointly contribute to an unjust threat, the threat to which they causally contributed was private. So as a final point, let's look at a case involving citizens whose causal contributions to an unjust threat are mediated through a state institution. Here's an example:

Nuclear Reactor. State *A* operates a taxpayer-funded nuclear power plant near the border of state *B* to augment *A*'s public power grid. Unexpectedly, the reactor begins leaking deadly nuclear material, and *A* has no way of shutting down the reactor. As the reactor spins out of control at an increasing rate, experts predict the reactor will implode and release massive amounts of deadly nuclear material high into the air. Due to projected wind patterns, most of the lethal material is expected to blow across the border into *B*. The only way to stop the threat to *B*'s citizens is to implode the

facility, thereby entombing the reactor and keeping the contamination localized within *A*. *A* makes no attempt to implode the facility. *B* has the military capability to strike the site, but doing so will likely kill several of *A*'s citizens immediately, while also endangering a fair number of *A*'s citizens over time due to long-term contamination.

In this example, *A*'s citizens do not operate the nuclear facility, nor do they directly interact with the state employees who do. Nevertheless, I still think *A*'s citizens are morally responsible for the unjust threat their state institution poses to *B*'s citizens. The explanation is as follows. *A*'s citizens causally contribute to their state's nuclear program by funding it through their taxes. As most citizens know (or should know), operating a nuclear program is a foreseeably risk-imposing activity.¹⁵ And *A* built and operated the facility in their citizens' names, and the latter benefitted from the energy production. Given their causal contribution, the foreseeability of the risk involved, and their relationship with their state's institution, I think most state *A* citizens share moral responsibility for the unjust threat that *B* now faces.

Accordingly, I think *A*'s citizens have an enforceable duty to bear the costs and harms necessary to avert the contamination from befalling *B*'s innocent citizens. *B* would be justified in bombing *A*'s reactor and would not wrong any of *A*'s citizens in the process. The latter are liable to be harmed in that way for purposes of averting the wrongful nuclear threat. As a matter of fairness, *B*'s citizens should not have to bear the harm that *A*'s institutions created.

4.4 The Duty to Prevent Harm During an Unjust War

Hopefully, the takeaway from the preceding analysis is clear. Unjust citizens voluntarily participate in, financially support, and benefit from state institutions

¹⁵ The obvious examples here are Chernobyl, Three Mile Island, and – more recently – Fukushima.

that wield enormous power. These institutions act in the citizens' name, ostensibly on their behalf, and – given their power – in a way that foreseeably risks threatening unjust harm to others. My claim is that most citizens share moral responsibility for their state institutions and thus have an enforceable duty to prevent their institutions from wrongfully harming innocent people. If their institutions malfunction and initiate an unjust war, then most unjust citizens are obligated to attempt to end the aggression and, should that attempt fail, to bear the costs and harms necessary to protect the victim state's citizenry.

Yet as history confirms, unjust citizens rarely attempt to stop their state's aggression. Perhaps in some cases, the citizenry is ignorant about the injustice of their state's war. But even in cases where it's fairly obvious that their state is committing aggression, unjust citizens generally do nothing, hoping instead to go about their daily lives without incident. Unfortunately for them, fanatical ambivalence is not an option when their state is committing aggression – at least not one that defeats their liability. They don't have the option to remain passive and indifferent while their institutions threaten innocent life. One cannot idly stand by and remain morally indifferent to an unjust harm that one has causally contributed to, especially when the unjust harm is done in one's name.

Unjust citizens have an enforceable duty to attempt to prevent their state from wrongfully harming others. When they choose not to take up their responsibility, their duty can be enforced. But enforced by whom? As Frances Kamm explains, "In international relations, there is often no international agency that will enforce the duties of one state relative to another. And, arguably, when

that is the case, a state may itself try to enforce the duties owed to it.”¹⁶ Kamm’s claim here dovetails with McMahan’s earlier point: when others choose not to fulfill their enforceable duties, they can be justifiably coerced to do so. Because the unjust citizens have a duty to bear the costs of averting their state’s aggression and have chosen not to attempt to fulfill that duty, just combatants can enforce the unjust citizens’ duty by imposing harm on them when necessary. Unjust citizens who choose not fulfill their duty are liable to be harmed during war, and thus have no legitimate complaint when they are in fact harmed.

Some readers will recoil from this conclusion. Just what, they might wonder, can the unjust citizens do in these circumstances? As McMahan suggests, “each citizen knows that nothing that he or she does can make more than a tiny, probably negligible, contribution to ending the war.”¹⁷ Of course, this suggestion isn’t about refusing to do one’s duty; rather, the suggestion is that unjust citizens cannot fulfill their duty on their own.

In reply to this concern, we should first note that McMahan’s claim is probably true for each individual citizen acting *as* an individual. In other words, likely no citizen can end his or her state’s unjust war while acting alone. But as discussed in the previous chapter, the aggregated actions of large numbers of people can have powerful, profound effects. If most citizens have a duty to avert their state’s aggression, then it seems natural to think they also have a subsidiary duty to

¹⁶ Frances Kamm, “Failures of Just War Theory,” in *The Moral Target: Aiming at Right Conduct in War and Other Conflicts* (Oxford: Oxford University Press, 2012), 67-8.

¹⁷ McMahan, “Who is Morally Liable,” 550. See also McMahan, *Killing in War*, 215-16.

organize themselves and coordinate their efforts so that together they might fulfill their jointly held duty.¹⁸ Though perhaps few in number, in some situations the coordinated efforts of the unjust citizenry may succeed in halting an unjust war.

But let's assume the citizens make reasonable effort and fail. Does this absolve them of any liability they might otherwise have incurred? I think not. Their duty is to prevent their state institutions from killing innocent people. Should they fail in this duty or not even attempt to fulfill it, they still have a duty to bear the costs of averting their state's unjust threats. Thus, others can still enforce the unjust citizens' duties; just combatants may still justifiably impose the costs of their defensive war onto most unjust citizens.¹⁹

That conclusion may strike some readers as unfair. My claim, they will say, seems to suggest there is nothing the unjust citizens can do during the unjust war to escape liability. My reply is: that's mostly true, but it's not unfair. One can think of the unjust citizens as being in a position similar to that of the driver in *Conscientious Driver*. Once he's careening out of control toward pedestrian, there's nothing driver can do to escape liability to the pedestrian's defensive harm. His liability is grounded in his early choice to engage in a foreseeably risk-imposing activity.

Similarly, there's nothing a renter can do in the *Apartment Dog Owners* example to escape liability once the dog begins attacking the innocent passerby.

¹⁸ See, among others, Virginia Held, "Can a Random Collection of Individuals be Morally Responsible?" *The Journal of Philosophy* 67, no. 14 (1970): 480.

¹⁹ Though to repeat a point from the preceding chapter, harming the unjust civilians must reasonably be believed to be causally effective in averting the unjust state's aggression. Thus, because intentionally killing civilians is almost never causally effective, most justifiable harm to unjust civilians will be in the form of collateral harm while striking military targets.

The renter cannot simply say to the victim, “I will no longer have anything to do with the dog, I will desist from paying his future keep,” and so on. Even if true, those future actions do nothing to protect the passerby from the unjust threat she currently faces – a threat the renter shares responsibility for bringing about. The renter’s liability to be harmed to protect the victim is grounded in his earlier decision to causally contribute to a risk-imposing activity.

In both of these cases, the driver’s and the renter’s prior actions that contributed to the unjust threat render them liable to defensive harm, and their liability extends throughout the duration of the threats. So too, unjust citizens simply cannot argue that they shouldn’t be liable to defensive harm given that they can’t turn off their state’s war machine. Instead, their liability is grounded in their earlier decisions to maintain residency and citizenship in the unjust state, causally contribute to its powerful institutions, and so forth. Now that those institutions are wrongfully harming others, they are liable to bear the necessary costs of averting that harm, and will remain so until their state no longer poses an unjust threat.

The preceding discussion of the driver and renter examples also helps to show why protesting and other forms of political disassociation are insufficient actions for avoiding liability. I argued earlier that part of what explains a citizen’s institutional responsibility is her association with her state’s institutions: she participates in and helps finance those institutions, and the latter in turn act in her name and on her behalf. So one might think that given this normative relationship, when state institutions commit massive injustice in a citizen’s name, she has a duty to disassociate herself from those institutions. As Thomas Hill argues, “A person can

disassociate himself from a corrupt group both by acting to prevent their unjust acts and also, in appropriate contexts, by protesting, denouncing what they do, and taking a symbolic stand with the victims."²⁰ I do think unjust citizens have a duty to protest and disassociate from their aggressing institutions. However, I don't think those actions negate the unjust citizens' liability.

As we've seen, once one bears moral responsibility for contributing to an unjust threat, one's duty to bear harm for preventing that threat persists throughout the duration of the threat. Just as driver and renter cannot escape liability by waiving off their association with the vehicle and the dog once those threats eventuate, so too unjust citizens cannot disassociate themselves from their state's aggressive institutions in a way that defeats their duty to bear harm. Thus, even though unjust citizens have a duty to resist and disassociate themselves from their state's aggression, these efforts still do not negate their duty and subsequent liability. Rather, their duty persists throughout the duration of their state's aggressive war; they remain liable to defensive harm until war's end.

4.5 Are Causal Contribution and Benefitting Sufficient for Liability?

Based on the preceding arguments, I think most unjust citizens who causally contribute to the unjust state's war-fighting abilities are liable to defensive wartime harm. But not everyone who causally contributes is liable, nor is citizenship alone sufficient to ground liability. So what's necessary now is to identify and explain why some parties escape wartime liability.

²⁰ Thomas E. Hill, "Symbolic Protest and Calculated Silence," *Philosophy & Public Affairs* (1979): 90.

Let's begin with a concern recently raised by McMahan. McMahan objects to the following claim made by Tadros: "Citizens who causally contribute to the might of the unjust state and benefit from it have a duty to prevent the wrongful actions of the state, and in virtue of that duty they are liable to be harmed."²¹ In reply, McMahan says he assumes Tadros's claim is disjunctive: either contributing to or benefitting from state institutions is sufficient to ground a duty to incur harm.²² But that can't be right, McMahan thinks. If causally contributing to a state's economic strength (and thus war-fighting ability) were sufficient, then given our system of global interdependent commerce, "a high proportion of the rest of the people in the world acquire a duty to incur harms as a side effect of military action against that state."²³ Similarly, if merely benefitting from a state's institutions were sufficient, then:

if the state fighting the unjust war is one of the major economic powers, a high proportion of the people in the world have such a duty, since these people benefit from many of that state's economic activities and have contributed to its wealth in various ways, through trade, labour, lending, the provision of services, and so on.²⁴

So if causally contributing to an aggressor state's institutions or benefitting from them were sufficient to ground a duty to bear harm, then numerous people around the world would become liable based on their prior interactions with the unjust state. Thus, the conclusion goes, Tadros's view is certainly mistaken.

In reply to McMahan's objection, I think it's worth making two points, one minor and one more substantive. As a minor point, I think the better reading of

²¹ Tadros, "Duty and Liability," 274.

²² McMahan, "Individual Liability in War," 297.

²³ *Ibid.*, 298.

²⁴ *Ibid.*

Tadros's claim is that the *conjunction* of contributing to and benefitting from state institutions grounds a duty. But the point is only minor because we can still come up with many examples of people who meet both conditions and yet intuitively don't have a duty to be harmed. For example, many Canadians financially contribute to U.S. wealth (and thus U.S. war-fighting capability) through trade and banking. Many Canadians also benefit from those same transactions, and might also parasitically benefit from the deterrent effects of the local presence of U.S. military forces. Yet McMahan is right: few of us think these Canadians have a duty to bear any harm to prevent U.S. institutions from unjustly harming others.

But this Canadian example leads us to the more important point: McMahan overlooks the fact that Tadros's claim refers to *citizens* who contribute to and benefit from state institutions. Although many Canadians casually contribute to and benefit from U.S. institutions, these Canadian citizens are not morally responsible for the U.S. institutions because the latter do not act in the name of the Canadians, nor generally on their behalf. Canadian contributors and benefitters do not have the kind of normative relationship with U.S. institutions the way U.S. citizens do. In other words, U.S. state actions cannot be imputed to the Canadian citizens the way they can be imputed to most American citizens. The duty American citizens have to bear the costs of preventing or averting their institutions' unjust threats stems from their normative relationship with the state – a relationship that non-citizens lack. Citizens are not morally responsible for the actions of other states that do not act in their name and on their behalf. So although many Canadians causally contribute to

and benefit from U.S. institutions, they carry no duty to bear harm to prevent U.S. institutions from unjustly harming others.

McMahan is surely right to argue that most people around the world don't incur a duty to shoulder the harm necessary for averting an unjust state's aggression. But it doesn't follow that the unjust citizens lack such a duty; they've causally contributed to and benefitted from the state institutions that act in their name. Knowing that the state acts in their name and by way of their support, citizens who choose to maintain their residency and citizenship, and participate in state institutions and finance them through taxes, take on a moral responsibility for those institutions in a way that other people who merely commercially interact with the same state do not.

4.6 Citizenship Alone Cannot Ground Liability

One might conclude from the preceding discussion that citizenship is a necessary condition to bear moral responsibility for state institutions. But is citizenship a sufficient condition for bearing institutional responsibility? Can citizenship alone ground a person's duty to bear harm when necessary to avert his or her state's unjust threats? Some have thought so. Kamm, for example, argues "civilians who have done nothing wrong (e.g., have not supported an unjust regime) may be liable merely in virtue of being citizens to bear some costs or risks in order that their country not be unjust."²⁵ Hannah Arendt apparently held this same view.²⁶

²⁵ Kamm, "Jus Post Bellum, Proportionality, and Compensation," in *The Moral Target*, 162-63.

²⁶ See Young, *Responsibility for Justice*, 78, 85.

I disagree; citizenship alone is an insufficient ground for incurring a duty to bear harm. To begin, recall that I'm arguing from within an individualist account of liability to wartime harm. Thus, individual liability must be grounded in individual choices and actions. Or put differently, liability to defensive harm is predicated on the exercise of responsible agency. So on this point, I agree with McMahan who says that "the idea that people can be liable to attack, or immune from attack, merely by virtue of their membership in a group ... is both false and morally repugnant."²⁷ In order to be liable to harm, a citizen must do something that causally contributes to her state's unjust war.

Yet causal contribution by citizens is not enough. On the individualist account, the underlying basis for liability to harm is moral responsibility for an unjust threat. So in addition to causally contributing to one's state's unjust war, one must also be morally responsible for that contribution. Thus, the problem with claiming that citizenship is sufficient to ground liability is the fact that some citizens don't causally contribute to their state's unjust threats, or at least not in a way for which they are morally responsible. Young children, invalids, and the mentally challenged are examples here. It seems these citizens don't causally contribute to their unjust state's aggression. And even if one were to argue that their mere existence causally contributes by prompting parents and other citizens to fight on their behalf, the former parties aren't morally responsible for the supposed contribution they make. Thus, one can be a citizen without being morally responsible for contributing to state institutions. If that's true, then citizenship

²⁷ McMahan, *Killing in War*, 209. Iris Young argues the same point; see *Responsibility for Justice*, 85, 123, 137.

alone cannot ground a duty to bear harm in order to avert a state's unjust threats. Instead, citizens must be morally responsible for causally contributing before they can become liable to harm.

Although my position regarding unjust civilian liability draws heavily from Tadros's notion of an enforceable duty to avert harm, I disagree with his claim that unjust civilians can have such a duty even in the absence of moral responsibility for causally contributing. For example, Tadros argues that citizens can be "collectively liable" for averting their state's unjust threat even though they may not be "collectively responsible" for the threat.²⁸ He elsewhere adds: "There is a kind of collective responsibility on the unjust side, where each citizen can be expected to bear some of the costs of the war even if they are not morally responsible for the war."²⁹ For sake of brevity, I won't argue against Tadros's claim other than to point out that I think an individualist account of liability to defensive harm requires that one be morally responsible for her causal contribution. But as already argued, I think most citizens are in fact morally responsible for causally contributing to their state's unjust war given that they've voluntarily acted in the right kind of ways relative to state institutions that foreseeably risked threatening wrongful harm to others.

And yet, not every aggressor state citizen who is morally responsible for causally contributing to his state's aggression is liable to defensive harm. Otherwise, we'd have to conclude that most German-Jews were liable to be harmed given their institutional responsibility for Nazi aggression, and likewise that most

²⁸ Tadros, "Duty and Liability," 272.

²⁹ *Ibid.*, 275.

Kurds were liable given their shared responsibility for Iraq's actions in 1990-91.

Most of us likely agree with David Miller that such conclusions would be "absurd."³⁰

Instead, we should say that there is a threshold at which citizens are no longer morally responsible for state actions, and that threshold is when citizens are actively persecuted by their own state.

The explanation for why persecuted citizens aren't institutionally responsible goes to the justification for the state itself. The justification for the state is to secure the presumptive goods of safety and security or, using different terminology, to protect our most basic rights. When a state actively violates the rights of some of its people, the state can no longer be said to be acting in their name. Instead, the persecuted citizens are victims within their own state; they are just as much victims of the unjust state as those citizens in the just state who have been attacked.

So at the point when a citizen no longer benefits from the existence of her state, and in fact is made worse off by active state persecution, then the normal normative relationship between state and citizen is absent and she no longer bears institutional responsibility for state actions. Although these citizens may causally contribute to their state institutions by participating in the economy and paying their taxes, their contributions are helping to fund their own persecution. At some point, both the German Jews and the Iraqi Kurds ceased being responsible for their states' actions. So the end result seems to be that citizens who are morally responsible for causally contributing to their state's institutions and who actually

³⁰ David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), 132.

benefit from those institutions have a duty to bear harm when necessary to prevent their institutions from wrongfully harming innocent others.

4.7 Citizens Living Under Non-Democratic Regimes

The conclusion in the preceding section implies that most citizens living under autocratic rule will be institutionally responsible, so long as they're not individually persecuted by their state. This implication will strike many as unfair. How, they might ask, can most citizens in an autocratic state be thought morally responsible for their state's actions? Worse still, how can such a questionable claim of responsibility ground their liability to defensive harm during their dictatorial state's unjust war? Not only should the Kurds not have been liable for Iraq's actions in the 1990's, they might argue, but the Shia population should not have been liable as well. Though not actively persecuted by the Iraqi state the way the Kurds were, the Shia were denied most political offices, were disfavored by the Sunni ruling class, and so on. Surely, an objector will conclude, these kinds of marginalized citizens should not bear responsibility for their state's institutions. Instead, if moral responsibility for state institutions ever falls to citizens, that responsibility should fall only to the citizens of liberal democracies.

My response to this line of argument is to hold fast to the conclusion that dictatorial state citizens share responsibility for their state's institutions. Let's begin with the concern that citizens in dictatorial states often denied political office, or lack the right to vote in fully democratic electoral processes. Although true, there's no reason to think that the ability to run for office or participate in a full

democracy are necessary conditions for bearing institutional responsibility. On this point, I follow Tadros, who writes:

Some people believe that citizens of democratic states, but not undemocratic states, are liable for the unjust wars that their states prosecute.... But democracy, I believe, is not necessary to ground the liability of citizens of the unjust state.³¹

Citizens can still become liable for unjust state actions even though they live under less than ideal political arrangements.

The justification for the foregoing claim is that in most cases, citizens living under a dictatorial regime still have the right kind of normative relationship with their state to ground a duty to avert the state's unjust threats to others. These citizens still participate in their state's institutions and markets, pay taxes, and generally benefit from these institutions in the form of security and economic coordination. Returning to the example of Iraq, even McMahan acknowledges that prior to the '03 invasion of Iraq, most all Iraqis could lead stable and secure lives.³² And that observation holds true not only for Sunnis, but for the Shia as well. In the absence of being persecuted by the own state (such as the Kurds were), most Shia were all things considered better off living under the Iraqi state than they would have been in its absence. Although I disagree with Kamm's claim that citizenship alone is sufficient to ground liability, I agree with her observation that citizens can be liable even if their state does not treat them well.³³ A state that does not treat its people well doesn't negate the latter's institutional responsibility, though a state that actively persecutes its people does.

³¹ Tadros, "Duty and Liability," 276.

³² McMahan, "The Morality of Military Occupation," 111.

³³ Kamm, "Failures of Just War Theory," 66.

In addition to the fact that most unjust citizens in dictatorial states bear responsibility for their state's institutions because they causally contribute to and benefit from them, we might also think part of their moral responsibility stems from the fact that they've allowed themselves to be governed by a dictatorial regime in the first place. The underlying idea here is that citizens cannot ambivalently go about their daily lives, acquiescing along the way to an autocratic regime, and then point to the type of regime they live under in order to escape any liability they might otherwise incur because of the regime's actions. Just as part of a drunk driver's responsibility for running over a pedestrian reaches back to his earlier choice to allow himself to become drunk, so too part of the unjust citizenry's responsibility for their state's current unjust war reaches back to their prior acquiescence to be governed by a dictator.

In the case of a dictatorial regime, part of the citizens' responsibility points back to the fact that they ceded the political space that allowed the dictator to arise in the first place, and further for allowing the autocratic regime to amass and maintain overwhelming political power.³⁴ George Fletcher underscores this point:

No dictator rules in a vacuum. To muster power he must enjoy the support of the military, the implicit emotional consent of business leaders and professionals, and the tolerance of the public as a whole. In the face of a dissenting public incessantly banging on pots ... or marching in the streets ... no dictator can maintain power.³⁵

Fletcher may be somewhat overstating his claim about effective resistance, but I think his general point is right. The public's tolerance provides the political space

³⁴ Reiman, "A Moral Equivalent," 371.

³⁵ George P. Fletcher and Jens David Ohlin, *Defending Humanity: When Force is Justified and Why* (Oxford: Oxford University Press, 2008), 159.

and passive support that a dictator needs to wield political power. This tolerance is what helps ground most citizens' moral responsibility for their dictatorial state's institutions. Commenting on ambivalent citizens who tolerate such a government, Iris Young notes, "their passivity produces a political vacuum" which amounts to "passive support" for their regime.³⁶ Michael Green takes this thought a step further. After noting that people ought to resist and overthrow tyrannical regimes, Green argues: "Insofar, then, as the nation doesn't oppose such a government, it thereby lends legitimacy to it and its actions so that it comes to express the general will of that people."³⁷ Through their inaction and tolerance, citizens support and legitimize the autocratic regimes under which they live out their lives. Thus, such citizens bear political responsibility for how they're governed,³⁸ and so the fact that they live under despotic rule does not negate their moral responsibility for their state's institutions.

Still, some will counter this claim by appealing to the fact that citizens in these states have no choice but to be governed by a dictator; the price for resisting tends to be too great. McMahan is sympathetic to this concern, noting that there "are real dangers involved in resisting a dictatorial regime."³⁹ Erin Kelly echoes this

³⁶ Young, *Responsibility for Justice*, 86.

³⁷ Michael Green, "War, Innocence, and Theories of Sovereignty," *Social Theory and Practice* 18, no. 1 (1992): 52.

³⁸ As Jaspers wrote to his fellow Germans in the aftermath of World War II, "we are politically responsible for our regime ... and for the kind of leaders we allowed to rise among us." Karl Jaspers, *The Question of German Guilt*, trans. E. B. Ashton (New York: Dial Press, 1947), 78. According to Jaspers, "Everybody is co-responsible for the way he is governed." *Ibid.*, 31.

³⁹ McMahan, *Killing in War*, 215.

sentiment: “We typically do not choose to be members of our political society, and the costs of leaving or engaging in serious political opposition may be high.”⁴⁰

McMahan and Kelly raise an obviously valid concern here, one with much intuitive pull. Resistance and emigration are difficult, highly burdensome options. Yet, what they highlight is the fact that dictatorial state citizens face much duress in trying to change the nature of their government. Although true, duress is an excusing condition capable of negating culpability, not moral responsibility – a point that McMahan has argued for at great length (2.2.4). The duress unjust citizens face may lessen the amount of moral responsibility they bear for their state’s actions, but duress doesn’t fully defeat their responsibility. I think Parrish gets this point exactly right: “In non-democratic and dictatorial states, fear of retaliation may diminish or lessen the citizens’ moral responsibility ... but it doesn’t negate it completely.”⁴¹ Citizens living in an autocratic state may choose to do nothing about their political arrangements, but in so doing they do not escape the possibility of liability to defensive harm when their subsequent actions contribute to their state’s killing of innocent people.

4.8 Two Real-World Examples

We can briefly examine how the above theory of unjust civilian liability plays out by looking at two historical examples – both involving Iraq. First, consider Iraq’s invasion of Kuwait in 1990. Even though Saddam’s regime ruled with an iron fist, I still think most Iraqis bore some responsibility for their state’s unjust invasion.

⁴⁰ Kelly, “The Burdens of Collective Liability,” 128.

⁴¹ John M. Parrish, “Collective Responsibility and the State,” *International Theory* 1, no. 1 (2009): 143.

Even after the 1980 invasion of Iran and the genocidal campaign against the Kurds from 1986-1989, the vast majority of Iraqi citizens chose to maintain their residency and citizenship. They continued to participate in, support, and benefit from Iraqi institutions. Given their regime's belligerent history, it was obviously foreseeable to most citizens that their institutions might pose unjust threats of harm to others. When those threats eventuated in the unjustified invasion of Kuwait, I think most Iraqis had an enforceable duty to avert that aggression, to include a duty to bear any harm necessary for protecting the innocent Kuwaitis. Accordingly, Kuwaiti combatants (or others acting on their behalf) had a liability justification for collaterally harming most Iraqi civilians.

Most Iraqi Kurds, on the other hand, were not morally responsible for the Iraqi invasion given their state's active persecution of them. Most Kurds were victimized as much as the Kuwaiti citizenry was. If the just combatants harmed any Kurds during the war, the combatants would have harmed them with a lesser evil justification, not with a liability justification. The same holds true for any other collaterally harmed bystanders such as neighboring neutral country citizens who happened to be visiting or travelling through Iraq when war broke out.

Now let's shift gears and look at the U.S.-led invasion of Iraq in 2003. The justness of that war is controversial, with many people believing the invasion to be unjust. For sake of argument, let's assume for a moment that that claim is true. If so, then the U.S. troops were unjust combatants, most U.S. civilians were unjust civilians, the Iraqi soldiers were just combatants, and most Iraqi civilians were just civilians. Given that prior to the invasion most U.S. citizens participated in,

financially supported, and benefitted from their state's institutions, most American citizens would have incurred an enforceable duty to avert their state's unjust threats against the Iraqi people. Since most U.S. citizens either chose to do nothing or were unable to avert their state's unjust threats, the Iraqi just combatants would have been justified in enforcing their duty. In other words, the Iraqi military could have permissibly harmed most American citizens in order to defend the innocent Iraqi citizenry.⁴²

So for sake of illustration, let's further imagine that in 2003 the Iraqis had possessed intercontinental S.C.U.D. missiles capable of striking targets in the U.S. Given the preceding assumptions, the Iraqi forces would have been justified in targeting the Pentagon during the early hours of the war in an attempt to throw the U.S. military's command and control into disarray. Suppose Iraq in fact had bombed the Pentagon with multiple S.C.U.D. missiles, killing and injuring many nearby civilians.

In this scenario, I think the Iraqis would have been all things considered justified in their attack, and that they would have had a liability justification for most of the harm they caused because most U.S. citizens would have been liable to that collateral harm. I say 'most' because the Washington D.C. area would have contained a large number of non-U.S. citizens who lacked moral responsibility for U.S. institutions and actions, as well as any U.S. citizens who wouldn't be institutionally responsible (such as children). If harming these latter parties had been justified, it would have been justified as a lesser evil relative to the strategic

⁴² Again, assuming that harming the U.S. citizens would have been causally effective, such as collaterally harming the citizens while striking legitimate military targets.

importance of striking the target coupled with the expected benefit of its destruction.

4.9 Chapter Conclusion

In this chapter, I've argued that citizens who participate in, financially support, and benefit from state institutions create a normative relationship between themselves and their state. When a state's institutions initiate an unjust war, most citizens share moral responsibility for their state's aggression, and incur a duty to bear the necessary costs for averting those unjust threats. The unjust citizens' duty is enforceable; if they choose not to avert the harm or cannot fulfill the duty on their own, others may permissibly enforce the duty by imposing harm on the unjust citizens. In short, most unjust citizens are liable to be harmed by the just combatants' defensive force for purposes of protecting the just citizenry. Because most unjust citizens are liable to be harmed in this way, they are not wronged when so harmed. The exceptions to this general principle are citizens who lack the capacity for being morally responsible for their causal contributions, or citizens who are actively persecuted by their own state.

If one denies that citizens share moral responsibility for their state's actions, one would need to justify an asymmetric claim: citizens should be allowed to participate in and enjoy the benefits of state institutions so long as the institutions produce good outcomes, but those very same citizens should not be responsible for shouldering any harmful effects their institutions produce. Instead, the innocent victims should have to shoulder those costs. In other words, even though citizens financially support and maintain state institutions, the citizens should be able to

reap the fruits of the institutions while incurring no responsibility for ameliorating any unjust outcomes. Or as John Parrish nicely puts the matter:

If states can act ... without committing its citizens to responsibility for state actions, the modern nation-state can effectively become a very efficient responsibility-laundering machine: taking actions in the world with the gravest consequences for which there is simply no one available to take responsibility.⁴³

Against this view, I argue that state actions can be imputed to most state citizens.

But that's not to say that the citizens are culpable or blameworthy. Rather, they are morally responsible. They causally contributed to institutions that foreseeably risked harm to innocent people. Should those institutions malfunction and threaten unjust harm against innocent people, the citizens who've contributed to those institutions become liable to defensive harm. Admittedly, their moral responsibility for their state's aggression is slight. But unfortunately for the unjust citizens, their state institutions have created a lethal forced choice situation. The just state's citizenry must either accept the unjust harm, or employ defensive force that will harm some unjust civilians. Given that the latter bear *some* responsibility for the unjust threat, as a matter of fairness the harm should fall to them. In forced choice situations, small moral asymmetries between parties can be decisive (2.2.4, 3.5).

The account of unjust civilian liability that I've just argued for is at odds with what a majority of just war theorists claim. McMahan, for example, argues that just combatants have a liability justification for harming unjust civilians only if the latter have acted complicitously or made significant contributions toward their state's

⁴³ Parrish, "Collective Responsibility and the State," 127.

aggression. Since most unjust civilians neither act complicitously nor make significant contributions, they are not liable to be harmed. Thus, for McMahan and most others, the justification for harming unjust civilians during war must be as a lesser evil. The problem with this suggestion, however, is that harm justified as a lesser evil nevertheless wrongs the harmed parties. And normally, causing wrongful harm grounds robust obligations toward the wrongly harmed parties. So the difference between harming unjust civilians with a liability justification on the one hand, and harming them with a lesser evil justification on the other, will have a profound effect when determining postwar obligations. We'll begin examining this idea in the next chapter.

CHAPTER 5

5. Basic Groundwork for Postwar Obligations

I argued in Chapters 3 and 4 that most unjust civilians are liable to necessary and proportionate defensive harm because most unjust civilians bear some responsibility for their state's aggression. If that claim is true, and if unjust combatants are liable to defensive harm for the unjust threats they pose, then just combatants have a liability justification for harming unjust combatants and most unjust civilians. And if that claim is true, we're confronted with several interesting questions. Given that just combatants have a liability justification for harming most of their wartime victims, do just citizens incur any obligations requiring positive action at war's end? If so, then for what reasons do they incur these obligations, and what is their content and scope?

Other theorists who endorse justice-based theories of defensive harming (such as Montague, Draper, Segev, and Wallerstein) don't address the issue of post-conflict obligation. Even McMahan, who has tendered the most complete justice-based theory of defensive harm, never directly addresses this issue. Although he discusses the harms to which unjust citizens might be liable, such as occupation, property damage, and reparation payments, he doesn't discuss obligations that might fall to the just state. For example, most aggressor state citizens might be liable to postwar occupation, but is such an occupation ever morally required of the victorious just state and, if so, why?

Other related issues remain. In the course of waging a just war, just combatants will almost inevitably collaterally harm *some* non-liable parties. Do

victorious just states owe compensation to these people? Or suppose just combatants inadvertently contaminate the environment during war, or leave large amounts of unexploded ordnance behind. Are they obligated to neutralize these potential harms? Advocates of justice-based theories of defensive harm haven't yet tackled these questions. The goal for the remaining chapters will be an attempt to fill that gap in the literature.

Before proceeding, however, I should clarify the framework from within which the rest of the project will unfold. As discussed, I largely follow McMahan's Responsibility Account for defensive harming. However, the major exception is that I think most unjust civilians are liable to collateral harm, whereas McMahan apparently thinks unjust civilians are not liable to collateral harm unless they have either acted complicitously, or have made significant contributions toward their state's unjust war. So to distinguish my position from McMahan's, I'll refer to mine as the Responsibility Account'. The reader should understand that the Responsibility Account' is McMahan's broad justice-based framework for defensive harming, with the notable exception that most unjust civilians are liable to defensive harms.

My aim in this chapter is to begin extending the Responsibility Account' of defensive harm to the topic of postwar obligation. Specifically, the chapter will focus on the theoretical grounding that underlies post-conflict duties. Once this framework is in place, subsequent chapters will further extend the account by focusing on the specific obligations that just victors might incur at war's end.

5.1 The Maximalist Account of Postwar Obligation

As discussed in the first chapter, there are two broad approaches to *jus post bellum*.¹ Minimalist *post bellum* theories aim at restricting what victors are permitted to do once hostilities end. In contrast, maximalist *post bellum* theories argue that in addition to normative restrictions, victors sometimes also incur positive duties at war's end – duties such as occupying the defeated state, or paying restitution to harmed bystanders.

The problem for maximalist theories, Bellamy argues, is that “maximalism lacks a justification of *why* the victors acquire extra responsibilities.”² Whereas minimalist *post bellum* theories are grounded in traditional just war literature, “maximalist ideas are almost utterly alien to classical Just War considerations.”³ I think Bellamy's claim here is right, but on my view that is just to say that traditional just war theory has lacked completeness. So my goal in this and the following chapters will be to articulate and defend one such maximalist theory. In response to Bellamy's claim, I will provide an explanatory account of why just citizens sometimes incur positive obligations at war's end. And as I see it, this explanatory account of postwar obligation will be but an extension of the Responsibility Account' to include the postwar period.

Before proceeding, two quick points are in order. The first regards terminology. In the ensuing discussions, I will employ the following terminology. “Unjust combatants” will refer to aggressor state combatants, “unjust civilians” will

¹ Bellamy, “The Responsibilities of Victory,” 602.

² *Ibid.*, 619, original emphasis.

³ *Ibid.*, 621.

refer to civilians in the aggressor state who bear responsibility for their state's actions, and "unjust citizens" will refer to the conjunction of both. On the just side of the war, "just citizens" will refer collectively to just combatants and just civilians. Finally, "bystanders" will refer to non-labile parties in the aggressor state (or neighboring states) who bear no responsibility for the unjust war, such as non-nationals who happen to be located within the aggressor state. The bystander category also includes aggressor state citizens who are non-labile, such as persecuted citizens or children (more will be said about this category shortly).

The second point concerns the scope of project. Obviously, every situation at war's end will differ. One cannot speak to every contingent scenario. Rather, the goal of the following chapters is sketch a broad normative framework for evaluating postwar obligations by focusing on the moral principles most likely to be in play in many postwar situations. Aiming for completeness is well beyond the scope of the project. Instead, I aim at the more modest goal of mapping the broad contours of the topic.

5.2 Grounds for Post-Conflict Obligations in Domestic Cases

According to the reductive account of war, the moral principles governing national defense reduce to the same moral principles governing individual defense. If so, then a helpful starting point for thinking about how defenders might incur post-conflict obligations will be to look at individual defense cases. If we can identify post-conflict obligations stemming from the use of defensive force in domestic cases, then by the same moral principles we should expect to see similar kinds of post-conflict obligations following defensive war. Naturally, such obligations will

not be isomorphic given some genuine asymmetries between war and individual defense, but still we should expect to see a largely congruent overlap.

At first glance, it seems successful defenders in domestic cases likely have no moral obligations after securing their defense. Consider a standard case of assault:

Standard Aggressor. Aggressor unjustly attacks victim. Acting in self-defense, victim uses necessary and reasonable defensive force. Aggressor is hurt, but remains conscious and ambulatory. Once victim has defended herself, she stops harming aggressor.

Reflecting on this case, the likely conclusion most people will draw is that victim can walk away without obligation. The reason why is straightforward. Aggressor made himself liable to victim's defensive force; accordingly, victim did not wrong the aggressor in harming him. If victim did not wrong aggressor, then victim has no obligation toward aggressor.

Here is a second example:

Rape Victim. A rape victim manages to harm her assailant by gouging at his eyes. Assailant halts his attack and backs off; victim does not pursue him. Assailant is able to walk off the scene, though he is left permanently blinded in one eye.

The conclusion and analysis in this case mirror those in *Standard Aggressor*: victim can walk away without obligation because the rapist made himself liable to victim's defensive harm. Even though assailant sustains a significant life-long injury, victim owes him nothing because she did not wrong him.

Let us proceed by taking the above cases as a starting point. There is a strong presumption against just defenders incurring post-conflict obligations, assuming the harmed party was liable to defensive harm and that the defender's use of force was necessary and proportionate. Assuming that much is true, and also that the

reductive account of war is true, then it is but a short step to draw the conclusion that just citizens do not incur obligations after successfully defending themselves by way of justified warfare, assuming the just combatants fought in accordance with *jus in bello* restrictions.

George Fletcher and Jens Ohlin articulate this line of thought when they write,

What should an occupying country do after successfully repelling an aggressor? Should it simply withdraw its forces? If we follow the teachings of domestic self-defense, we would have to say yes.⁴

Paul Robinson strikes a similar note:

Let us assume ... that we are faced by a war which is just according to *jus ad bellum*, and which the just side has won, having fought at all times justly in accordance with the rules of *jus in bello*. It is not obvious why the victor in this case owes the defeated, unjust, enemy anything.⁵

Robinson points out that “under normal interpretations of just war theory, the ideally just victor does not owe anything to his defeated enemies.”⁶

It is easy to see how Bellamy, Fletcher, Ohlin, and Robinson draw the above skeptical conclusions about postwar obligations. If we reason from straightforward domestic cases such as *Standard Aggressor* and *Rape Victim*, then it seems natural to think defenders don’t incur such duties. The problem, however, is that the structure and facts of the *Aggressor* and *Rape* cases fail to capture the full realm of individual defense situations.

⁴ Fletcher and Ohlin, *Defending Humanity*, 38.

⁵ Paul Robinson, “Is There an Obligation to Rebuild?” in *Justice, Responsibility and Reconciliation in the Wake of Conflict*, ed. Alice MacLachlan and Allen Speight, Vol. 1 (New York: Springer, 2013), 111.

⁶ *Ibid.*, 106.

After surveying a broader range of domestic self-defense cases, I think most readers will agree that victims *sometimes* incur positive obligations after using defensive force. In fact, I think we can identify four situations that possibly give rise to post-conflict obligations. We will briefly survey these four situations, and then in Chapters 6 and 7 we'll consider analogous postwar scenarios.

5.2.1 Unnecessary or Excessive Force

Of the four possible grounds for post-conflict obligation, the first is perhaps the most obvious: when a victim's use of force is excessive or unnecessary. Consider first the use of excessive force. As discussed (2.2.3), liability to defensive harm has an internal proportionality requirement. A person cannot be liable to defensive harm *h* if *h* is disproportionately harmful relative to that person's threat.

For example, imagine aggressor threatens to slap victim and begins to swing his open hand toward victim's face. In response, victim pulls out a revolver and shoots aggressor. Victim has wronged aggressor because aggressor was not liable to be shot. Though unpleasant, slapping is not a harmful enough threat to justify deadly force. So in this case, victim's defensive force would be disproportionate. Accordingly, because victim wrongs aggressor, victim would be obligated to compensate aggressor should he live, or compensate his family should he die.⁷ (The issue of restitution will be discussed in Chapter 6.)

A second example involves cases where victim's initial use of force is proportionate, but victim then continues to use force when no longer necessary. As discussed (2.2.3), a person is liable to defensive harm only when harming that

⁷ To be clear, my interest is whether defenders are *morally* obligated to render positive aid or restitution, not whether defenders are *legally* obligated to do so.

person is necessary to avert an unjust threat. If harming a person is unnecessary for averting a threat, or if the threat is no longer present, then that person cannot be liable to be harmed.

Imagine aggressor attacks victim, beating him with his fists. In response, victim uses a Taser device to temporarily incapacitate aggressor. So far so good: victim's defensive force appears proportionate to the threat he attempts to avert. However, once aggressor is incapacitated, victim must cease harming. But suppose victim then picks up a large rock and bludgeons aggressor, crippling him for life. In this situation, the original victim has ceased being a victim and has become an aggressor. Because his use of force turned from defensive force to gratuitous violence, victim wrongfully harmed aggressor. Accordingly, victim has an obligation to compensate aggressor. Aggressor, in turn, would also have a compensatory duty toward victim.⁸

We should note that the above two domestic cases involve victims wrongfully harming aggressors. Wartime analogues to these domestic cases would include scenarios in which just combatants violate *in bello* restrictions by employing unnecessary or disproportionate force. One of my foundational assumptions for the project, however, is that the just combatants fight in a just manner. So given the hypothetical absence of *in bello* restrictions, subsequent chapters will not examine this possible ground for post-conflict obligation.

⁸ In such a case, their compensatory obligations might off-set, or, given the severity of the harm that original victim inflicts, original victim's compensatory obligation might be reduced by some amount given the original aggressing agent's contributory wrongful inducement.

5.2.2 When Victim Imperils Aggressor's Life

The second ground for post-conflict obligation is when victim's use of force imperils aggressor's life. Consider again *Standard Aggressor*: aggressor unjustly attacks victim, and victim in turn employs proportionate defensive force. In that example, I stipulated that the aggressor was left conscious and ambulatory. I claimed that victim could walk away without obligation, which seems right.

But suppose instead that victim's use of force leaves aggressor in a life-threatening, incapacitated condition: aggressor is unconscious and bleeding badly. Does victim incur an obligation to help aggressor? I think so, at least in some circumstances. If aggressor will die without victim's aid, and the latter can render aid with no harm or unreasonable cost to self, then in those circumstances I think victim does incur an obligation to help.

Some readers might find that last claim counter-intuitive. If victim were initially justified in harming her culpable aggressor, why would victim later have an obligation to save him? The reason why is because after the unjust attack is repelled, aggressor's life presumably still has worth; his welfare still matters. After all, if aggressor's life lacked all worth, there would be no need to talk about self-defense restrictions such as necessity, proportionality, and minimal force. But defensive force *is* restricted in these ways precisely because of the presumption that every life has *some* intrinsic value.

Notice, however, that the source of victim's obligation is based on considerations about the worth of aggressor's life, and not on any claim about victim's wrongdoing. Because aggressor made himself liable to victim's defensive

force, she did not wrong the aggressor by imperiling him. Victim's causal role does not provide her with an agent-relative reason to help. Instead, victim's obligation is grounded in the same agent-neutral reason that any party present would have: victim has a Samaritan obligation to save aggressor's life if she can do so without significant threat or unreasonable cost to herself.

But because victim has only a standard Samaritan obligation to help, she need not imperil her own life to save aggressor. In general, third parties are not required to risk their lives in order to save others. So victim need not jump into a fast moving river to save aggressor, nor need she resuscitate him if she has reason to believe he will attack again. But if aggressor is unconscious, immobilized, or otherwise no longer poses a threat, then victim is obligated to at least summon help.

Perhaps some readers will remain skeptical. If so, one reason might be because of lingering doubts about the claim that victims have Samaritan obligations toward their *culpable* attackers. As Walzer says, "strangers (*but not enemies*) might be entitled to our hospitality, assistance, and good will."⁹ Perhaps Walzer is right; enemies aren't entitled to our assistance. Nevertheless, it is unclear what impact this denial would have against my broader argument for postwar obligations. For even if one denies that victims might have obligations toward aggressors, one should still think victims have obligations toward non-culpable but morally responsible parties whom they've justifiably imperiled.

In the case of agents whose liability is grounded in non-culpable moral responsibility for unjust threats, we have compelling reason to help: they are

⁹ Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983), 33, my emphasis.

victims of bad circumstantial luck. Though we may be justified in harming them, we also have strong reason to help them afterward. A good example is *Conscientious Driver* (2.2.4). In that case, pedestrian is justified in intentionally harming driver. Suppose pedestrian shoots the driver, and driver veers off into a ditch. If driver survives but is in critical condition, certainly it would be wrong for pedestrian to walk away. Even though pedestrian is justified in harming driver, once pedestrian successfully defends her life she has an obligation to try to save driver's life.

If so, this claim will prove important when we consider wartime analogues. As noted (2.2.7), many unjust combatants have excusing conditions that negate their culpability, such as when they act under duress or epistemic limitation. In those cases, the unjust combatants are morally responsible for the unjust threats they pose, but non-culpably so. So if we think defenders incur post-conflict obligations in domestic cases involving imperiled non-culpable parties, the same should hold in postwar scenarios involving excused unjust combatants who are imperiled at war's end.

Finally, even if the reader holds fast to the conclusion that victims have *no* obligations to aid either former aggressors or non-culpable but morally responsible parties, this denial still won't greatly affect the overall conclusions in the coming chapters. The reason why is because most postwar obligations are actually grounded in wartime analogues to the following two kinds of post-conflict duties.

5.2.3 Harming and Imperiling Innocent Parties

A third type of situation in which victims might incur post-conflict obligations is when their defensive force imperils or harms bystanders. Because bystanders are

by definition people who have done nothing to make themselves liable to harm, any harm they suffer wrongs them. For the moment, let us assume that victims bear moral responsibility for the foreseen but unintended harms they inflict on bystanders (this issue will be revisited later). If victims are morally responsible for harming bystanders, and if harm to bystanders wrongs bystanders, then victims are morally responsible for inflicting wrongful harm on innocent persons.

To illustrate, consider:

Hiker. Victim is hiking along the river in a remote park. As victim passes by, aggressor jumps out of the bushes and attacks victim with a knife. Victim kills aggressor by striking him on the head with a large rock. During the scuffle, victim also knocks a nearby bystander into the fast-moving river below. No one else is nearby.

And here is a second variant:

Hiker'. Victim is hiking in the park when he crosses paths with aggressor and his young son. Aggressor lunges at victim with a knife. Victim kills aggressor by smashing him over the head with a rock. The young child is unharmed. It is becoming dusk, and no one else is in the park.

Let's begin by first noting that in both *Hiker* and *Hiker'*, victim used necessary and proportionate force against a culpable aggressor. Because aggressor made himself liable to victim's lethal force, victim did not wrong aggressor.

The interesting question is whether victim has an obligation toward the hiker in the first case, and toward the child in the second. I think so. In fact, the obligation seems particularly robust in both cases. By claiming that victim's obligation is robust, I mean to say that his obligation is weightier than a standard Samaritan obligation. In other words, if instead victim had stumbled upon the scene to find the bystander in the river, or the child wandering alone, certainly he would have an agent-neutral Samaritan obligation to help.

But in *Hiker* and *Hiker'*, victim is morally responsible for the wrongful harm threatening bystander and child (the latter have done nothing to become liable to the threats they now face). In both cases, victim voluntarily acted in a way that foreseeably risked harm to innocent people. Because victim is morally responsible for wrongful threats to both bystanders, victim has an agent-relative reason to help the hiker and the child – an especially weighty reason above and beyond any agent-neutral reasons anyone present would have for trying to save bystander's life.

The agent-relative reason that victim has for saving the bystander in each case explains why victim has more than a Samaritan obligation to help. Samaritan obligations require agents to intervene only when doing so poses no unreasonable risk or cost to the intervening agent. But in *Hiker* and *Hiker'*, each victim's actions threaten wrongful harm to innocent parties. As a matter of fairness, those bystanders should not be expected to bear the costs of victim's self-defense. After all, victim was not obligated to defend himself. He voluntarily chose to do so, foreseeing that his actions might inflict wrongful harm on innocent others. When those harms or threats of harm eventuate, then victim must make every reasonable attempt to avert the wrongful harm from happening or, if the harm has already occurred, to compensate bystander for his harm.

Moreover, victim must take some risk in attempting to save bystander's life if necessary. Bystander can rightfully say to victim, 'but for your defensive force, my life would not be imperiled – you need to take back this cost or burden, or at least share in it.' So in the case of *Hiker*, I think victim incurs a significant obligation to attempt to rescue the bystander whom he has knocked into the fast-moving river, to

include taking on some risk if necessary. Perhaps he may need to jump into the river himself. It is not obvious exactly how much risk the victim is expected to take on. But he certainly needs to go above and beyond the general Samaritan obligation expected of any party present.

Similarly, in *Hiker*, victim incurs a robust obligation to help save child's life. To begin, victim has the same obligation that any passerby would have in order to prevent the child dying from exposure. For example, anyone would be expected to call local authorities and await their arrival, or to give the child a ride back into town. But suppose there is no cell-phone reception in the area, the temperature is dropping rapidly, and victim's automobile is located across a fast-moving stream. If victim must make a somewhat dangerous fording of the stream in order to save the child, that is a risk the victim likely must take. Again, it isn't clear how much danger victim is required to court. It seems unreasonable to say that victim is required to sacrifice his life. But it also seems reasonable to say that victim must risk more danger than a mere uninvolved passerby.

Finally, it is worth noting that if victim's defensive force causes wrongful harm to an innocent person or her property, then victim has a moral obligation to compensate that party. So in *Hiker*, suppose instead of knocking bystander into the river, victim broke one of bystander's fingers during the melee and also damaged her expensive watch. Setting aside for a moment any considerations concerning aggressor's estate, it seems reasonable to say that victim owes bystander compensation for the wrongful harm suffered.

5.2.4 Threatening Future Harm to Innocent Parties

The fourth type of scenario in which victims might incur post-conflict obligation involves cases where defender's justified use of force threatens future harm to innocent people. This category might actually be thought of as a sub-category of the previous one, but I think it is worth analyzing separately. This category is similar to the previous one in that it involves threats of wrongful harm to non-liaible parties. The difference, however, is that in this case the threat of wrongful harm is temporally distant from victim's use of defensive force, whereas in the previous category the threat of harm to the non-liaible party was temporally proximate to defender's use of force.

Although these types of scenarios are common during war, they tend to be less common in domestic defense cases. But we can imagine an individual defense case along these lines, even if somewhat contrived:

Booby Trap. Victim, while camping in a remote park, is unjustly attacked and pursued by aggressor. As victim escapes, aggressor vows to track down victim and kill him. Out of self-defense, victim booby traps the two walkways leading to his camp because he is unsure which approach aggressor will take. Aggressor approaches down one of the walkways and is killed by a trap.

Aggressor made himself liable to victim's lethal defensive force. Victim did not wrong aggressor by killing him with the booby trap. The problem, however, is that the other booby trap still poses a lethal threat.

Although victim was justified in setting his traps, once he has successfully defended himself he has an obligation to disarm or safe the other trap to avoid future harm to an innocent person. Victim would be morally at fault if he simply walked away and left the other deadly trap in place. In general, if one's self-

defensive actions threaten future harm to non-labile parties, one must attempt to avert that harm.

Perhaps one might think that what's doing some of the work in *Booby Trap* is that victim creates a threat of harm in a public space. That claim can't be right though. Suppose instead that aggressor invites victim onto his property and then attempts to kill him. Victim manages to get away and set his defensive traps. As in the original case, aggressor is killed by one of the traps.

Even in this case where victim's defensive force creates a threat on aggressor's private property, victim still has an obligation to disarm the traps after he defends his life. The explanation is the same as in the original case: if victim's defensive force creates a risk of future harm to a non-labile party, then victim must avert that harm. The problem with victim's booby traps is that the traps don't discriminate whom they will harm. Even though the traps are on aggressor's property, any number of different innocent people could be killed or maimed, such as a county surveyor, mail carrier, solicitor, someone from the electric department checking the electric meter, a neighboring child, and so on. Victim would be reckless should he knowingly leave behind his deadly traps knowing that they might kill or maim an innocent party.

5.3 Extending the Grounds for Post-Conflict Obligations to War

We've just surveyed four possible grounds for post-conflict obligation in various domestic cases. The goal now is to extend these theoretical grounds to illuminate potential post-conflict obligations in cases of war. As already noted, because the dissertation project begins from the assumption that a just state is fighting a just

war in a just manner, the first of the four categories – obligations grounded in the use of excessive or unnecessary force – won't be applicable.

Of the remaining three categories, most postwar duties falling to the victor state will be grounded in situations analogous to the latter two categories, both of which involve wrongful harm or threats of harm to bystanders. But before discussing these potential obligations, two issues need to be addressed. The first regards the important category of bystanders. Thus far I've gone to great lengths to argue that most unjust civilians share some responsibility for their state's unjust war and, consequently, are liable to be collaterally harmed by just combatants' necessary and proportionate defensive force. So if most postwar obligations are grounded in harm to bystanders, we first need to get clear about who comprises the bystander category.

The second important issue centers on my claim that just combatants are morally responsible for the wrongful harm they inflict on bystanders. Although I think that is right, the claim is but part of the story. Many other people might also be responsible for the bystanders' wrongful harm, and it will be important to clarify this issue. So the next section will address the status of bystanders, and the sections after will conclude the chapter by addressing the issue of who bears moral responsibility for the wartime harming of bystanders.

5.4 Wartime Bystanders

So far, I've argued that all unjust combatants and most unjust civilians are liable to necessary and proportionate defensive harm. But some people harmed during war are not liable to be harmed. They are called bystanders. Several different groups of

people comprise the bystander category, which we can sort into two broad classes based on citizenship.

Non-citizens comprise the first group of bystanders. Common examples here include non-nationals travelling through the aggressor state, those visiting on holiday, and those conducting business. Although these people benefit temporarily from aggressor state institutions (such as military protection from external threats, and police protection from internal threats), they don't have the right kind of normative relationship with the state to ground responsibility for state actions. They lack a duty to monitor aggressor state institutions, and can't be expected to attempt to avert unjust harm should those institutions malfunction in the form of unjust war. These people remain innocent. Any harm they suffer during war wrongs them.

And yet, non-citizenship alone isn't sufficient to establish non-liability status. Those who reside long-term and pay taxes seemingly meet the criteria, assuming they participate in and benefit from the aggressor state institutions. What the exact threshold is in these cases isn't obvious. But at some point, when non-nationals have resided long enough, and participated in and benefitted from state institutions enough, and paid taxes, these people take on some responsibility for state actions. Ex-pat communities are an obvious example here. Though not citizens of the host state, they approach a status very near citizenship. Importantly, they have formed enough of a normative relationship with the aggressor state to take on responsibility for its actions. People meeting this criterion can be considered as the equivalent of unjust civilians, and treated accordingly.

As should be obvious, citizens of neighboring states are also bystanders – assuming their state remains neutral during the war. Although often overlooked, these bystanders are also sometimes harmed during war, such as when just combatants strike a military target in the aggressor state near the border with a neighboring neutral state. Just combatants might be all things considered justified in striking the target even though they foresee the possibility of harming some innocent neutral state citizens, but the combatants’ justification for doing so would be as a lesser evil, not as a liability justification.

Various aggressor state citizens comprise the second broad group of bystanders. Perhaps the most obvious examples are citizens who can’t exercise agency in the way necessary for being morally responsible. Children are the paradigmatic example here, but others include the insane or the mentally challenged. Because these individuals lack the requisite type of agency, they lack moral responsibility for their state’s unjust threats, and thus lack liability to defensive harm.

Citizens persecuted by their own state are also bystanders by my usage of the term. The underlying claim here is that citizens are not responsible for their state’s institutions if those same institutions threaten those citizens’ lives. As argued in the previous chapter, what grounds a citizen’s institutional responsibility is the reciprocal nature of the normative relationship between citizen and state. Although persecuted citizens participate in and help maintain state institutions (via taxes), they do not benefit from the institutions, and in fact are made worse off by them. This fact negates any responsibility these citizens otherwise might have. To use

examples mentioned in the previous chapter, German Jews and Iraqi Kurds didn't share responsibility for their respective state's unjust machinations.

Although the number of bystanders in any given war sounds significant, the total number of bystanders in the aggressor state will in most cases be relatively small compared to the population as a whole. So in proportionality calculations, just combatants typically will be justified in believing their actions likely will harm a larger number of liable unjust combatants and unjust civilians than the number of harmed bystanders.

5.5 Obligations to Assist and Compensate Harmed Bystanders

Because wartime bystanders are innocent, any harm or threats of harm they suffer during war wrongs them. And normally when innocent people are wronged, the parties responsible for inflicting the wrongful harm incur obligations toward the wronged innocent parties. When bystanders are threatened with wrongful harm, they are owed assistance in averting that harm. If the harm has already occurred, then the bystanders are owed compensation. But the important issue is to determine to whom these obligations should fall.

So the main issue we're concerned with now is the forward-looking sense of moral responsibility. Who is morally responsible to aid or compensate harmed bystanders? Following Robert Goodin, we can refer to this forward-looking sense of moral responsibility as 'task responsibility.'¹⁰ A natural way to go about answering

¹⁰ Robert E. Goodin, *Protecting the Vulnerable: A Reanalysis of our Social Responsibilities* (Chicago: University of Chicago Press, 1985), 127, 131. David Miller refers to this same type of moral responsibility as "remedial responsibility." See David Miller, "Distributing Responsibilities," *Journal of Political Philosophy* 9, no. 4 (2001): 454; Miller, *National Responsibility and Global Justice*, 84.

the question of task responsibility is to begin from the backward-looking sense of moral responsibility. Retrospectively, who bears moral responsibility for causing the wrongful harm? It seems natural to think that as a matter of fairness, the parties responsible for wrongfully harming the bystanders should also be the parties who incur positive obligations to assist or compensate the bystanders.¹¹ The goal for the remainder of this chapter is to determine the retrospective issue: who bears moral responsibility for the wartime harm inflicted on bystanders? Determining this attribution question will take us a long way toward figuring out which postwar obligations should fall to the victor state. Chapters 6 and 7 will then take up the issue of prospective task responsibility.

5.6 Moral Responsibility for Wartime Harm to Bystanders

In order to determine the retrospective issue of who bears responsibility for wartime harm to bystanders, we should begin from the claim that just combatants bear responsibility for the wrongful harm they inflict on the innocent. During most wars, just combatants foresee that their military attacks will inevitably kill or harm some bystanders. And almost all theorists agree that the just combatants are nevertheless justified in doing so, either by way of lesser evil or double effect reasoning. But even though I think the just combatants are justified in their use of force, my claim is that they still bear responsibility for the collateral harm they cause. Apparently, some theorists would deny my claim. Paul Robinson, for example, argues that “under the doctrine of double effect, which forms an important part of just war theory, one is not morally responsible for the innocent who are

¹¹ See, for example, David Miller, “Distributing Responsibilities,” 455.

harmed by one's attacks, as long as one did not intentionally harm them and as long as one took reasonable measures to avoid doing so."¹²

Robinson is surely right to say that within traditional just war theory, double effect reasoning plays a prominent role in justifying collateral harm. What is less clear, however, is whether there is an actual consensus among just war theorists that just combatants bear no responsibility for collaterally harmed bystanders. The problem stems from the fact that many theorists focus on justifying the combatants' actions without discussing the further issue of responsibility for the ensuing wrongful harm bystanders suffer. If in fact Robinson is right and the common view is that just combatants aren't responsible for the collateral harm they cause, then I think the common view is mistaken and in need of revision.

For sake of brevity, I won't argue against Robinson's non-responsibility claim, other than to point out a criticism raised by Thomas Cavanaugh, among others. As Cavanaugh points out, almost every single version of the doctrine of double effect (DDE) includes some variant of an internal proportionality requirement: the intended good effect of the contemplated action must sufficiently outweigh the foreseen but unintended bad effect(s).¹³ And yet, if an agent isn't morally responsible for foreseen but unintended bad effects, then why do most all versions of DDE include an internal proportionality criterion? Why one would be

¹² Paul Robinson, "Is There an Obligation to Rebuild?" 112. For a similar claim, see Colm McKeogh, "Civilian Immunity in War: Augustine to Vattel," in *Civilian Immunity in War*, ed. Igor Primoratz (Oxford: Oxford University Press, 2007), 112.

¹³ T. A. Cavanaugh, *Double-Effect Reasoning: Doing Good and Avoiding Evil* (Oxford: Clarendon Press, 2006), 48.

expected to calculate harms for which one isn't responsible in order to determine whether the contemplated act is permitted?

Instead, it makes more sense to say that DDE normally has an internal proportionality requirement because in order to determine whether an agent is all things considered permitted to perform an action, the agent must compare the two sets of outcomes (one intended and the other foreseen but unintended) both of which he will be morally responsible for creating. The fact that he will be morally responsible for both sets of effects is precisely why he must ensure that the good effect must outweigh the bad effect in order for the act to be all things considered justified.

Against what Robinson calls the common view, I argue that agents who justifiably infringe other peoples' rights are nonetheless responsible for the foreseen but unintended harms. One may be justified in performing action x , but at the same time one knowingly chooses to infringe (or knowingly take the risk thereof) a non-liable party's rights. Because one knowingly threatens wrongful harm to an innocent person, she is responsible for that harm should it materialize.

So the theoretical position that I'll be working from is this: agents are morally responsible for the foreseen but unintended harms they cause, whether their actions are judged permissible by either DDE or lesser evil justification. And even if this is not the common view, as Robinson alleges, the position is certainly not without supporters.

David Rodin, for example, says that a farmer who intentionally burns his neighbor's field in order to save the town is justified in doing so as the lesser evil,

but notes, “despite the justified nature of the farmer’s act, the neighbor is still owed some compensation, redress, or apology.”¹⁴ Similarly, in considering the case of tactical bombers who foresee that their actions will kill some innocent civilians in the process of destroying a valuable military target, Rodin writes:

The bomber pilots are objectively justified in inflicting incidental harm on the civilians. Their actions are not wrong, all things considered, but still they wrong the civilians, in the sense that they infringe their rights.¹⁵

Along the same lines, Alex Bellamy observes that according to the lesser evil doctrine, “a wrongful act remains wrong even if it produces the least worst of the range of possible consequences.”¹⁶

Similarly, several theorists argue that agents bear moral responsibility for the foreseen but unintended harms they cause when performing actions justified by double effect reasoning. For example, Whitley Kaufman writes:

DDE would seem to entail that one is indeed morally responsible for the foreseen but unintended harm. Thus it would be reasonable to hold that one has a responsibility to mitigate that harm after the fact to the extent reasonably possible.¹⁷

And as Gregory Reichberg and Henrik Syse argue, DDE “does not say that the unintended side-effects are not imputable to the agent,” but rather “he or she knowingly and willingly accepts them.”¹⁸

¹⁴ Rodin, *War and Self-Defense*, 28.

¹⁵ Rodin, “Justifying Harm,” 87.

¹⁶ Alex J. Bellamy, “Dirty Hands and Lesser Evils in the War on Terror,” *The British Journal of Politics & International Relations* 9, no. 3 (2007): 514.

¹⁷ Kaufman, *Justified Killing*, 76.

¹⁸ Gregory Reichberg and Henrik Syse, “Protecting the Natural Environment in Wartime: Ethical Considerations from the Just War Tradition,” *Journal of Peace Research* 37, no. 4 (2000): 465. See also Cavanaugh, *Double-Effect Reasoning*, 48.

The rationale for the foregoing claims regarding moral responsibility for foreseen but unintended harms has already been touched upon. In general, when agents voluntarily act in ways that bring about certain states of affairs, those agents bear moral responsibility for all the effects that were foreseeable – whether intended or not. In other words, an agent is morally responsible for whatever effects she *knowingly* causes. Given her informed, voluntary choice, we can impute the ensuing effects to her as a result of her agency. But for her voluntary choice to act as she did, the bad effect would not have eventuated.

In cases of self-defense, it is unfortunate that through circumstantial luck the victim finds herself in a forced choice situation: she must either accept the harm, or use violence to protect herself. But however unfortunate the situation may be, a victim cannot use defensive force with moral impunity if in doing so she foreseeably threatens wrongful harm to an innocent party. The reason victim bears moral responsibility for the unintended harm is because victim is permitted – *but not required* – to defend herself. After all, victim could have avoided the foreseen harm to the bystander by choosing not to act as she did; victim had the option to accept the originally threatened harm. But assuming her defensive force is necessary and proportionate, victim nonetheless is permitted to defend herself. But she cannot do so in a way that foreseeably might harm a bystander without also assuming moral responsibility for that wrongful harm should it come to fruition.

So regarding defensive warfare, my claim is that just combatants bear moral responsibility for the collateral harm they cause to bystanders. After all, the just citizens were permitted – though not required – to defend themselves. Since they

voluntarily chose to act in a way that foreseeably risked wrongful harm to bystanders, the just combatants bear responsibility for the unintended harm.

Before moving on, it is worth clarifying one quick point. In order for an agent to be morally responsible for a foreseen but unintended harm, what's required is that the harm be foreseeable – not that the harm be actually foreseen. If the latter were true, then many actors would be absolved of responsibility for the collateral harm they knowingly cause. For example, artilleryists, cruise missile operators, and bomber pilots almost never see the military targets they attack, let alone whether bystanders happen to be nearby. Yet this epistemic limitation doesn't absolve the combatants of responsibility when their strikes harm innocent parties. Rather, the foreseeability condition regarding moral responsibility for collateral harm is that the unintended wrongful harm was *foreseeable* – not that the wrongful harm must have been *actually foreseen*.

During war, I think the foreseeability requirement is almost always met. While it may be true that the bomber pilot, artilleryist, or cruise missile operator don't actually foresee the bystanders whom they threaten with wrongful harm, it is nonetheless obvious that the *type of action* they engage in foreseeably does. Defensive violence – as a type of action – almost always foreseeably poses some risk of harming innocent people, especially when the violence involves discharging weapons, dropping bombs, and so forth

More generally, we can say that using any powerful weapon such as a gun, grenade, or bomb meets the foreseeability criterion given the inherent danger such weapons pose. The same point holds in domestic cases. When four young men

allegedly attempted to mug Bernhard Goetz on a New York subway in 1984, he pulled his revolver and fired five shots. At the time, the subway car was filled with several other passengers. But suppose instead that the car had been empty. Even in that case, Goetz would have been morally responsible had one of his bullets somehow struck a bystander. In such a situation, it was foreseeable that discharging a weapon might result in a stray bullet striking someone in the next car, or someone on the station terminal waiting for the next train.

5.6.1 Shared Responsibility

In the previous section, I argued that just combatants are morally responsible for the wrongful harm they inflict on bystanders. Although true, that conclusion tells only part of the story. For even though just combatants voluntarily act in ways that foreseeably risk collateral harm to bystanders, the just combatants do not bear *sole* responsibility for that wrongful harm. In fact, on my view they don't even bear significant responsibility. So instead of saying that just combatants bear moral responsibility for collateral harm to bystanders, what I should have said is that just combatants *share* responsibility for that harm. They are partially responsible for the harm, but to a significantly lesser degree than other parties.

Before explaining who bears most of the responsibility for harm to bystanders, let me first clarify the concept of 'shared responsibility,' and distinguish this idea from the related notion of 'collective responsibility.' Shared responsibility refers to a group of people who share moral responsibility for a harm in a way that responsibility for the harm distributes to *each* member of the group.¹⁹ The group

¹⁹ Larry May, *Sharing Responsibility* (Chicago: University of Chicago Press, 1992), 38.

itself need not be intentionally formed; the group may be nothing more than the aggregation of agents responsible for causing a particular harm.

But to say that responsibility distributes to each member is not to say that the amount of responsibility distributes equally. As Larry May writes, “shared responsibility concerns the aggregated responsibilities of individuals, all of whom contribute to a result and for that reason are personally responsible, albeit often to different degrees, for a given harmful result.”²⁰ Imagine, for example, that five men coordinate their efforts to rape a victim. Of the five, one man participated only as a lookout. All five men together share responsibility for the crime, with each of the four main participants sharing a greater amount of responsibility for the harm than the lookout.

In contrast, collective responsibility refers to situations in which a group of people is responsible for a particular harm, but where the responsibility does not distribute to all of the group’s members, or perhaps not even to any of the members.²¹ Good examples of collective responsibility often involve groups such as corporations. In these cases, it is natural to claim that a corporation is responsible for a particular harm, even though responsibility for the harm doesn’t individually distribute to most of the corporate members. With this distinction between shared and collective responsibility in mind, the remainder of the chapter will focus on shared responsibility for wartime harm to bystanders.

The aim of the dissertation project is to determine whether just states incur obligations to render positive assistance or compensation after winning a just war.

²⁰ Ibid., 106.

²¹ Ibid., 38.

Earlier in the chapter I indicated that if victorious states incur postwar obligations, those obligations likely would be grounded in the just combatants' moral responsibility for harming bystanders during war. And in fact, I think in most modern wars just combatants tend to harm innocent people. But from those facts we should not hastily conclude that the just state incurs positive obligations toward the bystanders. Instead, we should recognize that several different parties together share varying degrees of responsibility for the wrongful harm – a fact that will significantly affect adjudications about postwar obligation. But before proceeding to that discussion, we first need to analyze the claim of shared responsibility.

5.6.2 Shifted Responsibility

If just combatants act in ways that foreseeably risk wrongful harm to bystanders, and if just combatants could have avoided harming bystanders by not using defensive force, then why should we think other parties share responsibility for the harm? The answer lies in the fact that although just combatants voluntarily act in ways that cause wrongful harm to innocent people, most of the responsibility for the harm transfers to the parties responsible for creating the forced choice situation to which the just combatants responded. Following Francis Kamm, we can refer to this idea as *shifted responsibility*.²²

We can begin the discussion of shifted responsibility by considering a brief domestic example. Suppose an aggressor, with knife in hand, unjustly lunges toward defender walking with his children. Although defender notices a bystander in the background, defender draws his revolver and shoots aggressor.

²² Kamm, "Failures of Just War Theory," 72-3. Kamm's shifted responsibility argument will be discussed later in the chapter.

Unfortunately, the bullet passes through aggressor's torso and strikes bystander in the leg. Bystander clearly suffers a wrongful harm; she did nothing to make herself liable to defender's defensive force. The question is who bears moral responsibility for the wrongful harm?

My claim is that although defender inflicted wrongful harm onto bystander, *most* of the responsibility for the wrongful harm shifts to the aggressor. The reason for the shift in responsibility is because aggressor culpably created the lethal forced choice situation confronting defender. Defender was permitted to defend himself and his family, even though he foresaw but did not intend the possibility of injuring bystander. Nevertheless, defender shares some (much lesser) amount of responsibility for the wrongful harm. This last point is important, but one which will be set aside until later in the chapter.

5.6.3 Shifted Responsibility in War

If the reductive account of war is true, then the concept of shifted responsibility at play in the previous domestic example should also help sort out the issue of moral responsibility for wartime harm to bystanders. Essentially, the idea is that if the political and military leaders of the unjust state are morally responsible for initiating and prosecuting an unjust war, then they should bear the bulk of the responsibility for the collateral harm bystanders suffer. Moreover, if most unjust civilians and unjust combatants also share responsibility for their state's aggression, then they too share responsibility for the wrongful bystander harm. In the end, the conclusion I'll argue for is that unjust culpable agents bear the greatest amount of responsibility for the wrongful harm, non-culpable but morally responsible parties

such as unjust civilians bear some responsibility, and the innocent just combatants who redistribute the unjust harm bear the least responsibility.

Before proceeding to an analysis of shifted responsibility, it is worth noting that others in the just war tradition embrace the concept. Even theorists with as widely divergent views as Michael Walzer and Jeff McMahan endorse some version of shifted responsibility. On the topic of responsibility for just combatant harm to innocent parties, McMahan writes:

The unjust combatants ... went to war despite the fact that doing so would expose their civilian population to risks that would otherwise not have existed, such as risks of harm as a side effect of justified, defensive attacks by just combatants. *They, not the just combatants, therefore bear ultimate responsibility for the threat their innocent civilians face.*²³

McMahan later enlarges his claim by noting that in addition to unjust combatants, unjust state leaders also bear primary responsibility for the threats that just combatants pose to the innocent civilians.²⁴ Although McMahan doesn't use the expression 'shifted responsibility', clearly this is the idea he has in mind when attributing responsibility to unjust agents for the collateral harm that just combatants cause.

Walzer expresses similar responsibility attributions for collateral harm. He notes that if French pilots had flown at higher altitudes during WWII to minimize their vulnerability while striking targets within occupied France, the pilots "would have *shared responsibility* with the Germans" for the increased civilian deaths.²⁵

²³ McMahan, "Debate: Justification and Liability," 239, my emphasis. On the same point, see also McMahan, *Killing in War*, 49.

²⁴ McMahan, "Debate: Justification and Liability," 242.

²⁵ Walzer, *Just and Unjust Wars*, 158, my emphasis.

Even more illuminating are Walzer's comments about harms to civilians during siege warfare. He imagines a situation in which an army retreats within the walls of a city and defends the city against the will of the inhabitants. Walzer imagines that the pursuing army offers terms of surrender, which are refused. Should the pursuing army choose to bombard and attack the city, foreseeing that civilians will die, Walzer argues that although the besieging combatants will kill some civilians, "these deaths are, in an important sense, not their 'doing.'"²⁶ Rather, Walzer argues that moral responsibility for the collateral deaths "*is shifted onto the defending army, which has made surrender impossible.*"²⁷

I agree with McMahan's and Walzer's shifted responsibility claims in the preceding passages. The problem, however, is that both theorists seemingly embrace the notion of shifted responsibility without providing an underlying explanation as to *why* responsibility should be shifted in these cases. Perhaps a helpful way to better understand McMahan's and Walzer's shifted responsibility claims is to take a look at shield cases.

5.6.4 Shifted Responsibility for Harming Shields

My suggestion is that we can look to innocent shield situations as a workable model for understanding shifted responsibility for collateral harm to bystanders. Consider the following two cases offered by Kamm and Walzer. In a short passage on shifted responsibility, Kamm writes:

One form of shifted responsibility occurs when A may permissibly transfer its moral responsibility for negative effects of its acts to B. A recognized example is when a country itself puts bystanders in the way of what would

²⁶ Walzer, *Just and Unjust Wars*, 163.

²⁷ *Ibid.*, my emphasis.

otherwise be a just response to its threat. In that case, the moral responsibility for deaths caused by A's permissible bombing is attributable to B who moved people into harm's way.²⁸

Walzer offers an historical example with the same basic structure.²⁹ During the Franco-Prussian War of 1870, French forces were attacking German army supply trains behind German lines. In response, the German commanders positioned coerced civilians onto the trains to deter French attacks. On Walzer's view, responsibility for the civilian deaths shifted to the German commanders even though the civilians were killed by French attacks on the trains.

In these two examples, Kamm and Walzer refer to situations in which combatants *intentionally* moved bystanders into harm's way for purposes of deterring the opposing side from using defensive force. In other words, Kamm and Walzer are talking about standard shield situations – situations involving the intentional, opportunistic use of innocent people.³⁰

There are two different types of standard shield cases. The first type is when an agent uses a bystander to physically block a physical threat such as a projectile. The second type is when agents use bystanders as deterrents, with hopes that the enemy will refrain from using defensive force in order to avoid harming the innocent party. Following Cecile Fabre, we can refer to the former type as "shields-

²⁸ Frances Kamm, "Failures of Just War Theory: Terror, Harm, and Justice," *Ethics* 114, no. 4 (2004): 689.

²⁹ Walzer, *Just and Unjust Wars*, 174, footnote.

³⁰ The exception here would be cases of *voluntary* shields, but those instances need not concern us because in those cases the agents are no longer bystanders; instead, voluntary shields take on combatant status given that they intend to advance or facilitate an unjust threat.

as-targets,” and the latter type as “shields-as-deterrents.”³¹ Using this distinction, Kamm’s and Walzer’s examples involve the use of shields-as-deterrent.

Many people agree that victims are permitted to defend themselves in shields-as-deterrent situations, and also that if the bystanders are harmed, primary moral responsibility for that harm shifts to the culpable party who initially created the forced choice situation. As Coady says, “innocent shield cases do seem to belong to a category in which responsibility for the outcome must lie heavily with those who force a choice between bad outcomes onto others.”³²

But we need to realize that standard shield cases don’t exhaust the grounds of shifted responsibility. Note how Walzer’s WWII French pilots case (hereafter *French Pilots*) differs from his example of the German commanders who placed innocent civilians on German trains during the Franco-Prussian War (hereafter *German Trains*). *German Trains* is a standard shields-as-deterrent case – the commanders intentionally put the bystanders at risk, using them for deterrent purposes.

But that doesn’t seem to be the case in *French Pilots*. Germany didn’t invade France with the *intent* to use the French civilians as a deterrent against defensive attacks. Rather, Germany invaded France for other intended reasons, all the while *foreseeing* that the invasion would likely expose the French civilians to risk of being collaterally harmed. In other words, by invading France, the German forces

³¹ Fabre, *Cosmopolitan War*, 258. Gerhard Overland makes the same distinction between the two types of shields; see Gerhard Overland, “Killing Civilians,” *European Journal of Philosophy* 13, no. 3 (2005): 362, footnote 30.

³² C. A. J. Coady, *Morality and Political Violence* (Cambridge: Cambridge University Press, 2008), 152.

knowingly but unintentionally put the French civilians at risk. And knowingly putting civilians at risk obviously differs from intentionally putting them at risk. And if we agree that primary responsibility for collateral harm to the civilians in the *French Pilots* should shift to the German commanders, then intentionality must not be a necessary condition for shifted responsibility. So in addition to intentionally putting a bystander at risk of collateral harm, it must also be true that knowingly putting a bystander at risk of collateral harm can also ground a claim of shifted responsibility.

5.6.5 Incidental Shields

If the reader agrees that responsibility for the bystanders' harm lies with the German forces in both *French Pilots* and *German Trains*, the likely explanation is because both examples share the same basic underlying structure. In each case, combatants are forced to choose between either accepting the opposing forces' harm, or using defensive force that foreseeably threatens collateral harm to bystanders. Whether German forces put the bystanders at risk *intentionally* (as in *German Trains*) or *knowingly but unintentionally* (as in *French Pilots*), the broad effect remains the same. In both cases, German forces voluntarily act in ways that foreseeably imperil innocent civilians. In turn, the civilians' presence alongside the German combatants functions as a deterrent against the opposing forces' military response. Thus, *French Pilots* and *German Trains* both have the structure of shield cases, as do the earlier examples by McMahan and Kamm. My claim is that in all of these shield cases, primary responsibility for the bystanders' harm should shift to

the party who initially put the bystanders at risk. However, we still need to provide an explanatory account justifying this shifted responsibility claim.

But before proceeding to that argument, it may be helpful to introduce some terminology to distinguish between the two different types of shield cases discussed above. We can continue to refer to cases in which a party intentionally puts bystanders at risk as “standard shield cases.” *German Trains* is such an example.

On the other hand, I will refer to cases in which a party knowingly but unintentionally puts bystanders at risk as “incidental shield cases.” *French Pilots* is an example of an incidental shield case because although the presence of the French civilians was a deterrent consideration against the French pilots attacking their targets, the German forces didn’t intend to use the civilians for that purpose.

The reason I refer to the civilians in *French Pilots* as incidental shields is because the risk of harm to the civilians was foreseeable. Incidental harms are harms that are foreseeable but unintended. Accidental harms, on the other hand, are harms that are both unforeseeable and unintended.³³ So if the harms to the French civilians had been unforeseeable for some reason, then the civilians would have been *accidental* shields.

This distinction between incidental and accidental harm is important because a necessary condition for moral responsibility for a wrongful harm is that the harm must have been foreseeable. To see this point, recall McMahan’s *Cell Phone Operator* (2.2.4) in which the agent’s pressing of the ‘send’ button

³³ For the distinction between incidental and accidental harms, I draw from Coady’s “Collateral Immunity in War and Terrorism,” in *Civilian Immunity in War*, ed. Igor Primoratz, 141-42.

unexpectedly sets off a bomb. In that example, the cell phone operator wasn't morally responsible for the subsequent harm because that harm wasn't foreseeable.

But things are different in the *French Pilots* case. German forces foresaw – or should have foreseen – that invading France would expose the local civilians to risk of collateral harm. Because the German forces foresaw this risk but chose to invade anyway, the French civilians became incidental shields, not accidental. And placing innocent people at risk as incidental shields is what grounds a claim of responsibility for the wrongful harm the shields suffer.

With the distinction between standard and incidental shield cases in place, we now need an explanatory account for shifted responsibility in both types of cases. As previously pointed out, McMahan, Kamm, and Walzer each appeal to intuitive cases of shifted responsibility without providing the grounds for such a claim. Eric Mack, however, has provided a justice-based explanation for shifted responsibility in cases where self-defense results in collateral harm to bystanders.

5.6.6 An Explanatory Account of Shifted Responsibility

Mack's account of shifted responsibility is straightforward yet compelling.³⁴

Focusing on self-defense cases, Mack draws attention to the fact that defenders only redistribute an unjust harm that another party created. Confronted with a forced choice situation, victims must either accept the unjust harm or attempt to

³⁴ Eric Mack, "Three Ways to Kill Innocent Bystanders: Some Conundrums Concerning the Morality of War," *Social Philosophy and Policy* 3, no. 01 (1985): 1-26. It is worth noting that the aim of Mack's paper is to offer an alternative principle to the doctrine of double effect – a principle that he calls the Doctrine of Antecedent Causation (AC). Thus, Mack's explanatory account for shifted responsibility is but part of a larger argument advocating AC over DDE. Although AC has much intuitive appeal, for present purposes I wish only to harvest Mack's shifted responsibility account; I take no stance on his AC/DDE debate.

redistribute it. For Mack, the crucial point in these situations is that the aggressor is morally responsible for creating the evil that victim redistributes. If victim foresees but does not intend that some of the redistributed harm will wrongly fall to bystander, then that wrongful harm should trace back to the aggressor who forced the choice, not the victim who redistributed the harm. But that is not to say that primary responsibility *always* traces back to the aggressor.

For Mack, the key issue regarding moral responsibility for collateral harm in self-defense cases hinges on whether the victim's intervening agency (i.e., his use of defensive force) negates the aggressor's responsibility for creating the initial evil. His answer is that victim's defensive force negates the aggressor's responsibility only in cases where victim *intends* to harm bystander – whether as a means to the victim's defense, or as an end itself. But if victim foresaw but did not intend harming bystander, and assuming victim's defensive force was both necessary and proportionate, Mack concludes that moral responsibility for the bystander's wrongful harm shifts back to the aggressor. As Mack explains,

the causal connection between the eventual harm and the situation which necessitated some distribution of an evil is negated by an agent's intermediate action only if the agent does that evil to whom it befalls, rather than simply acting in such a way that it gets distributed to him. And I take it that the agent does that evil to the party to whom it befalls if, and only if, that evil result is intended as an end or as a means in the agent's plan of action.³⁵

In forced choice self-defense situations, if victim redistributes the unjust threat while foreseeing but not intending harm to bystanders, then “responsibility for the ensuing deaths can be attributed to ... an author of those circumstances.”³⁶ In cases

³⁵ Mack, “Three Ways to Kill,” 21-22.

³⁶ *Ibid.*, 20-21.

of self-defense, it is aggressor's responsibility for creating the lethal forced choice that justifies shifting to him responsibility for any subsequent harm that victim incidentally distributes to bystander(s).

Mack's account explains our intuitions that aggressors should bear primary responsibility for harm to bystanders in both standard and incidental shield situations. If aggressor is responsible for collateral harm in standard shield cases, then it is difficult to see why aggressor wouldn't also be responsible for similar collateral harm in incidental shield cases. Even if aggressor doesn't intend to put bystander at risk of being collaterally harmed, the fact that he knowingly and voluntarily does so should likewise ground his responsibility for the situation.

This last claim that aggressors who knowingly put innocent parties at risk should bear responsibility for the bystanders' harm should come as no surprise. After all, I've already argued that defenders bear responsibility for the foreseen but unintended harm they cause to bystanders during their defense, regardless of whether the victims act with double effect or lesser evil justification. Assuming that claim is true, then the parties responsible for creating the forced choice situation to which victim responds should also be responsible. And if aggressor and victim share responsibility for the bystander's harm, then certainly the aggressor should bear the bulk of the responsibility given that he culpably created the unjust harm that victim justifiably redistributed.

But my claim that victims still bear some (though lesser) responsibility for bystander's harm also forces me to disagree with Mack on an important point. Mack apparently believes that *all* responsibility for the collateral harm shifts to the party

responsible for the creating the forced choice. On Mack's view, defenders acquire responsibility only if they intend harm to bystanders – either as a means or as an end. But assuming that the defender foresees but does not intend the foreseen collateral harm, on Mack's view defender bears *no* responsibility for that harm. Instead, all the responsibility traces back to the aggressor who initially created the evil that victim redistributes.³⁷

On this point, I can only refer back to the previous discussion about moral responsibility for foreseen but unintended harms (5.6). Victim is permitted to defend himself, but is not obligated to do so. One cannot voluntarily choose to defend one's life in a way that foreseeably risks harming an innocent party without at the same time assuming responsibility should the foreseeable harm fall to an innocent person. So on this point, I think Walzer and McMahan got things right in their earlier quotes when they wrote of "shared responsibility" and "primary responsibility" (assuming primary responsibility means to bear the *bulk* of the responsibility, *but not all*). The party responsible for creating the forced choice evil inherits most of the responsibility for bystander's wrongful harm, though defender does share some residual amount of responsibility.

5.6.7 Shifted Responsibility During War

If the reductive account of war is true, then Mack's account explains not only shifted responsibility for bystander harm in domestic cases, but also shifted responsibility for collateral harm during war. By aggressing against another state, **the unjust state** **political and military leaders** ("unjust regime" for short) bear moral responsibility

³⁷ Mack, "Three Ways to Kill," 25-26.

for creating a lethal forced choice situation. Additionally, the unjust regime foresaw that their aggression likely would prompt the victim state to retaliate in force, thus imperiling bystanders' lives. And yet the unjust regime chose to aggress anyway, knowingly placing the bystanders at risk. Given that they knowingly created a forced choice situation while recklessly exposing bystanders to the possibility of collateral harm, the unjust regime carries primary responsibility for any incidental harm to bystanders.

Unfortunately for the just combatants, they likely cannot defend themselves and their fellow citizens without incidentally killing some innocent people. By knowingly placing the bystanders at risk, the unjust regime has effectively transformed the bystanders into incidental shields: their presence deters against the just combatants' use of defensive force. Still, the victim state is justified in responding militarily, assuming their force is necessary and proportionate. Just combatants foresee that they will incidentally harm some bystanders during war. But the just combatants didn't create that wrongful harm; instead, they redistribute the wrongful harm that the unjust regime created. If the just combatants foresee but do not intend the collateral harm as either a means or as an end, then their intervening military action does not sever the unjust regime's primary responsibility for the bystanders' harm. Thus, ultimate moral responsibility for wartime collateral harm traces back to the unjust regime.

And yet, the just citizenry was not obligated to defend themselves. They were permitted to do so. Because they voluntarily chose to defend themselves while

foreseeing that their use of force would likely harm innocent people, the just citizens also share some lesser amount of responsibility for the bystanders' plight.

The preceding discussion is incomplete, however, for it overlooked two groups of agents who also share some responsibility for bystander harm: unjust civilians and unjust combatants. As argued at length, I think most unjust civilians share some responsibility for their state's aggression, and that unjust soldiers also share some responsibility grounded in their participation in their state's unjust war.

Neither group is especially blameworthy – if they are blameworthy at all. In the case of the unjust civilians, they are institutionally responsible for their state's actions given the causal contributions they have made, and they also likely did nothing to avert their state's unjust threats. In the case of the unjust combatants, though they may have acted under duress or epistemic limitation, they are almost never fully excused such that they don't bear some responsibility for their actions.

Together, most unjust civilians and most unjust combatants share responsibility for their state's unjust war. Certainly they bear less responsibility than the unjust regime. But they bear more responsibility than the just civilians and just combatants. The unjust civilians and unjust combatants share responsibility for creating the unjust harm that the just combatants redistributed. Assuming again that the just combatants did not intend for the redistributed harm to fall to bystanders as either a means or as an end, then some moral responsibility for the collateral harm traces back to the unjust civilians and the unjust combatants.

In other words, responsibility for harming the bystanders shifts to the parties responsible for creating the original harmful situation – responsibility for the

collateral harm ultimately resides with the unjust citizens, most especially their leaders, and to a lesser extent the unjust civilians and unjust soldiers.

The just combatants' intervening agency does not negate the unjust citizens' responsibility for creating the harm that the just combatants redistributed.

5.6.8 Tripartite Division of Responsibility

We began the current discussion by considering which parties bear retrospective responsibility for the wrongful harm bystanders suffer during war. Given the preceding analysis, I think the complete answer involves a tripartite division of moral responsibility. Taking shifted responsibility into consideration, we can begin by saying that primary responsibility for bystander harm resides with the culpable unjust regime who initiated the unjust war while foreseeing that doing so would expose bystanders to great risk of collateral harm.

Secondary responsibility for the collateral harm falls to the unjust civilians who share responsibility for their state's aggression, and to the unjust combatants who share responsibility for participating in the unjust war.

Finally, just combatants incur tertiary responsibility for the wrongful harm that they foreseeably but unintentionally inflict. Although the just combatants' defensive force is all things considered justified, this does not absolve them of all responsibility because they still chose to act in a way that foreseeably risked harming innocent people. The just combatants were permitted but not required to use defensive force; that they voluntarily chose to do so grounds their responsibility for some of the subsequent wrongful harm. The just citizenry cannot solve its problems at the expense of innocent bystanders without some moral consequence.

On my view, the tripartite division of moral responsibility is a scalar construct. The just regime bears most of the responsibility, a lesser amount falls to the unjust civilians and combatants, and the least amount resides with the just citizens. This division of responsibility is important because the amount of responsibility parties bear for wrongfully harming innocent bystanders will play a key role in determining which party should incur the prospective task for assisting or compensating the bystanders.

So as we move forward with the general aim of determining which postwar obligations fall to the victorious just citizenry, doing so will be considered against this backdrop of the shared moral responsibility the various parties have for harming bystanders. My claim is that as a matter of fairness, such obligations should generally fall to the parties most responsible for the harm to be averted, or the harms needing to be remedied.

But although I claim that the unjust regime bears primary responsibility for the harm to bystanders, this fact does not absolve just citizens from having any positive postwar obligations. As a matter of fairness, post-conflict obligations should fall to the most culpable or most responsible party. But if the unjust parties are unable to fulfill those obligations, then the obligations may fall to the just citizenry. The latter are much less responsible, but if the primary and secondary parties are unable or unwilling to assist, then sometimes these obligations will fall to the tertiary party. As a matter of justice, it would be unfair to allow the costs to fall solely to the innocent bystanders if any of the responsible parties is able to share the burden.

5.7 Chapter Conclusion

In this chapter, I have identified four domestic situations in which victims might incur post-conflict obligations following successful self-defense. Assuming the reductive account of war is true, we should expect to see possible parallel cases of post-conflict obligations following successful self-defensive warfare. Of the four possible sources of postwar obligation, most will likely be grounded in the fact that just combatants have harmed or imperiled innocent bystanders. Yet as also argued, just combatants do not bear sole responsibility for such collateral harm. In fact, most responsibility for bystander harm will fall to the unjust regime, with a lesser amount falling to the unjust civilians and unjust combatants. The just combatants bear the least amount of responsibility for bystander harm but, as we will see, even small amounts of moral responsibility for wrongful harm can ground obligations to aid or compensate the wronged parties.

The aim for the next two chapters is to complete the extension of the Responsibility Account' to determine a just state's postwar obligations. I will argue for a maximalist position: my claim is that victorious states that have successfully defended themselves sometimes do incur positive obligations to assist others at war's end.

CHAPTER 6

6. Specific Postwar Obligations

Now that we've surveyed the possible grounds for post-conflict obligations and the issue of shifted responsibility for wartime harm, we're ready to determine which obligations states might incur after winning a just war. In this chapter, we'll consider whether victorious states are obligated to provide safety and security in the vanquished state at war's end, and also whether the just state is obligated to mitigate potential postwar environmental threats. In the next chapter, we'll consider additional potential obligations including restitution, physical reconstruction, transitional justice, and political reconstruction.

6.1 The Obligation to Provide Transitional Security

We'll begin with the most pressing problem at war's end: defeated states teetering on the edge of anarchy. Weakened by war, vanquished regimes sometimes collapse internally. In other cases, just states intentionally topple belligerent regimes. And even in cases where the aggressor regime is left intact, its military and police forces may be too decimated to maintain postwar order. In all these situations, the problem is the same: in the absence of stable government institutions, many people are left vulnerable to chaos.

By "vulnerable," I mean that people are left at risk of death or serious bodily harm.¹ In war's aftermath, such vulnerability might take many forms, including ethnic cleansing, religious persecution, civil war, genocide, bandits, looters, rapists,

¹ Goodin, *Protecting the Vulnerable*, 110.

as well as predation by neighboring states. Humanitarian threats such as disease and starvation often follow not far behind.

Given such dire circumstances, one should wonder whether the victorious state is obligated to protect these imperiled parties by providing safety and security. Borrowing from Joris Voorhoeve, we can refer to the substance of this potential obligation as “transitional security,” which he defines as the restoration of public order and the stopping of violence after war.² The obligation to provide transitional security is distinct from other closely related obligations such as political rehabilitation (installing a new government), physical reconstruction (rebuilding infrastructure), and transitional justice (holding parties accountable for the wrongs of war). I will discuss these latter issues in the next chapter.

For now, let’s just focus on the topic of transitional security. We can begin by imagining a scenario in which an aggressor state unjustly invades a neighboring victim state. The victim state, in turn, wages a self-defensive war and defeats aggressor state by toppling the unjust regime and defeating its military forces. Given this newly created vacuum of authority, the aggressor state slowly slips into a chaotic scene rife with ethnic tension, looting, and lawlessness. Widespread violence breaks out. In a situation such as this, are the just combatants obligated to step in and establish order?

In such dire circumstances, a majority of theorists argue that just states are obligated to establish safety and security to protect the at-risk populations. Walzer, for example, argues that “the positive obligations of just warriors after they

² Joris Voorhoeve, *From War to the Rule of Law: Peacebuilding After Violent Conflicts*, Vol. 16 (Amsterdam: Amsterdam University Press, 2007), 54.

overthrow an aggressive or murderous regime and stop the killing begin with what we can think of as provision,” which includes providing “law and order, food and shelter.”³ “The crucial requirement of *jus post bellum*,” Walzer adds, is “the preservation of life.”⁴

Eric Patterson argues the same: “The first and fundamental principle of *jus post bellum* is Order,” meaning “the end of a war should be a situation of stability and security.”⁵ Louis Iasiello nicely sums up the majority view on this topic:

Victors have a moral obligation to ensure the security and stabilization of a defeated nation. ... Great care must be taken to provide both security and life support to all, and special attention must be afforded a society’s most vulnerable groups: children, the elderly, women, displaced persons, and the infirm. Many of these at-risk groups will be totally dependent on others for food, water, medicine, shelter, and, of course, their security.⁶

Iasiello points to the same considerations that Walzer and Patterson highlight: at war’s end, some people are left vulnerable and in need of protection. The problem, however, is that Iasiello, Walzer, and Patterson fail to explain why victorious states are *obligated* to provide the needed security in these situations. So although I agree with the preceding claims, what we need is an explanatory account grounding this obligation.⁷

³ Michael Walzer, “The Aftermath of War,” in *Ethics Beyond War’s End*, ed. Eric Patterson (Washington, DC: Georgetown University Press, 2012), 43.

⁴ *Ibid.*, 45.

⁵ Eric Patterson, *Just War Thinking: Morality and Pragmatism in the Struggle Against Contemporary Threats* (Lanham, MD: Lexington Books, 2007), 84.

⁶ Louis V. Iasiello, “Jus Post Bellum: The Moral Responsibilities of Victors in War,” *Naval War College Review* 57, no. 3 (2004): 42.

⁷ It is important to note that the preceding general claims about transitional security obligations are also reflected in various international laws of war. See 1907 Hague Convention IV; 1949 Geneva Convention IV, Art. 55; see also 1977 Geneva Protocol I. As one might expect, those international documents merely prescribe behavior without theoretical explanation. For U.S. policy documents on the same subject, see

So what reasons might ground a victorious state's positive duty to aid imperiled parties at war's end? An obvious starting point is the fact that many people are left in harm's way. Their imperiled condition makes a normative claim on others to intervene. Yet this consideration alone doesn't uniquely single out the just combatants as the agents who should be obligated. Instead, the imperiled parties' vulnerability only provides agent neutral reasons counting in favor of any party to intervene.

But two additional reasons do seem to single out the just combatants as the appropriate duty-bearers. First, the just combatants are uniquely positioned to help. Their physical proximity to the situation singles them out from other potential intervening agents. Second, the just combatants are likely capable of establishing order and saving lives given their training, organization, weapons, and supplies. So taken together, the just combatants' proximity and ability might ground their obligation to intervene.

James Griffin employs this line of reasoning to ground duties of rescue. He argues that "being in a position to help can impose moral responsibilities – and nothing more special to the situation than that may bring the responsibility."⁸ As Griffin says, "ability is one reason-generating consideration in cases of aid."⁹ Robert Goodin agrees, arguing that a special ability to help is a "crucial factor" in imposing

the U.S. State Department's *Guiding Principles*; *U.S. Army Field Manual for Stabilization Operations*; DoD Directive 3000.05, *Stability Operations*. For a helpful overview of these U.S. policy documents, see Eric Patterson, *Ending Wars Well: Order, Justice, and Conciliation in Contemporary Post-Conflict* (New Haven: Yale University Press, 2012), Ch. 7.

⁸ James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008), 102.

⁹ *Ibid.*, 103.

duties to intervene. Henry Shue refers to this reason to help as “responsibility through ability.”¹⁰

There’s much intuitive force behind Griffin’s, Goodin’s, and Shue’s claims. Close proximity to an at-risk party – coupled with the ability to help – does seem to generate a robust obligation to aid the distressed party. Recall the *Hiker*’ example from the previous chapter (5.2.3), where victim justifiably kills aggressor but also thereby imperils aggressor’s son. In that case, much of the normative force behind the victim’s obligation to render aid hinges on his unique position and ability to protect the child. He can summon local authorities, or give the child a ride back to town. Although victim’s role in causing the child’s imperilment is important, that feature takes a backseat to the more decisive fact that victim is present and able to protect the child.

Unfortunately, this “responsibility through ability” argument seems unable to ground an obligation to provide postwar transitional security. Notice that on its own, the conjunction of physical proximity and ability to help ground only a Samaritan obligation to help. As discussed, Samaritan duties only require agents to intervene when doing so poses little threat or unreasonable cost to the intervening party. In cases where intervention carries more than a negligible amount of risk, other agents are not obligated to intervene even when proximate and able to help.

Now we should pause here to acknowledge that the “responsibility through ability” argument *sometimes* can sufficiently ground an obligation to provide postwar security – namely in situations involving negligible post-conflict violence.

¹⁰ Henry Shue, "Exporting Hazards," *Ethics* 91, no. 4 (1981): 604.

In such cases, the fact that just combatants are physically proximate and able to help – and can do so at little risk to themselves – does ground an obligation to intervene. Perhaps post-WWII Germany is an example here. Once the Nazi regime was toppled and major hostilities ended, the threat to the remaining Allied troops was fairly minimal. In that case, it does seem that the Allied forces were obligated to establish order and provide security based on considerations of proximity and ability alone.

Unfortunately, many postwar scenarios are far more dangerous than post-WWII Germany. Many postwar situations are shot through with risk and danger. In a vacuum of authority, some states devolve into anarchy and chaos, with rival factions competing for power. In these deadlier situations, the “responsibility through ability” argument fails to ground an obligation to intervene because proximity and ability only require intervention when the risk to intervening agents is minimal. But assuming the threat to the just combatants is more than negligible, why think they are morally *required* to stay to do this dangerous work?

One possible answer is that just combatants are obligated to protect vulnerable parties in dangerous situations because that’s part of their role as combatants. Part of what it means to be a combatant is the requirement to take on risk. And if risk-taking is necessary to protect imperiled bystanders, then combatants have a role-based reason to accept that danger. As Walzer says, “soldiers are destined for dangerous places.”¹¹ McMahan concurs: “The reason why combatants are required to expose themselves to risk in the course of defending those who are threatened with wrongful harm is simply that it is their *job* to do that:

¹¹ Michael Walzer, “The Politics of Rescue,” in Walzer, *Arguing About War*, 73.

it is what they have pledged to do and are paid to do. It is part of their professional role.”¹² So drawing from Walzer’s and McMahan’s assertions, one might argue that proximity and ability, coupled with role-based duties to assume risk, ground the just combatants’ obligation to intervene in dangerous postwar situations.

This line of argument carries much intuitive appeal. Of course soldiers are destined for dangerous places – that much is a truism. Moreover, McMahan is right to aver that soldiers have role-based duties to accept danger. And if that’s true, then just combatants who are proximate to and able to assist imperiled bystanders appear obligated to establish security in dangerous postwar situations.

Unfortunately, I don’t think that argument works. To see why, let’s return to McMahan’s quote. He says combatants are required to accept danger in order to protect innocent people because it is what the combatants “have pledged to do and are paid to do.” That much sounds right. But it sounds right only in relation to protecting their *own* state’s citizens.

The problem stems from McMahan’s conception of a soldier’s role. Soldiers are, as McMahan puts it, like other professional defenders such as police or bodyguards.¹³ But this analogy seems inapt. The reason police must take on extra danger is because they’ve agreed to serve and protect all the residents in their district. Likewise, bodyguards must take risk in order to protect the clients they’ve agreed to serve. Thus, police and bodyguards have role-based obligations to accept

¹² McMahan, “The Just Distribution of Harm,” 366. It’s worth pointing out, however, that McMahan’s remarks were made about combatant risk-taking *during* war. It’s unclear whether he would argue that combatants have a role-based obligation to accept risks after war in order to protect bystanders.

¹³ *Ibid.*, 367.

risk *in order to protect the people they serve*. But soldiers don't pledge to serve all citizens in all states,¹⁴ nor is that what they get paid to do. They must accept danger in order to protect the fellow citizens they serve, but they don't have role-based obligations to court danger to protect the world's population writ large.

So in short, the role-based argument for combatant risk-taking can't help ground the just combatants' obligation to provide transitional security in dangerous postwar situations. Proximity, ability, and combatant status count in favor of intervention, but together aren't sufficient to ground an outright obligation.

Even so, I do think just combatants are *sometimes* required to preserve the lives of imperiled bystanders in dangerous postwar situations. The explanation why is based on a moral reason above and beyond proximity, capability, and combatant status.

6.1.1 Grounding the Just State's Obligation to Protect

So why should we think victorious just combatants are sometimes obligated to establish transitional security in dangerous situations? Their obligation to intervene is grounded in the responsibility they bear for causing the bystanders' plight. As discussed, many people in the aggressor state have done nothing to make themselves liable to wartime harm, nor do these people bear institutional responsibility for state actions. Third party nationals visiting or travelling through the aggressor state are examples here, as are children. Because the just forces foresaw – or should have foreseen – that their defensive force would put some of these innocent parties at risk, the just combatants incur a *prima facie* obligation to

¹⁴ U.N. peacekeepers would be an exception.

help alleviate their vulnerability. And the combatants must do so even if it requires them to take on more than a negligible amount of risk.

The line of reasoning I'm invoking here is the same as that given in the *Hiker* and *Hiker'* scenarios. In those cases, I argued that victims bore moral responsibility for imperiling an innocent bystander (by knocking bystander into the river in *Hiker*; by causing child's vulnerability to the elements in *Hiker'*). Even though victim's use of necessary and proportionate force was justified in each case, both victims incur a robust obligation to save bystander's life. If one's voluntary defensive action foreseeably risks harming an innocent party and that harm materializes, then one has an especially weighty agent-relative reason to save or protect the threatened party. As McMahan nicely puts it, "responsibility for a person's need for aid normally *does* give one a special reason to provide that aid."¹⁵

In the *Hiker* and *Hiker'* scenarios, most of us wouldn't expect an uninvolved passerby to risk his or her life to save the imperiled parties. Third parties have Samaritan obligations to intervene: they are obligated to act only if they can do so at little risk. But things are different with the defending victims; they voluntarily acted in ways that foreseeably put the bystanders in harm's way. Accordingly, the defenders are obligated to attempt to save the vulnerable parties, even if they must expose themselves to danger in the process.

On my view, an analogous obligation arises in chaotic postwar situations. The mere fact that some people are vulnerable at war's end cannot ground an obligation to intervene if the situation on the ground is dangerous – even if the just

¹⁵ McMahan, *The Ethics of Killing*, 367.

combatants are proximate and able to establish security. But as soon as we factor in the just combatants' moral responsibility for creating the bystanders' vulnerability, we now arrive at an adequate grounding for a robust obligation to intervene. The just combatants have voluntarily acted in ways that foreseeably risked imperiling innocent people; now that those bystanders are actually imperiled, the just soldiers are *prima facie* obligated to protect the bystanders' lives, even if doing so will pose some risk to those intervening forces. If one's justified conduct threatens wrongful harm to innocent parties, then one must make reasonable attempt to protect those people.

At this point, one might object by appealing to the shifted responsibility account I offered in the previous chapter. For if that tripartite division of moral responsibility for wartime harm to bystanders is right, then just combatants bear only a small degree of moral responsibility for the bystanders' wrongful imperilment – with primary responsibility falling to the unjust regime, and secondary responsibility falling to the unjust combatants and the unjust civilians. If that's right, then the obligation to provide transitional security should fall to those more responsible parties; the just combatants shouldn't be expected to risk their lives.

In reply, we should note that in the cases currently under consideration, the parties bearing primary and secondary responsibility for the bystanders' imperilment are either unable or unwilling to protect the at-risk parties. In situations involving failed states or toppled regimes, the former unjust regime is by definition no longer in power. Thus, even though the political and military leaders

bear primary responsibility for culpably forcing the choice that ultimately put the innocent parties in harm's way, those leaders no longer have the power to protect the innocent.

In the case of the parties bearing secondary responsibility, the unjust civilians likely don't have the ability to establish security on their own; they lack the training, weaponry, and resources. The unjust combatants, on the other hand, are by hypothesis either too decimated at war's end to maintain law and order, or are unwilling to do so (perhaps they have turned against parts of their own population, etc.). Now if in fact the unjust combatants were able and willing to establish security and prevent widespread death and suffering, then the just combatants wouldn't incur an obligation to intervene. But the scenarios we're currently considering just are those in which large numbers of innocent people are at risk.

So let's assume the parties bearing primary and secondary responsibility are either unable or unwilling to establish and maintain security. If so, my claim is that the just combatants are obligated to step in and establish that security. But why, one might ask, should this obligation fall to the minimally responsible unjust combatants? Isn't it a bit unfair to ask minimally responsible parties to risk their lives for the benefit of others?

The reason why the just combatants must provide postwar security is because they are responsible for the bystanders' plight. After all, the bystanders would not be imperiled *but for* the just combatants' defensive force. In defending themselves (and their citizenry), the just combatants voluntarily shifted some of the costs of their defense onto the bystanders. I say "voluntarily" because the just

citizens were not required to defend themselves; they could have accepted the initial aggression. By choosing to use defensive force that foreseeably risked harm to innocent parties, the just combatants imposed risks of wrongful harm onto the bystanders. As a matter of fairness, the just combatants must own some of the risk they created; it would be wrong to leave the vulnerable bystanders to shoulder the risk themselves. Just as the defending victims in *Hiker* and *Hiker'* are obligated to help save the bystander knocked into the river and the child rendered vulnerable to exposure, so too just combatants must protect the innocent people they've imperiled with their defensive force.

6.1.2 Fiduciary Duties

Jean Elshtain argues for a position close to the one I'm advocating. She writes: "If a country has been disarmed, the occupying power has taken on responsibility for its security and protection from external and internal enemies."¹⁶ On my reading, Elshtain's argument is that combatants are obligated to protect the vulnerable citizens because the combatants are morally responsible for creating their vulnerability. And the reason the combatants are morally responsible for the vulnerability is because intentionally disarming a state foreseeably puts that state's citizens at risk. Thus, as Elshtain rightly argues, occupying forces have assumed responsibility for providing security within the disarmed state.

Perhaps a helpful way for thinking about the combatants' responsibility to provide transitional security in cases such as Elshtain's is as a kind of fiduciary duty. Larry May, for example, writes that fiduciary relationships "can also arise when one

¹⁶ Jean Elshtain, "Just War and an Ethics of Responsibility," in Patterson, *Ethics Beyond War's End*, 128.

person has been placed in a position of dependence vis-à-vis another person.”¹⁷

Although he begins with the example of captors having fiduciary duties toward POWs, he goes on to argue that *complete* dependence is not a necessary condition for a fiduciary duty.¹⁸ Lesser forms of dependency can also ground fiduciary duties, especially dependencies involving significant danger such as when vulnerable people must rely on others for their protection and care.¹⁹ This seems to be the idea behind Elshstain’s claim: by disarming the defeated state, the just combatants create a relation where the vulnerable citizenry must rely on the victorious forces for protection.

Other theorists also argue for postwar obligations grounded in the fiduciary-like relations between the victorious and defeated states. Iasiello, for example, refers to the victor’s obligation to provide security for the defeated society as a kind of “protectorship.”²⁰ Walzer describes the victor’s postwar relations with the vanquished as a “trusteeship,” as does Noah Feldman.²¹ Regardless of whether we refer to these various relationships as fiduciaries, trusteeships, or protectorates, the broad underlying idea is the same: in each of these claims the victor state is obligated to secure the vulnerable people in the defeated state given the causal role the combatants played in creating the vulnerability. By imperiling innocent others,

¹⁷ Larry May, *War Crimes and Just War* (Cambridge: Cambridge University Press, 2007), 150.

¹⁸ *Ibid.*

¹⁹ *Ibid.*, 151.

²⁰ Iasiello, “*Jus Post Bellum*,” 42.

²¹ Walzer, *Arguing About War*, xiii; Noah Feldman, *What We Owe Iraq: War and the Ethics of Nation Building* (Princeton: Princeton University Press, 2004), Ch. 2.

one creates a normative relationship that grounds a prima facie fiduciary duty to protect the imperiled party.

6.1.3 The Obligation to Provide

Up to this point, I've argued that if the parties sharing primary and secondary responsibility for the wrongful threats against the bystanders are unable to protect those innocent parties, then the obligation falls to the just combatants. But what exactly does this obligation entail? In short, I think the just combatants must make every reasonable effort to protect and preserve the bystanders' lives. Although I've referred to this obligation as one of transitional security, the substance of the obligation is much broader than mere security.

In order to preserve the bystanders' lives, the victorious forces must attempt to provide those things necessary for living. Following Klosko, we can refer to these things as "presumptive goods" – those goods that we can presume all people both need and want.²² For our purposes, we can sort presumptive goods into two broad categories: security and provision. Security means that vulnerable people must be protected from threats both internal and external to the state. Provision, on the other hand, refers to those physical needs that all people require to live: food, water, clothing, shelter, and medical care.

Let's consider provisioning first. My claim is that after war ends, just combatants are obligated to attempt to help innocent parties in need of basic provisions. If the combatants are able to share their food with those on the brink of starvation, they should. If the combatants can provide tents to those without

²² George Klosko, "Presumptive Benefit, Fairness, and Political Obligation," *Philosophy & Public Affairs* 16, no. 3 (1987): 246.

shelter, they should. The same goes for medical care and potable water. In short, just combatants should do whatever they reasonably can do to prevent death and ameliorate suffering at war's end.²³ There are limits to what can be expected of the victorious troops, but we'll return to that issue shortly.

Unfortunately, just forces tend to be limited in their ability to provide provisioning. Defensive forces are often forward deployed across state boundaries; their supply lines tend to be too long and too thin to handle large-scale humanitarian crises. But in dire circumstances, all states have agent-neutral reasons to help provide the necessary provisioning. International aid organizations are also able to assist. Often what these organizations need to perform their mission is simply a secure environment in which to distribute goods – and this is a need just combatants can oftentimes fill.

Aside from basic provisioning, just combatants might also incur an obligation to help people in need because the combatants possess special capabilities. For example, most modern militaries deploy medical personnel specifically trained to treat gun shot wounds or administer amputations. These professionals should help treat the local populace when necessary. Similarly, public health units can help fight disease outbreaks, and civil engineering units can help bring potable water back online for the local populace. In all of these and numerous other ways, the just state should do whatever it can to preserve lives within the defeated aggressor state.

²³ The foregoing points are largely codified in the international laws of war. See, for example, 1949 Geneva Convention IV, Articles 54, 55, and 59; 1977 Geneva Protocol I, Article 69.

6.1.4 Providing Security

Although just combatants might not be especially well equipped to provision a needy local populace, combatants tend to be good at providing needed security. Given that the use of their unique military capabilities helped cause the imperiled bystanders' plight, the combatants must now use those same capabilities to protect the local populace. Their obligation consists of securing the vulnerable people against threats from others, whether those threats originate inside or outside the vanquished state.

Ideally, the just combatants must establish some level of order. They must prevent the looting, raping, revenge killing, and ethnic and religious attacks that often follow in war's wake, as well as staving off predation from neighboring political communities. In short, the just combatants must attempt to establish safety and maintain stability. Depending on the severity of the post-conflict situation, the combatants may need to perform a variety of tasks, running the gamut from establishing border security in remote areas to patrolling local city streets. Soldiers are generally trained to perform these functions, and they should when necessary to avert harm to innocent people.

In some cases, the just combatants might be able to fulfill this security obligation by augmenting the defeated regime's efforts. But in order to provide security in situations involving collapsed or toppled regimes, the victorious forces may need to occupy the defeated state.

6.2 Occupation as Obligation

Before discussing the possibility of occupation as an obligation, we should first clarify the concept. Following Kristen Boon, we can define an occupation as the “de facto control over a territory by a hostile army.”²⁴ As the word “hostile” in the preceding sentence indicates, an occupation is backed by threat of military force.²⁵ Further, we can distinguish between three types of occupations: occupations that are prohibited, occupations that are permitted but not required, and those that are required. An example of a prohibited occupation would be an aggressor’s control of a defeated state after an unjust war. An example of a permitted but not required occupation would be when a victorious just state occupies its defeated adversary for pragmatic reasons such as justified disarmament. I wish to focus only on the third type – those in which the victor state is *obligated* to occupy the vanquished state.

So when might a victorious just state be obligated to control the territory of its former adversary? If the just combatants are obligated to protect innocent people at war’s end, and the just combatants can do so only by occupying the defeated aggressor state, then it follows that the just state has a *prima facie* obligation to occupy. Occupation is morally required when it is necessary to protect innocent life. In the absence of occupation, ensuring security may well be impossible; so the two will often need to be coextensive, with the obligation to occupy parasitic on the obligation to protect.

²⁴ Kristen E. Boon, “Obligations of the New Occupier: The Contours of Jus Post Bellum,” *Loy.LA Int’L & Comp.L.Rev.* 31 (2009): 60.

²⁵ McMahan, “The Morality of Military Occupation,” 101.

The problem, however, is that occupation harms. As McMahan points out, occupation is highly burdensome to the occupied people: it undermines their individual and collective self-determination.²⁶ Because occupation harms, there is a presumption against it. So at first glance, the obligation to occupy the defeated state appears to be in tension with the fact that occupation will harm a large number of people. The tension is between the duty to protect and the duty not to harm.

Yet upon further reflection, there isn't much tension after all. Although the occupying forces will harm many people by occupying their territory, the combatants don't wrongfully harm most of those people.²⁷ McMahan's theory is especially helpful on this point, and I largely follow his framework regarding the morality of occupation.²⁸ As McMahan notes, combatants can have a combination of liability, consent, and lesser evil justifications for the harms they cause during occupation.²⁹ I will briefly discuss each justification in turn.

Let's start by considering the imperiled bystanders in the aggressor state. These people are vulnerable, and it is their vulnerability that grounds the combatants' obligation to occupy the aggressor state in the first place. Occupation aims to protect them. Thus, presumably the bystanders will benefit from the occupation. And as McMahan says, it is reasonable to believe that those who will benefit from the occupation would consent to the occupation. So although the

²⁶ McMahan, "The Morality of Military Occupation," 103.

²⁷ This assumes that the just combatants conduct the occupation in a reasonably just manner.

²⁸ It is important to point out, however, that McMahan only considers the issue of liability to occupation; he doesn't address the issue of when occupations might be morally required.

²⁹ *Ibid.*, 104.

soldiers will in some sense harm the imperiled bystanders by burdening them with occupation, the combatants have a presumed consent justification for doing so. And if that's true, then the occupying forces do not wrong the bystanders even if the latter are harmed to some extent.

In addition to consent justification, just combatants also have liability justification for harming most people during occupation. According to McMahan, individuals who share moral responsibility for the harm the occupation aims to prevent are "liable to suffer the effects of occupation."³⁰ By contributing to the conditions that led to the dangerous postwar situation, these parties are not wronged when occupied. Because of their shared moral responsibility for the perilous conditions following their state's aggression, these parties have no legitimate complaint against being occupied when necessary to protect innocent, non-responsible bystanders. So on my view, the just combatants have a liability justification for occupying all unjust leadership, all unjust combatants, and most unjust civilians.³¹

The final type of justification for harming people during occupation is as a lesser evil. This justification would permit harming non-liable parties who won't benefit from the occupation, i.e., non-imperiled bystanders. An example might be third party nationals temporarily living in the aggressor state who aren't threatened by postwar ethnic violence (let's assume they're in the ethnic majority). Because

³⁰ McMahan, "The Morality of Military Occupation," 103; see also McMahan, *Killing in War*, 219.

³¹ Moreover, if the situation on the ground is so dire as to require occupation, then most civilians will also likely benefit from the occupation, and thus the combatants would also have a consent-based justification for occupying them.

occupation would harm these non-labile people but not benefit them, the justification for occupying them must be as a lesser evil. In other words, when harming these non-labile people is necessary to avert much greater harm to the imperiled bystanders, then the just combatants are all things considered justified in doing so.

The reason it might be necessary to occupy some non-labile people is because occupation tends to be an all or nothing endeavor. It would be unreasonably burdensome – if not impossible – for the occupying forces to make enough fine-grained discriminations to ensure this third category of people isn't harmed during occupation. Instead, the only alternative is to allow these people to get caught up in the net of occupation, with a lesser evil justification for doing so. As McMahan argues, "when innocent people are harmed, or wronged, by an occupation, the occupation may still be just if most of those under occupation are liable to suffer its effects and the harm to those who are not is unintended and proportionate."³²

Now, given the liability theory I outlined in the first few chapters,³³ I think few people in the aggressor state will be non-labile to occupation and at the same time wouldn't benefit from one. There are two reasons for this claim. First, because most unjust civilians share responsibility for their state's aggression, they become liable to occupation when necessary to protect threatened bystanders within their state. Second, if the situation on the ground were dire enough to warrant occupation, then most people in the aggressor state would benefit from the stability occupation likely would bring, and thus presumably they would consent. Given a

³² Jeff McMahan, "The Morality of Military Occupation," 105.

³³ Responsibility Model'.

combination of these liability and consent justifications, just combatants will seldom have to harmfully occupy innocent people as a lesser evil in order to avert a much greater harm to other bystanders.³⁴

But it's interesting to note that on McMahan's account, just combatants might have to harm countless people by occupying them as a lesser evil in order to protect imperiled bystanders. Recall that for McMahan, unjust civilians share moral responsibility for their state's aggression only if they acted complicitously or made significant contributions to the unjust war. If the unjust civilians have done neither, then they cannot be liable to postwar occupation given their lack of responsibility.

This point is underscored by McMahan's discussion of the 1980 Iraqi invasion of Iran. Because the Iraqi people did not popularly support the invasion or create the culture that led to war, and because resisting Saddam's regime would have been dangerous, McMahan concludes the Iraqi civilians bore *no* responsibility for their state's war and thus would not have been liable to postwar occupation.³⁵ But had Iran toppled Saddam's regime and a postwar occupation had been necessary to protect at-risk people, presumably McMahan would say that it could have been justified only as a lesser evil given that few Iraqis were liable to occupation. I disagree. I think most Iraqi civilians bore *some* responsibility for their state's aggression, and thus would not have been wronged if occupied to protect vulnerable people within their territory.

³⁴ This conclusion applies only to occupations required to stem widespread violence against bystanders.

³⁵ McMahan, "The Morality of Military Occupation," 106.

6.3 Limits on the Obligation to Protect

In the preceding sections, I claimed that just combatants must provide security and facilitate humanitarian aid for a “reasonable” amount of time, while taking on a “reasonable” amount of risk. These qualifications suggest there are limits to what’s required of the just combatants. This issue of limits applies not just to occupation, but to the broader obligation to protect people in the aggressor state. But how much risk must the combatants take on, and for how long, and at what expense?

Before answering these questions, we should begin by pointing out that the obligation to provide transitional security will not arise in many postwar situations; the obligation will be triggered only in extreme cases. More often than not, a just state’s defensive force will leave a minimally stable regime in place. In such cases, it does seem morally permissible for the just combatants to withdraw immediately. In the absence of vulnerability and dependency, there is no special obligation to help provide transitional security.

Also, the obligation to protect might not arise even in postwar situations involving widespread vulnerability if the victorious state lacks the ability or resources. In other words, if ought implies can, and the just state simply can’t, then there is no sense in which the just combatants are required to intervene.

But in cases of widespread vulnerability involving toppled, collapsed, and degraded regimes, and where the just combatants possess the ability and resources to intervene, then they must do so. Still, there are limits as to what morality requires of the just state regarding the preservation of bystander lives. The first limit concerns the amount of danger just combatants must take on, and the second

centers of the amount of time and expense the just state can be expected to expend. I'll discuss each in turn.

6.3.1 Danger as a Limiting Factor

I previously argued that just combatants are *prima facie* obligated to protect bystanders whom the combatants have put in harm's way. The obligation is *prima facie* because it can be overridden by countervailing considerations – namely when attempting to protect the bystanders becomes unreasonable. Mark Evans nicely captures this point: "Occupiers should do all that could *reasonably* be expected of them in trying to discharge their full range of post bellum responsibilities; after that, withdrawal is morally justified."³⁶ But why think "reasonableness" is the right criterion? What we need is an explanation justifying this reasonableness standard.

A combination of several considerations together justifies the reasonableness criterion. First, we must remember that the just combatants acted with all things considered justification in using defensive force. Assuming they did not violate *in bello* restrictions while fighting, the combatants did not culpably contribute to the bystanders' imperilment. Given their lack of culpability, the just combatants are morally innocent, and their innocence counts in favor of only requiring them to make a reasonable effort to protect the bystanders.

Second, the just citizens have already been harmed by being attacked and forced to fight for their lives. Like the bystanders, the just citizenry has also been victimized. This too factors into limiting what's expected of the just state at war's end.

³⁶ Mark Evans, "Moral Responsibilities and the Conflicting Demands of *Jus Post Bellum*," *Ethics and International Affairs* 23, no. 2 (2009): 161, my emphasis.

Third, and most importantly, the just combatants bear only minimal responsibility for the bystanders' unfortunate plight. As previously argued in the shifted responsibility discussion, the just combatants are responsible only for redirecting an unjust harm that the unjust state culpably created. Although we should expect culpable parties to take on unlimited risk to protect the innocent, the just combatants can only be expected to take on a lesser, reasonable amount of risk given their minimal responsibility.

In conjunction, the three preceding considerations explain why the just forces need only take a reasonable risk to protect vulnerable bystanders. Minimally responsible parties who themselves were innocent victims cannot be expected to self-sacrifice for the sake of others. Perhaps we can underscore this claim by considering a domestic analogue.

Imagine a small group of individuals threatened by a culpable aggressor. The group can only defend itself in a way that foreseeably risks imperiling a bystander. Suppose the group chooses to defend, and the bystander is in fact imperiled. Given their responsibility for putting the bystander in harm's way, the group is obligated to take on more than a negligible amount of risk to save the bystander. Suppose they attempt rescue but their efforts fall short. Suppose further that a second rescue attempt would likely kill several group members. In this case, the original victims should not have to self-sacrifice to save the bystander.

I think the same claim holds in cases where the just combatants' defensive force imperils innocent parties in the aggressor state. Though the combatants must take some risk to protect the bystanders, the combatants need only take reasonable

risk. The explanation for the preceding judgments in both the domestic and national defense cases is the same. Once the victims have taken reasonable risk, they have fulfilled their obligation; there is no further obligation to take on extreme risk to attempt rescue.

But even if that explanation is right, we're still left with the problem of determining what constitutes "reasonable" in these situations. Admittedly, there is a line drawing problem here. Where exactly the line is drawn between the reasonable and the unreasonable is unclear. But surely at some point the amount of risk becomes too significant, and at that point the just combatants are morally justified in withdrawing. The best we can say is that difficult practical judgments will need to be made on a case-by-case basis. No doubt some readers will be dissatisfied with that vague characterization. Yet as Aristotle noted, we should only expect as much precision as the subject matter admits.³⁷

6.3.2 Time and Expense as Limiting Factors

Suppose the postwar situation on the ground is safe enough for just combatants to remain without incurring significant losses, but widespread vulnerabilities persist over time, perhaps due to governmental infighting, institutional impotence, and so on. As their security efforts drag on, the just forces' time commitments and mounting expenses will become overly burdensome at some point. In such a situation, can the just combatants be expected to stay the course indefinitely? And can the just citizenry be expected to fund the effort without end? It seems not.

³⁷ Aristotle, *Nicomachean Ethics*, 1094b24.

Just as just combatants should only be obligated to expose themselves to a reasonable amount of risk, so too the just state should only be expected to expend a reasonable amount of time and cost. We don't expect justified defenders to sacrifice their lives to save at-risk bystanders; so too, we shouldn't expect victims to be wedded to a situation indefinitely and at unlimited cost. There are limits to what we require of victims who justifiably employ defensive force, even in cases where that force threatens innocent parties. The rationale explaining why this is so is the same as that offered regarding the limits of risk: the just combatants are morally innocent, have already been victimized themselves, and bear only minimal responsibility for the bystanders' plight.

Given these considerations, the victor state need not bankrupt itself to provide transitional security, nor need the state be wedded to the situation indefinitely. Through justified self-defensive actions, parties cannot be expected to incur unlimited, overly burdensome obligations. The same point holds in parallel domestic cases. For example, we don't expect the hiker in *Hiker* to take care of the deceased aggressor's son for life. The victim need not adopt the child, nor incur unlimited debt to secure the child's future. Just as we think these more long-term costly obligations should shift to the state in the domestic case, so too if costly, long-term security obligations are required in the postwar case, these obligations should shift to the international community.

The rationale for this shift in obligation is because at some point, the just state will have fulfilled its obligation. In other words, eventually the victorious state's agent-relative reasons for assisting will cease, and agent-neutral reasons that

all parties have will take effect. If aid is still necessary at that point, and assuming all states have the same agent neutral reasons to help stabilize the defeated country, then other states should help share the costs. If urgent needs still exist, their fulfillment will become a general duty that all parties have for alleviating the harm. Perhaps the just combatants should stay to maintain security and the international community could then help pay the costs. Or instead, maybe an international peacekeeping force should take over. More importantly, the obligation to maintain security must be taken up by the vanquished people themselves at some point. Although those will be contingent matters, the general point remains: the time and expense that the just state is required to expend to provide transitional security must be reasonable.

As was the case with risk as a limiting factor, there will be line drawing problems regarding time and expense as well. Nevertheless, lines will have to be drawn somewhere. As Walzer notes, “the post in *jus post bellum* is not of indefinite duration.”³⁸ Nor, I would add, is it of unlimited expense. At some point, the just forces will be justified in withdrawing. Should innocent bystanders subsequently be harmed after the just forces withdraw, then responsibility for that harm will fall to the aggressor regime that initially put everyone in the aggressor state at risk, as well as to the intervening agents who caused the postwar harm.

6.4 The Obligation to Mitigate Postwar Environmental Threats

The next postwar duty I’d like to discuss is a just state’s potential obligation to prevent future harm from postwar environmental threats. In individual defense

³⁸ Walzer, “The Aftermath of War,” 46.

situations, one normally stops harming once one ceases to use defensive force. Rarely does individual defensive force threaten future harm. In the previous chapter, I introduced the *Booby Trap* case to discuss a domestic case that did threaten future harm. But that example was highly contrived.

Unfortunately, there is no need to contrive national defense cases where the use of defensive force involves threats of future harm. Rather, on this point we find a significant asymmetry between individual and national defense. Whereas individual defensive force rarely threatens future harm, the opposite holds true for national defense. After the last battle ends, war remnants continue to kill and maim unsuspecting parties. We're reminded of this fact every time a child steps on a 20- or 30-year old landmine and loses her legs or her life.

These kinds of environmental postwar hazards tend to be of two broad types: unexploded ordnance and environmental contamination. Unexploded ordnance includes undetonated rockets, artillery shells, aircraft bombs, cluster munitions, and landmines. Contamination threats can come from ordnance itself, such as the suspected environmental harms associated with armor piercing depleted uranium rounds.³⁹ Or contamination might come from destroyed targets, such as when NATO air strikes destroyed oil, petrochemical, and nitrogen-processing plants near Belgrade in 1999, releasing toxic chemicals into the Danube

³⁹ Some research has linked the presence of depleted uranium rounds with increased rates of cancer and birthing complications. See Iasiello, "Jus Post Bellum," 45; Mark Allman and Tobias Winright, *After the Smoke Clears: The just War Tradition and Post War Justice* (Maryknoll, NY: Orbis Books, 2010), 166-67.

River.⁴⁰ Given the severity of these kinds of threats, there's a fairly broad consensus in the literature that someone must mitigate these postwar environmental threats.⁴¹

6.4.1 The Aggressor State's Obligation to Mitigate

But who should inherit these obligations to mitigate postwar environmental threats? Initially, two reasons suggest the obligation should fall to the aggressor state. First, according to shifted responsibility theory, aggressor state leadership and most unjust citizens bear primary and secondary responsibility for the postwar environmental threats. Essentially, the aggressor state citizenry is responsible for bringing harm onto its own lands. This fact strongly tells in favor of requiring the defeated state to clean up its own territory.

The second reason why the aggressor state should bear the obligation to safe its environment is because it holds sovereignty over its territory. Since the emergence of the "Responsibility to Protect" literature, sovereignty is now widely viewed to entail not just a claim of non-intervention from outside states, but also to entail the sovereign state's responsibility to secure and protect the people within its own borders.⁴² With sovereignty comes responsibility.

So if the defeated state has a responsibility to protect people within its borders, coupled with the fact that the aggressor state is responsible for waging an

⁴⁰ Douglas Lackey, "Postwar Environmental Damage: A Study in *Jus Post Bellum*," in *International Criminal Law and Philosophy*, ed. Larry May and Zachary Hoskins (Cambridge: Cambridge University Press, 2010), 141.

⁴¹ See, among others, Schuck, "When the Shooting Stops," 983; George M. Clifford III, "Jus Post Bellum: Foundational Principles and a Proposed Model," *Journal of Military Ethics* 11, no. 1 (2012): 51; Iasiello, "Jus Post Bellum," 42; Allman and Winright, *After the Smoke Clears*, 165-72.

⁴² International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001), Ch. 2.

unjust war, there is a strong presumption in favor of the aggressor state bearing primary responsibility for mitigating postwar environmental hazards within its territory. Thus, *if* the aggressor state possesses the ability to remove or otherwise mitigate its postwar environmental threats, it is obligated to do so.

6.4.2 The Just State's Prima Facie Obligation to Mitigate Postwar Hazards

But suppose the vanquished state lacks the ability to clean up these environmental hazards. The question we must now consider is: is the just state obligated to help mitigate postwar environmental harms in the aggressor state? In short, I think the answer is 'yes.'

To work through this issue, let's begin from the somewhat intuitive claim that the just combatants shouldn't incur any obligation to prevent future harm from postwar environmental threats. One might argue, for example, that if the just combatants' defensive force was necessary and proportionate during the war, then employing that force shouldn't give rise to an obligation to prevent that use of force from further harming at war's end.

To illuminate the preceding point, consider the following scenario called *Airstrike*. Suppose during war, just combatants employ defensive means X (e.g., airstrikes) against strategic target Y (within aggressor state) at time t_1 . Although the airstrikes are anticipated to kill 200 people (a mixture of unjust combatants and unjust civilians), their deaths are considered proportionate given the importance that Y 's destruction will make toward ending the war. The just combatants are all things considered justified in using X to destroy Y ; they have a liability justification for doing so. Suppose the just combatants proceed with the attack. All their

munitions detonate on target, destroying Y and killing the 200 people.

Subsequently, given the destruction of Y , along with the justified destruction of other targets at t_1 , the just state prevails and the war ends at t_2 .

Now consider *Airstrike'*. All the details are the same as in *Airstrike*, except that in *Airstrike'* only some of the munitions detonate upon striking Y (though Y is still adequately destroyed, and the war still ends at t_2). The initial airstrikes kill 100 people; after the war ends, the remaining unexploded ordnance will continue to kill 100 additional people over timespan $t_3...t_n$.

The issue now is to explain why the just combatants would incur an obligation to prevent the additional 100 postwar deaths (assuming the aggressor state can't perform that function). If killing all 200 people at t_1 is proportionate in *Airstrike*, then killing 200 people from $t_1...t_n$ in *Airstrike'* should likewise be proportionate. In other words, if the result is the same (200 people killed, the war is won), then the temporal proximity between the use of force and the ensuing 200 deaths shouldn't affect proportionality determinations, all else being equal. And if using X in *Airstrike'* is no more disproportionate than using X in *Airstrike*, there's no reason to think the just combatants have an obligation to prevent the additional 100 postwar deaths in *Airstrike'*. The fact that some of X 's ordnance failed to detonate at t_1 provides no grounding for an obligation to mitigate the future threats X poses beginning at t_3 .

In reply, I think if the aggressor state is unable to prevent the additional 100 deaths in *Airstrike'*, then the just combatants must attempt to do so. Two reasons support this claim. First, recall that in self-defense situations, once victims achieve

successful defense, victims must cease harming. Continuing to harm when no longer necessary is morally prohibited. So in *Airstrike'*, once the war has been won at t_2 , the additional 100 deaths become unnecessary. Thus, the just combatants have positive reason at t_3 to prevent the future unnecessary deaths.

The mistake at the beginning of the previous section was to reason that since killing the 200 people at t_1 seemed proportionate in *Airstrike*, then killing 200 people in *Airstrike'* from $t_1...t_n$ would also be proportionate – and thus wouldn't ground a postwar obligation to prevent the additional 100 deaths. But we can now see that the just state's obligation to prevent postwar environmental harm is grounded not in proportionality restrictions, but rather in necessity restrictions. The collateral harming of the additional 100 people contributes nothing to the just state's defense, and thus should be prevented when possible.⁴³

At this point, one might object by pointing out that the unjust citizens (both combatants and civilian) were liable to be harmed by *X*. And to repeat a point made earlier, the temporal proximity between the use of *X* and the ensuing harm to the liable parties shouldn't matter. If the unjust citizens were liable to be harmed by *X*, then any harm from *X* does not wrong the unjust citizens. And if the just combatants haven't wronged the unjust citizens, then the combatants shouldn't have an obligation to prevent *X* from harming the citizens.

⁴³ The rationale behind the principle of necessity has already been discussed. Assuming all human life has worth, there is a strong presumption against harming others – a presumption captured in the principle of non-maleficence. Self-defense justifiably overrides this presumption, but once self-defense is achieved, the principle of non-maleficence is back in force, thus providing strong moral reason to prevent any further unnecessary harm.

In reply to this line of objection, it's important to remember that liability to harm is dependent on the presence of an unjust threat. Once the unjust threat ceases, the parties responsible for the unjust threat no longer bear liability to be harmed. So in *Airstrike*, unjust citizen liability is coextensive with their state's active harming; their liability terminates at war's end. At that point, the previously liable parties take on bystander status. And as I've argued earlier in the chapter, if one's defensive force imperils bystanders, then one incurs a prima facie obligation to prevent that harm from occurring.

But maybe instead what the objector wants to say is that when the just combatants use X at t_1 , they have a liability justification for the unjust citizens killed immediately, and *at the same time* a lesser evil justification for any unjust citizens killed by X after the war ends. Yet, even if that were true, having a lesser evil justification to use X at t_1 wouldn't negate the just combatants' obligation to avert the unintended evil beginning at t_3 – assuming they have the ability to do so. For if the postwar killing of the additional unjust citizens is in fact an evil, then the parties responsible for creating the threats to the citizens must make every reasonable effort to avert that evil.

Still, some readers might resist the preceding arguments and instead claim that if the unjust citizenry's actions necessitated the justified use of X at t_1 , then the unjust citizenry has made itself liable to be harmed by X from t_1 ... t_n . In other words, the claim is that the unjust citizenry's liability to be harmed by X persists indefinitely.

The reply to this suggestion highlights the second reason why the just state is prima facie obligated to mitigate postwar threats. Even if the unjust citizens' liability to be harmed by *X* persists indefinitely beyond war's end, *X* will simultaneously threaten harm to liable parties and bystanders alike. As history confirms, deadly war remnants don't discriminate among their victims based on liability status. Thus, innocent children, third party nationals, and future generations are just as likely to lose life or limb as the liable citizenry is. Because these current and future bystanders have done nothing to make them liable to harm, any postwar harm they suffer will wrong them. Therefore, given the uncertainty about which people the war remnants will harm, the just combatants must err on the side of averting those potential harms.

The underlying structure of the problem in *Airstrike*' is the same as that in *Booby Trap*. In the latter case, victim was all things considered justified in setting the two traps. However, once the first trap harms aggressor and secures victim's defense, victim cannot leave behind the second trap. To create and knowingly leave behind a foreseeable threat of wrongful harm to innocent people would be reckless.⁴⁴ Thus, victim is obligated to disable the second trap. My claim is that the same line of reasoning holds true not only in *Airstrike*', but also more generally

⁴⁴ According to legal definition, recklessness is conduct that reflects "disregard of or indifference to consequences, under circumstances involving danger to life or safety of others, although no harm was intended." Black's Law Dictionary, 6th ed., s.v. "Recklessness." According to Feinberg, recklessness is the conscious disregard of a known risk of harm that one has created. See Joel Feinberg, *Doing & Deserving; Essays in the Theory of Responsibility* (Princeton: Princeton University Press, 1970), 192-93.

regarding the use of all wartime defensive force.⁴⁵ Although just combatants may be justified in their use of force, if the means by which they wage war threatens future postwar harm to bystanders, the just combatants are prima facie obligated to help avert those harms from materializing if the defeated aggressor state lacks that ability.

6.4.3 Additional Considerations

In the previous section, I argued that if the just state's use of defensive force threatens future harm to non-labile parties, the just state is prima facie obligated to prevent those foreseeable postwar harms. In addition to that argument, two other considerations might also count in favor of the just state incurring this obligation.

First, the just combatants might possess special capabilities that the defeated state lacks. For example, the victorious forces may have better trained and better equipped EOD, detox, and decontamination teams. We can easily imagine a

⁴⁵ In this section, I argue for postwar environmental obligations grounded in the need to avoid future harm to non-labile *persons*. For alternative, non-anthropocentric arguments in favor of post-conflict obligations grounded in harm done to the environment itself, see Douglas Lackey, "Postwar Environmental Damage"; Jay Austin and Carl Bruch, *The Environmental Consequences of War: Legal, Economic, and Scientific Perspectives*, "Introduction." Lackey's approach is especially interesting in that he likens the environment to a neutral bystander harmed during war. Lackey recommends a strict liability approach regarding such excused harms to the environment, concluding that wartime agents are morally required to restore *all* environmental damage they cause – regardless of whether they fought on the just or unjust side of the war. I disagree with Lackey's approach for the obvious reason that the Responsibility Model' is premised on moral responsibility rather than strict liability. Relatedly, Mark Woods considers environmentalists' claims that the environment can be likened to a noncombatant, and then raises the interesting question whether that claim might justify something equivalent to a humanitarian intervention for purposes of protecting a threatened environment (such as the Amazon rainforest). See Mark Woods, "The Nature of War and Peace: Just War Thinking, Environmental Ethics, and Environmental Justice," in *Rethinking the Just War Tradition*, eds. Brough, Lango, and Harry van der Linden (Albany: State University of New York Press, 2007).

militarily advanced state defeating a lesser-developed aggressor state. In such a case, the victor state's unique capabilities for preventing environmental harms would provide another moral reason in favor of the victor state incurring an obligation to make the postwar environment safe.

Second, the just state might possess special knowledge that the defeated aggressor state lacks, such as specific information about unexploded ordnance locations. For example, sometimes forward observers call in airstrikes against enemy positions, only to report back that the ordnance failed to detonate. Because the spotters often request the aircrew to "revisit" the target, the location information is usually tracked. Such information can be crucial at war's end when trying to locate and defuse unexploded munitions. Additionally, just combatants likely possess acute knowledge about the mechanical workings of their own weapons systems and how best to safe them. Such specialized knowledge can save lives when trying to clean up the postwar environment.

6.4.4 The Just State's Role

Previously, I argued that if the defeated state possesses the ability to alleviate the postwar environmental threats within its territory, the obligation to do so should fall entirely to that state. The reasoning behind that claim was a combination of the primary responsibility the aggressor state bore for initiating the unjust war, coupled with that state's sovereignty responsibility to provide a safe and secure environment for the people within its borders.

But we should also consider two additional scenarios. The first scenario involves the unlikely postwar situation in which the defeated aggressor state

possesses virtually no ability to make its environment safe. We might imagine, for example, a defeated belligerent state utterly in ruins after losing a devastating, protracted war of aggression. In such a dire situation, I think the victorious just state is obligated to make a reasonable attempt to neutralize the postwar hazards within the aggressor territory – assuming the just state has the ability to do so.

The reason why is one of shifted responsibility. The just combatants – along with unjust state leadership and the unjust citizens – share responsibility for the postwar hazards that threaten bystanders. This shared responsibility grounds the just state's prima facie obligation to prevent postwar environmental harms to bystanders. If the parties bearing primary and secondary responsibility for the postwar hazards lack the ability to make the environment safe, and if the just combatants do possess that ability,⁴⁶ then the obligation to attempt to mitigate the postwar threats falls to the just state. As with the obligation to provide transitional security, there are limits to what is expected of the just state in fulfilling its obligation to prevent postwar harm to the bystanders. We'll come back to this point.

The second scenario is one in which the vanquished state possesses some ability to make its postwar environment safe, but not enough to do so effectively on its own. In such cases, primary responsibility to safe the environment should fall to the aggressor state as the party most responsible for the postwar hazards, with the

⁴⁶ For purposes of discussion, I assume the victor state has some capacity to clean up the postwar environment. But we can imagine two poor, under-developed countries warring with neither possessing the ability to clean up at war's end. In such cases, I think the international community probably has an obligation to help. That topic, however, is beyond the scope of this project.

just state incurring a lesser responsibility to augment the aggressor state's efforts. The aggressor state should take the lead in terms of effort, time, and expense. The just state should offer its unique capabilities and knowledge when necessary.

For example, we can imagine a postwar situation in which the aggressor state is able to dispose of regular wartime ordnance, but lacks the ability to handle a large-scale environmental contamination threatening the local population's water source. If the just state played a causal role in producing the contamination, and also possesses the ability to help mitigate that threat, then the just state is obligated to help the aggressor state in its decontamination efforts.

Or suppose instead that the defeated state can defuse more traditional munitions, but lacks the ability to handle a new smart weapons technology. In this situation, the just forces' EOD teams should help secure the ordnance. Or in other cases, perhaps the just combatants need only share the locations of known environmental threats, such as unexploded ordnance located in harbors and shipping lanes.

Michael Schuck argues much the same: "As a minimal requirement, victors must return to the fields of battle and *help* remove the instruments of war."⁴⁷ Similarly, Iasiello writes: "Both the victors and the defeated should *share the responsibility* of restoring the battlefield."⁴⁸ To these comments, I would simply add that the just state is obligated to help only if the aggressor state is unable to do so itself. Also, although in these latter cases the just and aggressor states share

⁴⁷ Schuck, "When the Shooting Stops," 983, my emphasis.

⁴⁸ Iasiello, "Jus Post Bellum," 47, my emphasis. Though to be clear, I agree with Iasiello's notion of shared responsibility only regarding the mitigation of environmental threats.

responsibility for cleaning up the environment, the responsibility should not be divided evenly; the bulk of the responsibility should fall to the aggressor state, with augmenting responsibility falling to the just state.

6.5 Limits on the Obligation to Prevent Postwar Environmental Harms

Let's assume the just state is obligated at war's end to mitigate (or help mitigate) postwar environmental harms in the aggressor state. The substance of the obligation is fairly straightforward: to make the environment relatively safe, secure, and minimally habitable by defusing unexploded ordnance and/or neutralizing any significant contaminations.⁴⁹ One issue remains, however: what limits apply to this obligation?

The quick answer is that the same limits of risk, time, and expense that applied to the obligation to provide transitional security likewise apply to the obligation to mitigate postwar environmental threats. To avoid redundancy, I won't repeat that theoretical discussion here, other than to say that fulfilling the obligation must be reasonable. Here again we have a line-drawing problem about what constitutes "reasonable." In response to those readers looking for a clearer criterion, all that can be said is that difficult practical judgments will need to be made on a case-by-case basis.

But in general, we can say that the required time, effort, costs, and risk must not be excessive. It would be unreasonable, for example, to expect the just

⁴⁹ As noted, the preceding discussions assume the just combatants have fought in accordance with *in bello* requirements. Special obligations would arise in cases where the just combatants violated necessity by wanton destruction or degradation of the environment, or violated proportionality by causing massive environmental destruction to achieve a minor military goal. For a helpful discussion of these issues, see Reichberg and Syse, "Protecting the Natural Environment," 449-68.

combatants to scour the countryside looking for every last single unexploded round. Instead, the just soldiers are required to make a good faith effort to make the environment safe, and then they should leave.⁵⁰ If at any point fulfilling the obligation becomes too dangerous (insurgency attacks, etc.), then the just combatants would be justified in withdrawing.

Moreover, the obligation to prevent postwar environmental harms is limited to those postwar hazards the just combatants played a causal role in producing. In other words, the just forces are only obligated to alleviate the hazards that they created. The basis for the just combatants' obligation is that they bear responsibility for some of the postwar hazards that threaten bystanders. Given that their use of force foreseeably would produce such postwar hazards, they share some responsibility for mitigating those threats. But those hazards are, strictly speaking, the extent of their obligation. The just combatants don't share responsibility for pre-existing threats (maybe from a previous war), nor for threats clearly created by the aggressor state. And if the just combatants don't bear responsibility for these hazards, then there is no ground for the just troops having an obligation to mitigate them.

One might think, however, that the just combatants have a weighty Samaritan duty to mitigate these hazards created by others. The just combatants

⁵⁰ One must recognize the natural tension between, on the one hand, remaining in the aggressor state to mitigate environmental hazards and, on the other hand, the need to depart the aggressor state as soon as possible in order to recognize and respect the unjust citizenry's sovereignty. As Gary Bass says, "the primary *jus post bellum* responsibility of a victorious state is to get out as soon as possible." Gary J. Bass, "Jus Post Bellum," *Philosophy and Public Affairs* 32, no. 4 (2004): 412. See also Evans, "Moral Responsibilities and Conflicting Demands," 157.

may be physically proximate to the threats, and possess the ability to neutralize the hazards. We should recall, however, that agents bear Samaritan duties only when doing so poses little to no risk to the intervening agents. Yet, in many cases disarming unstable thousand-pound bombs obviously carries inherent risk. In those risky cases involving threats the just combatants didn't create, it is difficult to see why they would be obligated to risk their lives.

The natural reply would be to point out that EOD personnel have assumed that risk by performing the function they do. But as previously discussed, members of the armed forces generally assume risks for the sake of benefitting their own state citizens, not for the sake of benefitting all citizens everywhere. Moreover, the just state has an obligation to minimize the risks to which it exposes its own soldiers. So we can't say that the just combatants are obligated to clean up postwar hazards created by others, though of course it would be good of them to take on that task. But that would constitute a supererogatory act, not an obligatory one. However, if there are postwar hazards that the just combatants can help avert with little danger to self, and if the aggressor state lacks that ability, then the just forces do seem to have a weighty Samaritan duty to help prevent the harm from befalling the local populace.

6.6 Chapter Conclusion

In this chapter, I've argued that just war victors are sometimes obligated to provide transitional security in the vanquished state at war's end, and also are sometimes obligated to mitigate postwar environmental threats. The general principle underlying both of these postwar obligations is the same: when the use of defensive

force threatens harm to non-labile parties, the just state is prima facie obligated to prevent that harm from occurring. Although these obligations initially fall to the unjust regime and the unjust citizenry responsible for the unjust war, if those parties are unable to avert the harm, then the just state must step in and make every reasonable effort to do so.

CHAPTER 7

7. Specific Postwar Obligations, Continued

In this chapter, we'll finish our analysis by considering whether victorious just states incur postwar obligations regarding restitution, physical and institutional reconstruction, transitional justice, and political reconstruction. We'll begin by looking at restitution.

7.1 Restitution

Restitution involves compensating victims for wrongful harms or losses.¹

Reparations are a type of restitution paid by the unjust state to compensate the just state for the costs of war.² Because I aim to determine which obligations a just state might incur at war's end, I won't address the vanquished aggressor state's reparative duties. Instead, I'll focus on whether a victorious just state incurs restitutive obligations for any of the harm its combatants have caused during war.

7.1.1 Liability and Restitution

We can begin by ruling out compensatory obligations to a large number of people: those individuals who were liable to be harmed. That's because wrongful harm is a necessary condition for restitution.³ In the absence of wrongful harm, obligations of restitution do not arise. When one harms with liability justification, the harm one inflicts is not wrongful. Thus, liability justification precludes restitutive obligations.

¹ Eric Patterson, *Ending Wars Well*, 164-65.

² Walzer, *Just and Unjust Wars*, 297.

³ Larry May, *After War Ends: A Philosophical Perspective* (Cambridge: Cambridge University Press, 2012), 186. See also Joel Feinberg, "Voluntary Euthanasia," in *Rights, Justice, and Liberty*, 230.

Consider a domestic case. Suppose aggressor unjustly attacks victim and, in defending herself, victim physically harms aggressor while also damaging aggressor's bicycle. Because aggressor was liable to defensive force, victim incurs no obligation to compensate aggressor – neither for harm to his person, nor for harm to his property.

The same line of reasoning holds true for wartime harming. If just combatants have liability justifications for harming all unjust regime leadership, all unjust combatants, and most unjust civilians (collectively, call them “unjust citizens”), then harming the unjust citizens does not wrong them. The just combatants neither violate nor infringe the citizens' rights not to be harmed since the latter are liable to be harmed. And if the harmed unjust citizens are not wronged, then the just state is not obligated to compensate them. Kamm, I think, gets this point exactly right. She notes that when unjust citizens are liable to suffer collateral harm when necessary to avert their state's aggression, “they might not be owed efforts ... to compensate for these side effects of war, even if the victor were able to provide it.”⁴ Although Kamm is here referring to unjust civilians, obviously the same claim can be said about the unjust regime that initiated the war, and the unjust combatants who waged it.

7.1.2 Infringing Peoples' Rights

Although just combatants have liability justifications for most of the wartime harm they cause, nevertheless they almost always harm some innocent parties as well. We can divide such wrongful harm to bystanders into two broad categories: rights

⁴ Kamm, “*Jus Post Bellum*,” in Kamm, *The Moral Target*, 163.

violations and rights infringements. McMahan nicely summarizes the distinction between the two: “When one permissibly acts against a right, I will say that one *infringes* that right, whereas when one impermissibly does what another has a right that one not do, one *violates* that right.”⁵ So the difference between rights violations and rights infringements hinges on culpability; if one unjustifiably transgresses another’s rights, one has violated those rights. If one justifiably transgresses another’s rights, one has infringed those rights.

In order for just combatants to violate bystanders’ rights during war, the combatants would have to violate *jus in bello* restrictions such as violating necessity, discrimination, or proportionality requirements. But because one of my starting assumptions is that the just state prosecutes a just war in a just manner, the just combatants do not harm culpably. Thus, the just state will not incur compensatory obligations grounded in rights violations.⁶

Just combatants do, however, frequently infringe bystanders’ rights during war. By collaterally harming bystanders, the just combatants may act with all things considered justification, yet still they infringe the bystanders’ rights by inflicting wrongful harm on them. So the issue we must now consider is whether the just state is obligated to pay restitution for inflicting wrongful wartime harm on innocent people.

⁵ McMahan, *Killing in War*, 10. See also Judith Jarvis Thomson, “Some Ruminations on Rights,” in *Rights, Restitution, and Risk*, 51.

⁶ Though to be clear, any *in bello* violation would ground a restitutive obligation.

7.1.3 Compensating Rights Infringements

Normally, infringing an innocent person's rights gives rise to an obligation to compensate the wronged party. The underlying rationale grounding this obligation is one of corrective justice. As Jules Coleman puts the matter, "each of us has a duty to repair the wrongful losses for which we are responsible."⁷ When bystanders' rights are infringed, the bystanders are owed restitution for the wrongful harm they suffer.

That rights infringements entail an obligation to compensate is a common view in the literature.⁸ Rodin, for example, holds that "when a right is justifiably infringed as a lesser evil, it grounds a claim for compensation or redress."⁹

Similarly, McMahan writes: "Even though an agent acts permissibly in infringing a right, the victim is nonetheless wronged and may thus be owed compensation."¹⁰

So if just combatants routinely infringe bystanders' rights during war, and if rights infringements normally entail an obligation to pay redress, does it follow that the just state is obligated to compensate the collaterally harmed bystanders?

⁷ Jules Coleman, "Tort Law and Tort Theory: Preliminary Reflections on Method," in *Philosophy and the Law of Torts*, ed. Gerald Postema (Cambridge: Cambridge University Press, 2001), 203.

⁸ An oft-cited example is Feinberg's case of a hiker who breaks into a vacant cabin during a blizzard. According to Feinberg, the hiker is all things considered justified in infringing the cabin owner's rights by eating his food and burning his furniture, but nonetheless the hiker is obligated to compensate the owner for his losses. See "Voluntary Euthanasia," in Feinberg, *Rights, Justice, and Liberty*, 230. For a similar example, see Robert Schopp, "Self-Defense," in *In Harm's Way: Essays in Honor of Joel Feinberg*, ed. Jules L. Coleman and Allen E. Buchanan (Cambridge: Cambridge University Press, 1994), 262.

⁹ Rodin, "Justifying Harm," 107. On the same point, see also Rodin, *War and Self-Defense*, 52.

¹⁰ McMahan, *Killing in War*, 10; McMahan, "The Morality of Military Occupation," 108.

7.1.4 Strict Liability for Rights Infringements

Some commentators argue that just states are always obligated to compensate for wrongful bystander harm during war. In other words, when just combatants inflict wrongful harm, this harm grounds an all things considered obligation to compensate. Several theorists embrace some variation of this approach. Consider the following representative passages.

The first, by Thomas Cavanaugh, is worth quoting at length. Cavanaugh notes that in collateral harm cases, just combatants permissibly injure in a way that calls for repair. He writes:

In the case of tactical bombing ... maimed victims can be helped. Moreover, the relatives of dead non-combatants will be harmed in their loss, for example, of a provider. Here one finds injuries for which one has *full responsibility*. Clearly, while justice does not prohibit one's act, because of one's *complete responsibility*, it does require repair. Having evaluated such an act as permissible, one now obligatorily assists those whom one has harmed. Yet, who owes reparations? Does the tactical bomber himself? No. For he acts as an agent of his country. Presuming that his country wages a just war for the sake of a just peace, it will be the responsibility of his country and others answerable for establishing a just peace to compensate non-combatant victims. This includes the victors, the vanquished, and those benefiting from the consequent peace who can assist the harmed.¹¹

Although Cavanaugh thinks justice permits the tactical bombers to carry out their mission, the bombers nevertheless bear "full" and "complete" responsibility for the harm they cause to bystanders, and thus owe the latter compensation. And if restitution is owed, it is owed by the just state on whose behalf the pilots acted.

The second example comes from Seth Lazar, who offers a line of argument very similar to Cavanaugh's. According to Lazar, if postwar restitution is grounded in corrective justice, then the just state should incur crushing restitutive burdens:

¹¹ Cavanaugh, *Double-Effect Reasoning*, 165-66, my emphasis.

On the most plausible accounts of corrective justice, compensation is owed not merely for all things considered wrongdoing, but for *pro tanto* wrongdoing as well, even when it is all things considered justified. ... On this far more plausible account of liability, even just belligerents will be liable for significant amounts of compensation.¹²

Though stated in different language, Lazar's take on the collateral harm issue appears the same as Cavanaugh's. Lazar agrees that the just combatants may be all things considered justified in inflicting collateral harm. But, he adds, the just combatants still engage in *pro tanto* wrongdoing, and for that they bear an obligation to pay restitution for all the unintended harm to innocent parties.

In these two passages, Lazar and Cavanaugh seem to be advocating for something along the lines of strict liability for wartime rights infringements. Because just combatants are responsible for inflicting wrongful harm on bystanders, the just state is all things considered obligated to compensate the wrongly harmed parties.¹³

Yet I think this suggested approach misses something important about corrective justice, at least in these collateral harm cases. In these situations, surely the aggressor's responsibility affects the just combatants' obligation to compensate the harmed bystanders. The claim that the just state should be straightforwardly liable for any bystander harm its combatants cause seems both unfair and counterintuitive.

¹² Seth Lazar, "Skepticism about *Jus Post Bellum*," 208.

¹³ Though to be clear, Lazar's ultimate conclusion is that compensation should take a backseat to the more important forward-looking tasks of reconstruction and establishing a lasting peace. Prioritizing compensation, Lazar argues, draws resources away from other more important postwar goals.

To support the preceding claim, consider a domestic analogue. Suppose an aggressor culpably attacks an innocent victim. In defending against aggressor's attack, victim foreseeably but unintentionally harms bystander. By Cavanaugh's and Lazar's reasoning, victim should be obligated to compensate the harmed bystander for the wrongful harm the bystander has suffered. Yet that conclusion seems counterintuitive. Aggressor is culpably responsible for forcing the violent situation; victim is responsible for permissibly redirecting aggressor's harm. Given this asymmetry between the parties, it seems fairer to conclude that the aggressor – and *only* the aggressor – should be obligated to compensate the bystander (assuming aggressor is able to pay; we'll come back to this point). But if that's true, why shouldn't we think the same holds in cases of compensating bystanders collaterally harmed during war?

But in fairness to Cavanaugh, he does seem to concede that the unjust state also bears responsibility for the collateral harm. At the end of his passage, Cavanaugh suggests that the vanquished state *shares* in the compensatory obligation. However, that's a puzzling conclusion. After all, he started out by saying the just combatants bear "full" and "complete" responsibility for the bystanders' plight. But if the just combatants were fully responsible for the collateral harm, why would the unjust state incur an obligation to share the compensatory burden? The fact that Cavanaugh recognizes that the unjust state has a compensatory obligation suggests he also recognizes they bear responsibility for the bystanders' plight. But even so, Cavanaugh still thinks the just state is strictly obligated to help pay the restitutive bill. That conclusion seems off target.

7.1.5 Shifted Responsibility and Restitution

The problem with Lazar's and Cavanaugh's suggested strict liability approach is that it glosses over important differences in responsibility for collateral harm. In short, they fail to account for shifted responsibility (or in Cavanaugh's case, to account for it adequately). Instead, they merely suggest that any party who inflicts wrongful harm should compensate for that harm. But that approach lacks important nuance. Although Cavanaugh and Lazar are right to say that just combatants sometimes inflict wrongful harm on bystanders, it doesn't follow that the just state is therefore all things considered obligated to pay.

Instead, compensatory obligations should be allocated in a principled way that takes shifted responsibility into account. As a matter of fairness, the obligation to compensate wrongfully harmed bystanders should fall to the parties most responsible. And since most of the responsibility for the bystanders' harm shifts to the culpable leadership and to the non-culpable but morally responsible unjust citizens responsible for the war, then as a matter of fairness the obligation to compensate the harmed bystanders should fall to those parties first.

7.1.6 Primary Obligation to Pay Restitution

If the fairest way to allocate restitutive obligations is based on responsibility, then the primary obligation should fall to the culpable parties who initiated and prosecuted the aggression – in other words, the senior unjust civilian and military leaders. Since they bear primary responsibility for putting the bystanders in harm's way, they should also bear primary responsibility for compensating the bystanders' harm.

In support of this claim, consider the following domestic case offered by Kamm. She describes a situation in which B unjustly attempts to kill A. In defending herself against B, A's defensive force damages a bystander's car. Kamm then argues: "Given that B unjustly put A in the position of having to defend himself, it is more likely that B has a duty to compensate *everyone* if he survives."¹⁴ Clearly Kamm is invoking shifted responsibility to explain her conclusion. Even though A damages the bystander's car, B incurs the obligation to pay bystander restitution given that B was culpably responsible for creating the situation.

My claim is that Kamm's suggested allocation of restitutive obligations for collateral harm in domestic cases also holds for collateral harm to bystanders during war. In Kamm's domestic case, B is responsible for the harm that A permissibly redirects, even though A does so with the unintended effect of damaging bystander's property. Accordingly, given B's responsibility for the situation, B should have to pay for the wrongful harm that bystander suffers. Similarly, in cases of war, unjust state leadership is responsible for creating the wrongful harm that the just combatants permissibly redirect, even though the combatants do so with the unintended effect of harming some bystanders or their property. Given the unjust leaders' responsibility for the situation, they should have to compensate the bystanders for the collateral harm they suffer.

On the topic of reparations, Orend suggests "monetary compensation due to Victim [state] ought to come, first and foremost, from the personal wealth of those political and military elites in Aggressor [state] who were most responsible for the

¹⁴ Kamm, "*Jus Post Bellum*," in *The Moral Target*, 157, original emphasis.

crime of aggression.”¹⁵ Similarly, Gary Bass argues that reparation bills should be “footed directly from the bank accounts of the aggressor leaders,” as well as “war supporters and profiteers.”¹⁶ I agree, although I think their claim holds not only for reparations, but also for restitution to harmed bystanders. If the aggressor state leadership and culpable supporters are obligated to compensate the victim state for the costs of war, then by the same reasoning they should also be obligated to compensate those wrongly harmed parties within its own territory or in neighboring states.

The general point is this: if the culpable unjust leaders are able to compensate for all the bystanders’ harm, they should. And sometimes they may be able to do just that if they are former oligarchs, or a ruling family that has siphoned wealth off the population for generations. Or it might be possible in cases of shorter, less devastating wars. In these cases, the restitutive obligations should fall exclusively to the unjust leadership.¹⁷ But what if – as is more likely – the culpable parties lack the resources to pay full compensation by themselves?

7.1.7 Secondary Obligation to Pay Restitution

Imagine a protracted war that results in widespread devastation, with numerous bystanders harmed during the fighting. In such a situation, there’s good chance the

¹⁵ Brian Orend, *The Morality of War* (Peterborough, Ont: Broadview Press, 2006): 166.

¹⁶ Bass, “*Jus Post Bellum*,” 408.

¹⁷ In cases where unjust leaders or unjust citizens are obligated to pay restitution, the just state might have a parasitic obligation to ensure the liable parties fulfill their compensatory obligations. This obligation might arise, for example, in postwar situations where the just state occupies the defeated aggressor state and temporarily oversees state financial institutions such as banking and finance.

culpable unjust leaders won't be able to compensate the harmed bystanders adequately at war's end.¹⁸ But if the bystanders are nevertheless owed restitution, to whom should the remaining obligation fall?

If the primary parties cannot pay, then the obligation should shift to the secondary parties who share responsibility for their state's aggression: the unjust citizenry. Given their institutional responsibility, unjust citizens are financially responsible for state actions; the state acts in their name, on their behalf. Accordingly, the unjust civilians have a duty to bear the costs of their state's aggression, and this duty can take the form of paying the financial costs of the war. They are liable to pay restitution and reparations; so as a matter of fairness, the obligation to compensate harmed bystanders should fall to them before falling to the just citizens. After all, the latter were completely innocent at the outbreak of war, whereas the former bore at least some responsibility.

But in order for the unjust citizenry to pay restitution, the funds likely will need to come from state tax coffers – a fact which might give rise to an objection. Because taxes fall to the entire populace, innocent parties will be forced to pay. As Coady points out, the tax burden would “fall on the guilty and the innocent alike.”¹⁹ According to Lazar, “innocent people will inevitably pay a steep price for the crimes

¹⁸ Gary J. Bass, “*Jus Post Bellum*,” 408; May, *After War Ends*, 186.

¹⁹ C.A.J. Coady, “The *Jus Post Bellum*,” in *New Wars and New Soldiers: Military Ethics in the Contemporary World*, ed. Paolo Tripodi and Jessica Wolfendale (Burlington, VT: Ashgate, 2011), 58.

of others.”²⁰ Orend agrees, arguing that taxing the entire unjust state fails to discriminate adequately.²¹

I think this objection can be overcome for two reasons. First, as I’ve already argued at length, most unjust citizens share responsibility for their state’s aggression. Given their institutional responsibility, they are liable to pay restitution to compensate for the wrongful harm their state has caused. And if that’s right, then most unjust citizens will not be wronged when taxed for restitutive purposes. Thus, the actual number of innocent people harmed by taxation will in fact be quite small.

Second, although *some* bystanders will be taxed, taxing them is justified as a lesser evil. Otherwise, if the unjust citizenry weren’t forced to pay, then either the entire just citizenry would have to pay or, worse still, the harmed bystanders would simply go uncompensated. Assuming the latter is the worst option, then it seems that either the entire just citizenry or the entire unjust citizenry will have to be taxed. But if most unjust civilians share some responsibility for the war and no just citizens do, then taxing the unjust citizens would be a lesser evil than taxing the just citizens (assuming that taxing either group as a whole will wrongly harm innocent people).

Walzer argues along this same line in his discussion of reparations. He writes:

Reparations are surely due to the victims of aggressive war, and they can hardly be collected only from those members of the defeated state who were active supporters of the aggression. Instead, the costs are distributed

²⁰ Lazar, “Skepticism About *Jus Post Bellum*,” 210.

²¹ Orend, *The Morality of War*, 167.

through the tax system, and through the economic system generally, among all the citizens....²²

Recognizing that some innocent people in the aggressor will be forced to contribute, Walzer justifies the taxation as a “consequence of citizenship.”²³ Although Walzer doesn’t expressly justify this ‘consequence’ as a lesser evil, that appears to be what he has in mind:

We penalize innocent people, including children, in the aggressor state in a constrained way, in order to benefit innocent people in the state that was unjustly attacked. And that is *jus post bellum*: not perfect, but as good as it can be.²⁴

Although Walzer’s comments are about reparations, the same reasoning should also justify taxing the unjust citizenry to pay restitution. Taxing the entire unjust citizenry – even though it will tax some innocent people – is a lesser evil than either taxing the entire just citizenry, or allowing the harmed bystanders to go uncompensated.

7.1.8 The Just State’s Obligation to Pay Restitution

Thus far I’ve argued that unjust state leaders are obligated to compensate harmed bystanders and, should those leaders be unable to compensate, then the compensatory obligation should shift to the unjust citizenry. But what if the unjust citizenry also is unable to compensate innocent parties for the wrongful losses they’ve suffered? In the aftermath of war, the defeated state may simply lack the

²² Walzer, *Just and Unjust Wars*, 297. See also Walzer, “The Aftermath of War,” 42.

²³ Ibid. Echoing Walzer’s sentiment, Gary Bass remarks that taxing the unjust state might be a “partial national price” to pay for state sovereignty. Bass, “Jus Post Bellum,” 408.

²⁴ Walzer, “The Aftermath of War,” 42.

requisite funds to compensate harmed bystanders.²⁵ In such cases, I do think the just state incurs an obligation to pay *some* restitution to the non-liable parties whom the just combatants have harmed.

Once again, we can begin the analysis by looking at a domestic case:

Destitute Aggressor. Destitute aggressor culpably attacks victim with lethal force. Victim can defend herself only in a way that also risks harming a nearby bystander. Victim chooses to defend herself; she kills aggressor, and harms bystander in the process.

In *Destitute Aggressor*, bystander suffers wrongful harm and deserves to be compensated. Normally, that compensatory obligation would shift to the aggressor who culpably created the situation. Yet in this case, aggressor is deceased, destitute, and unable to pay. In this situation, I think victim is obligated to compensate the bystander. Although victim was permitted to defend herself, she's morally responsible for infringing bystander's right not to be harmed. Because no party bearing more responsibility for the rights infringement is able to pay, victim is all things considered obligated to do so.

The rationale underlying victim's compensatory obligation is one of corrective justice. As Coleman and Ripstein argue, "each of us should bear the costs our conduct imposes on others; otherwise, we force others to bear costs which are properly ours – the costs resulting from the expression of our agency through our decisions and choices."²⁶ Victim cannot choose to solve her problem at bystander's

²⁵ Patterson, "Ending Wars Well," 140-41; May, *After War Ends*, 192.

²⁶ Jules Coleman and Arthur Ripstein, "Mischiefs and Misfortune," *McGill LJ* 41 (1995): 94.

expense with complete impunity.²⁷ As a matter of fairness, victim cannot shift the costs of her defense onto an innocent party and simply allow the burden to remain there. Infringing the rights of an innocent party during self-defense creates a residual injustice that must be righted.

Just as the victim in *Destitute Aggressor* has a restitutive obligation towards bystander, so too just states sometimes may have restitutive obligations toward bystanders whom they've harmed during war. Although just combatants are permitted to defend themselves and their fellow citizens, they still share moral responsibility for the collateral harm they cause. The just state cannot simply defend itself at the bystanders' expense. Given that the just combatants share responsibility for those rights infringements, the just state incurs a prima facie obligation to compensate.

In most cases, this prima facie obligation would not become an all things considered obligation to compensate. Instead, the just state's prima facie obligation would be overridden by the unjust leaders' and unjust citizens' obligation to render restitution. But in cases where those parties lack sufficient resources, some compensatory obligation will shift to the just state. In other words, if the harmed innocent parties would go uncompensated unless indemnified by the just citizenry, then as a matter of fairness the just citizenry should be obligated to pay

²⁷ As Epstein puts the point, "prima facie, one man should not be allowed to solve his own problems at the expense of physical harm to another." Richard A. Epstein, "Defenses and Subsequent Pleas in a System of Strict Liability," *J.Legal Stud.* 3 (1974): 169.

restitution.²⁸ The just state cannot let the costs of its defense lie with the harmed innocent bystanders.

However, that's not to say that the just state is on the hook for the entire restitution amount that the bystanders are due. After all, postwar compensation is divisible, and need not be all or nothing. So as a matter of fairness to the just citizens, their compensatory burden should correspond to the amount of responsibility their state bears for the bystanders' plight. Given their reduced level of responsibility for the collateral harm (relative to the other parties), the just citizenry should only be required to pay a correspondingly reduced amount of restitution.

Exactly how much restitution the just state should pay is a matter of debate. Lazar estimates that compensating the family of a deceased person killed in war would "amount to millions of dollars per victim" based on lost earnings and suffering.²⁹ But assuming the just state pays only a portion of what is ideally owed, the total amount may be manageable. Yet as Lazar rightly warns, the compensation amount quickly threatens to become a "crippling compensatory burden."³⁰ In reply, I think the best we can say is that the just state's restitutive obligation must be reasonable.³¹ The just state need not bankrupt itself for the sake of the harmed innocent parties.

²⁸ An interesting question that I won't pursue here is whether the just state's restitutive payments are an additional cost of war for which the just state might rightly seek future reparative compensation from the unjust state.

²⁹ Lazar, "Skepticism about *Jus Post Bellum*," 207.

³⁰ *Ibid.*, 208.

³¹ A separate issue – though beyond the scope of this paper – is whether the harmed bystanders might have a claim for future restitutive payment from the unjust state

7.2 Physical and Institutional Reconstruction Obligation

We'll now shift focus and consider whether victorious just states are obligated to help physically reconstruct defeated aggressor states at war's end. By "reconstruction" I mean the rebuilding or restoration of infrastructure and other public goods and non-essential institutions.³² Common examples include roads, bridges, public utilities, government buildings, and financial institutions and markets.

According to Cecile Fabre, the moral principle that "victorious belligerents ought to assist in the reconstruction of the vanquished country/countries" is "relatively canonical."³³ If Fabre is right that the principle of reconstruction is the orthodox view, then I find the orthodox view problematic, unjustified, and in need of revision. As we'll see, though, Fabre is right to claim that many theorists agree that victorious states are obligated to help reconstruct defeated states. The justifications they offer to ground this obligation fall into two broad categories: one based on the just state's right intention for going to war, and the other based on the effects of wartime harm to innocent people. We'll look at each in turn.

should it become able to pay. This suggestion might be problematic for two reasons. First, at some point future restitutive obligations will begin to harm innocent parties. Second, as a pragmatic concern, significant reparative burdens extending far into the future may sow the seeds for future conflict, such as the Treaty of Versailles did at the end of World War I. Regardless, even if innocent parties harmed during war have a reasonable amount of future claims against the unjust state, the enforcement of such compensation would fall to the international community, not to the victorious just state.

³² Life essential services would fall under the discussion of transitional security and humanitarian aid.

³³ Fabre, *Cosmopolitan War*, 4-5.

7.2.1 Right Intention Approach

Many theorists appeal to the *jus as bellum* criterion of right intention as the theoretical basis underlying the just state's reconstructive obligations. The right intention for going to war, they argue, is to secure a just and lasting peace. And given that one intends a just and lasting peace, one must necessarily engage in reconstructive efforts to help the defeated state overcome its devastation. The apparent unstated assumption in this argument is that postwar peace between victors and vanquished will not be possible until the defeated state is adequately rebuilt. But the general claim is that the just state's postwar reconstruction obligation is derivative from the just state's right intention for going to war in the first place: to establish a just and lasting peace.

This right intention argument appears somewhat frequently in the postwar reconstruction literature. Allman and Winright, for example, hold that "reconstruction is neither a gift or a donation, nor is it optional." Rather, they argue, reconstruction is "a constitutive dimension of just cause and right intent...."³⁴ They later remark:

In destroying the infrastructure of a nation and crippling its economy through war, even if one has justified reasons for doing so, a nation automatically assumes responsibility for the economic recovery of the vanquished. *If the aim of a just war is the tranquility that comes from order, then the jobs, infrastructure, and banking and financial institutions needed to bring economic stability must be seen as concomitant duties implicit in the reasons cited for going to war in the first place.*³⁵

Mark Evans employs the same line of reasoning. He writes: "Postwar reconstruction is not a supererogatory act of charity to one's vanquished enemies,

³⁴ Allman and Winright, *After the Smoke Clears*, 144.

³⁵ *Ibid.*, 163, my emphasis.

but rather a manifestation of a duty, derived from the original taking-up of arms, to do what one can to build a new, durably peaceful, and just world.”³⁶ He goes on to note that, “to secure the *post bellum* justice sought in the resort to war, just combatants must be prepared to ... take full responsibility for their share of the material burdens of the conflict’s aftermath in constructing a just and stable peace.”³⁷

Similarly, Iasiello argues that because all just wars are fought with the intention of producing a just and lasting peace, victors must help rebuild the defeated society, to include public utilities, schools, places of worship, transportation, and communications.³⁸ Iasiello’s claim here closely follows Allman, Winright, and Evans. All of these commentators agree that because the just state goes to war intending to establish a lasting peace, the just state must help reverse the damage its troops have inflicted on the unjust state’s economy and infrastructure.

7.2.2 Skepticism about the Right Intention Approach

Although the right intention justification for reconstructive duties has some intuitive appeal, nevertheless I think it fails. The weakness of the right intention argument is its hypothetical imperative structure: if one intends a just and lasting peace, then one must do what’s necessary toward that end, such as reconstructing the defeated state. But this is just to say that the obligation to reconstruct is

³⁶ Evans, “Moral Responsibilities and Conflicting Demands,” 154.

³⁷ *Ibid.*, 155.

³⁸ Iasiello, “Jus Post Bellum,” 43.

conditional upon the intent to secure a lasting peace. So if one lacks the antecedent intent to secure a lasting peace, there's no subsequent imperative to rebuild.

The problem is that the right intention relied upon is questionable. As Roger Williams and Dan Caldwell point out, "right intention is subject to diverse interpretations, none of which has ever assumed a clearly preeminent position among theorists and policy makers."³⁹ In fact, there's support in the literature for the claim that what one rightly intends when initiating war is something short of a just and lasting peace. According to Vattel, the object of waging war is to protect from injury and to repel violence.⁴⁰ Or as Gary Bass puts it, sometimes one's goal in waging war is "mere self-defense."⁴¹

The preceding claim should not surprise us. In domestic assault cases, we wouldn't fault attack victims if they intended only to defend themselves. Victims aren't expected to defend with an eye toward forging pacific relations with their former assailants – at least not in a way that would saddle the victims with post-conflict duties to rebuild their attackers' lives and property.

In domestic self-defense cases, the right intention for using defensive force is simply to repel aggression. The same holds true for national defense situations. A just state's right intention should be to halt the aggression that grounded its just cause for going to war. If that is right, this fact seems to undercut the argument that postwar reconstructive obligations are grounded in the *jus ad bellum* principle of right intention. If the just state intends only to ward off aggression, then it's not

³⁹ Robert Williams Jr. and Dan Caldwell, "Jus Post Bellum: Just War Theory and the Principles of Just Peace," *International Studies Perspectives* 7, no. 4 (2006): 312.

⁴⁰ de Vattel, *The Law of Nations*, 484.

⁴¹ Gary Bass, "Jus Post Bellum," 393.

clear why such a state would incur a postwar obligation to help reconstruct the defeated state.

7.2.3 Wrongful Harm Approach

Although some theorists appeal to right intention to ground reconstruction obligations, a majority point to wartime harm to innocent people as the proper grounds. The general idea is this: by damaging infrastructure and institutions, the just combatants have harmed *everyone* in the aggressor state – to include innocent people. And because the just state has harmed innocent people, it incurs an obligation to help reconstruct the defeated state to undo the wrongful harm the bystanders suffered.

Numerous theorists endorse this approach. Gary Bass writes:

Wartime damage inflicts a collective harm on the citizens of a country, including upon citizens who did not consent to the war or who played a trivial role in the decision to go to war that does not merit the kind of suffering they endured as a consequence of policies adopted in foreign ministries and cabinet meetings.⁴²

From this, Bass concludes that victors incur “some obligation to restore wartime damage,” including “economic restoration.”⁴³

Tony Coady echoes Bass’s suggestion, noting:

It may seem paradoxical that just victors should acquire obligations to restore the circumstances of the unjust, defeated enemy, but several considerations support this. One is that ... very many enemy citizens will not be seriously responsible for the war and deserve help in recovering from the distress of it; another is that where the enemy country has been attacked, much collateral damage will have been created to civilian property, health and livelihood, and even where this was licit (sanctioned by double effect or

⁴² Bass, “Jus Post Bellum,” 407.

⁴³ *Ibid.*, 406.

whatever) it is damage that should be repaired, preferably by those who inflicted it.⁴⁴

Similarly, Lazar suggests, “even justified warfighting involves a great deal of *pro tanto* wrongdoing – perhaps this can ground just belligerents’ liability to bear the costs of reconstruction.”⁴⁵

A final example of the wrongful harm approach can be found in Frowe, who writes:

Even just, defensive wars inflict harms upon innocent non-combatants in the aggressor nation. ... Since, in the course of defending themselves, the victors have inflicted harms upon innocent people, they may owe it to those people to help rebuild their state as a form of apology or compensation.⁴⁶

The underlying claim in each of these quotes is the same. By damaging state infrastructure and institutions, just combatants inevitably harm innocent and non-innocent parties alike. And it is the wrongful harm to innocent parties that generates the just state’s postwar obligation to help rebuild the defeated state.

7.2.4 Skepticism about the Wrongful Harm Approach

In response to this proposed wrongful harm approach, two points are worth making. First, unlike the theorists cited above, I think the vast majority of unjust citizens are liable to the harm inflicted by the just state. Whether the just combatants damage public or personal property makes no difference; unjust citizens are liable to both. Because the just citizenry was defending against aggression from unjust state institutions, those unjust state assets were liable to be

⁴⁴ Coady, “The Jus Post Bellum,” 62.

⁴⁵ Lazar, “Skepticism about *Jus Post Bellum*, 216.

⁴⁶ Frowe, *The Ethics of War and Peace*, 213. Though to be clear, Frowe’s text surveys different positions, and it’s not clear whether Frowe actually embraces the wrongful harm approach herself.

destroyed. Thus, relative to most citizens, the just combatants destroy public infrastructure and institutions with liability justification. So even if one thinks the public shares ownership of state infrastructure, most of the public was liable to suffer its destruction and thus was not wronged. And as previously discussed, harm inflicted with liability justification doesn't ground an obligation of restitution or restoration.

Nevertheless, the above theorists will argue that *some* people in the aggressor state are completely innocent during war, and surely these bystanders are harmed by the degradation of public goods. As a quick response, one might argue that because many bystanders are non-citizens visiting, travelling through, or temporarily working in the aggressor state, they would seem to have no legitimate claim for reconstruction of state goods in a state not their own. And in the case of children, one might argue they have no legitimate claim regarding the restoration of public infrastructure and institutions to which they have not contributed.

But let's assume bystanders do have legitimate claims for the restoration of non-essential public goods. If so, then one might wonder whether the just state is obligated to undo some of the public harm that has befallen the bystanders.⁴⁷ The answer to this question leads us to the second point that cuts against the wrongful harm justification: shifted responsibility points to the unjust state as the proper bearer of the obligation to restore public goods.

⁴⁷ As I've argued in the first part of this chapter, bystanders may be owed restitution to compensate them for the *personal* harms and losses they suffer. The issue under consideration now is whether the just state is obligated to rebuild the aggressor state in order to undo harm to bystanders stemming from the destruction of *public* goods.

If bystanders have a claim for public reconstruction, their claim is against the parties responsible for bringing harm to the aggressor state – namely, the culpable unjust regime, as well as the unjust citizenry who bears responsibility for the state institutions that malfunctioned. As a matter of fairness, those culpable and responsible parties should have to shoulder the costs of rebuilding rather than the just state citizens forced to defend themselves. Just as we expect parties responsible for domestic aggression to shoulder the costs of their unjust actions, so too the unjust state should have to pay the costs of its aggression. As May rightly observes, “when a vanquished state has caused damage to its own people, ... it must rebuild as a matter of justice.”⁴⁸

But, one might ask, what if the unjust state lacks the resources to reconstruct itself? In that case, shouldn’t the burden shift to the just state if it is able to do so? That’s a reasonable suggestion, especially because I’ve already argued that some postwar obligations – such as providing transitional security or preventing environmental harms – sometimes shift to the just state in cases where the primary and secondary parties are unable to do so. But the decisive consideration in those cases was that life or limb was hanging in the balance. Yet here, we’re talking about non-essential public infrastructure and institutions – situations in which life and limb aren’t at stake. And if life and limb aren’t at stake, then it’s not obvious why the reconstructive costs should fall to the defending citizenry.

Undeterred, an objector further might point out that I’ve previously argued restitutive obligations sometimes shift to the defending citizenry, and the payment

⁴⁸ May, *After War Ends*, 189.

of compensation generally doesn't involve life or limb. Although that may be right, I think there's an important difference between restitution on the one hand, and the restoration of public goods on the other. In the case of restitution, the bystander had a right to be free of harm, and a right that his property not be destroyed. Because these rights were transgressed, the bystander is rightly owed compensation. But I'm skeptical of the claim that citizens have a right to a certain level of public goods. Though they may be inconvenienced by damaged infrastructure and degraded institutions, this doesn't seem to be a type of harm that transgresses any of the bystander's personal rights. Thus, it's not clear on what grounds the bystander would have a claim against the just citizenry.

Moreover, two other considerations tell against the just state being obligated to reconstruct its defeated adversary. First, requiring the victim state to rebuild or otherwise compensate the aggressor state for harm caused during war would be tantamount to harming the victim state's citizens a second time over: first, by being attacked and forced to fight for their lives; and second, by being saddled with the bill for rebuilding its former enemy. And let's not forget that the just state will likely have its own reconstruction projects at home. It was, after all, the state originally attacked.

Second, requiring just states to rebuild their former adversaries would remove an important deterrent against aggression. For a rogue regime that might be contemplating an unjust attack, the potential costs of having to rebuild its state should it lose the unjust war provides a strong incentive against committing aggression in the first place. But imagine if just war victors were required to rebuild

their defeated adversaries. In that case, if an aggressor state wins its unjust war, it stands to keep the spoils of war. Conversely, if the aggressor state loses its unjust war, the victim state would be required to undo much of the defeated state's wartime damage. Oddly, in this case much of the costs of the unjust state's wrongdoing would end up being subsidized by their intended victims. That result can't possibly be right, for then aggressors would have little remaining reason not to attempt invasion, annexation, and so on.

Relatedly, the anticipated obligation to rebuild one's own state after an unjust war also incentivizes citizens to watch over their state institutions and attempt to control or influence them when they appear ready to commit wrong. In other words, the realization that a state will have to rebuild itself after losing an unjust war also encourages institutional accountability.

7.2.5 Other Possibilities

For the foregoing reasons, I think victorious just states are not obligated to physically reconstruct their defeated adversaries' infrastructure and non-essential institutions. But that's not to say that the just state is prohibited from helping. Just citizens may opt to help with reconstruction efforts as an act of beneficence, and they might also have prudential reasons for assisting (a reconstructed state may be less likely to war again, or might become an ally or trading partner). The Allied reconstruction of post-WWII Germany seems to be a good example of both.

Another possibility is that the international community may have an obligation to help rebuild the defeated aggressor state. Larry May, for example, argues that the obligation to rebuild vanquished states "is a form of collective

responsibility that falls in a distributed way on the society of States.”⁴⁹ Coady agrees: “It should be expected that other nations, not involved in the war, have some moral obligations to help, just as they do with natural disasters.”⁵⁰ Because I’m not attempting to determine which obligations the international community might have at war’s end, I won’t pursue May’s and Coady’s suggestion here. However, I will say that *if* the obligation to reconstruct the defeated state must fall to someone other than the aggressor regime or unjust citizenry, then there’s no reason to think it shouldn’t fall to the international community in general before it falls to the just state uniquely.

7.3 Postwar Accountability and Justice

The next issue we’ll consider is whether a just state incurs any postwar justice obligations. The aim of postwar justice is to hold individual agents accountable for wrongful actions they’ve committed during war.⁵¹ Although this accountability normally involves punishment, my aim is not to justify punishment for wrongs committed during war (I will assume such punishment is justified). Instead, my aim is to consider whether the victorious just state is ever obligated to pursue postwar accountability.

Many theorists seem to suggest that the pursuance of postwar accountability is obligatory. There’s a sizable consensus that wrongdoers *must* be held accountable for the crimes they commit during war. Walzer, for example, claims: “There can be no justice in war if there are not, ultimately, responsible men and

⁴⁹ May, *After War Ends*, 19.

⁵⁰ Coady, “The Jus Post Bellum,” 62.

⁵¹ Patterson, *Just War Thinking*, 43.

women.”⁵² According to Patterson, “*jus post bellum* requires moral accountability.”⁵³ For Gary Bass, “war crimes trials are morally mandated.”⁵⁴ Bellamy goes so far as to say, “the idea of prosecuting war criminals ... has assumed the status of a post-war duty.”⁵⁵

Perhaps the strongest language on this point comes from Davida Kellogg, who writes:

The meting out of punishment for crimes against humanity and war crimes, whether in international tribunals or in our own civil courts, courts-martial, or military tribunals, is in fact the natural, logical, and *morally indispensable* end state of Just War.⁵⁶

Kellogg’s sentiment here echoes Walzer’s: a just war demands that wartime criminals be brought to justice. In fact, Kellogg goes so far as to say that failing to punish responsible parties is “to condone evil.”⁵⁷

Let’s assume the consensus view is right; war criminals must be held accountable. The question now is: what corresponding obligations does the just state incur relative to this mandate? Is the victorious state absolutely required to prosecute war criminals at war’s end?

In order to best answer these questions, it might be helpful to divide wartime crimes into two broad categories. The first category consists of *ad bellum* violations, while the second consists of *in bello* violations. I’ll discuss each category in turn.

⁵² Walzer, *Just and Unjust Wars*, 288.

⁵³ Patterson, *Just War Thinking*, 83.

⁵⁴ Bass, “Jus Post Bellum,” 404.

⁵⁵ Bellamy, “The Responsibilities of Victory,” 613.

⁵⁶ Davida E. Kellogg, “Jus Post Bellum: The Importance of War Crimes Trials,” *Parameters* 32, no. 3 (2002): 88.

⁵⁷ *Ibid.*, 93.

7.3.1 The Crime of Aggression

When state leaders violate *ad bellum* restrictions and initiate an unjust war, they commit the ‘crime of aggression,’⁵⁸ also sometimes called a ‘crime against peace.’⁵⁹ As a matter of justice, these leaders should be held accountable. But which responsible parties are we referring to here? As Walzer explains, “the crime of aggression falls to parties who played a major role in the planning, preparations, initiation, and waging of aggressive war.”⁶⁰ I’ve previously referred to this collective group of people as the ‘unjust regime,’ comprised of the political leaders who ultimately make the state decision to initiate war, as well as the higher-level political and military leaders who advise them. Together, they should be held accountable for the carnage and devastation their decisions have wrought. They should be treated, as the literature commonly holds, as criminals. Rawls captures this basic sentiment when he notes that the aggressing state “leaders and officials are responsible; they willed the war, and for doing that, they are criminals.”⁶¹ But the interesting question is, exactly who should hold the unjust regime accountable?

One possible answer to this question is that the victorious just state should hold the unjust regime accountable. Francisco de Vitoria – one of the just war tradition’s founding theorists – strongly advocated this approach. Writing early in

⁵⁸ See Walzer, *Just and Unjust Wars*, 289, 291; Rodin, “Two Emerging Issues” 69; Fletcher and Ohlin, *Defending Humanity*, 189-90; Frowe, *The Ethics of War and Peace*, 216; David Luban, “Just War and Human Rights,” *Philosophy & Public Affairs* (1980): 164.

⁵⁹ Walzer, *Just and Unjust Wars*, 292; Orend, “Justice After War: Toward a New Geneva Convention,” in Patterson, *Ethics Beyond War's End*, 179-80.

⁶⁰ Walzer, *Just and Unjust Wars*, 292.

⁶¹ John Rawls, *The Law of Peoples; with, the Idea of Public Reason Revisited* (Cambridge: Harvard University Press, 1999), 95.

the sixteenth century, Vitoria argues: “The prince who wages a just war becomes *ipso jure* the judge of the enemy, and may punish them judicially and sentence them according to their offence.”⁶² Later, in his highly influential *On the Law of War*, Vitoria notes that after victory has been won, “the victor must think of himself as a judge sitting in judgment between two commonwealths, one the injured party and the other the offender; he must not pass sentence as the prosecutor, but as a judge.”⁶³

Unfortunately, the problem with Vitoria’s suggestion that the just state should punish the defeated aggressor state is underscored by his own further comments. Elsewhere, he writes that even after the just state has prevailed in war, “it is lawful to avenge the injury done by the enemy, and to teach the enemy a lesson by punishing them,”⁶⁴ which for Vitoria includes executing all enemy combatants,⁶⁵ and depriving the just state of part of their land out of revenge.⁶⁶ How, one might wonder, can someone stand as an impartial judge over the defeated state while keeping an eye toward avenging his own state’s injuries and teaching the enemy a lesson?

The problem here is a concern about impartiality and legitimacy. We can sense in Vitoria’s comments the real danger of victor’s justice, which too easily inclines toward victor’s revenge. Yet justice isn’t about revenge; it’s about impartial

⁶² Vitoria, “On the American Indians,” in Reichberg, Syse, and Begby, *The Ethics of War: Classic and Contemporary Readings*: 304.

⁶³ Vitoria, “On the Law of War,” in *Ibid.*, 332.

⁶⁴ *Ibid.*, 316.

⁶⁵ *Ibid.*, 328.

⁶⁶ *Ibid.*, 330.

accountability. But how can we expect the state initially attacked and forced to fight for its citizens' lives to remain impartial while judging their former aggressors?

As Lazar points out, impartiality requires that the “judge, jury, and executioner must have nothing to gain from the trial’s outcome, and they must have no prejudices about the plaintiffs.”⁶⁷ Rodin echoes the same concerns, arguing that legitimate punishment requires “a legitimate punitive authority which at the very minimum must display independence, neutrality and impartiality.”⁶⁸ Given these concerns about impartiality and legitimacy, it’s not clear that the just state can legitimately prosecute unjust leaders. And if that’s right, it seems unlikely that the just state would be obligated to prosecute unjust regime members for crimes of aggression.

7.3.2 International Tribunals

The obvious way to mitigate the forgoing impartiality and legitimacy concerns is for the international community to hold the unjust leadership accountable by way of international tribunal. Although this approach was not a viable option during Vitoria’s time, it is today with the recent history of ad hoc tribunals (Yugoslavia in 1993, Rwanda in 1994), and especially with the creation of the permanent International Criminal Court (ICC).

The international tribunal approach is gaining momentum as a solution to issues surrounding the prosecution of crimes against peace.⁶⁹ Under Article 5 of the 1998 Rome Statute that created the court (later ratified in 2002), the ICC holds

⁶⁷ Lazar, “Skepticism about *Jus Post Bellum*,” 214.

⁶⁸ Rodin, “Two Emerging Issues,” 75.

⁶⁹ See, for example, Kellogg, “*Jus Post Bellum*,” 93; Orend, *War and International Justice*, 230; May, *After War Ends*, 82.

specific jurisdiction for crimes of aggression, as well as war crimes, crimes against humanity, and genocide. Although 120 countries signed the Rome Statute, 7 countries voted against, with 21 abstaining. However, with the subsequent ratification of the treaty, Article 13(b) grants the court jurisdiction over non-parties to the treaty if the U.N. Security Council refers the case – though referral is subject to Security Council veto (an obvious Achilles heel for some potential cases).

So given the ICC's potential jurisdiction, coupled with its international and procedural structure, the court holds the promise of delivering the transparency and impartiality so sorely lacking when victorious just states prosecute on their own. Moreover, crimes against peace might be thought an obligation of justice for the international community writ large rather than for individual victim states. So based on these considerations, it seems reasonable to conclude that if any entity should be obligated to hold the aggressor regime accountable, it should be the international community. In turn, the original victim state might have a duty to assist the international community's efforts based on a general obligation to help uphold just institutions.

So let's suppose the international community chooses to pursue an unjust aggressor regime for crimes against peace. What might the just state's corresponding obligations be? The most obvious answer is that if the just state were occupying the defeated state, then the former would be obligated to help facilitate any tribunal investigations and prosecutions. This assistance might take the form of turning over suspected war criminals, as well as any relevant evidence.

Just combatants might also be required to escort and provide security to investigators and tribunal staff while in country.

In cases where the judicial hearings are held outside the aggressor state, the just state would be obligated to facilitate the extradition of suspects. May endorses this view: "There is an obligation to extradite heads of State to international courts, if valid international indictments and arrest warrants have been issued."⁷⁰ Although I agree with May, this extradition obligation must include not only heads of state, but also any culpable staff members who played an integral role in initiating aggression.

7.3.3 Is the Just State Obligated to Pursue Aggressor Accountability?

But what if the international community chooses not to pursue postwar accountability; is the just state then obligated to do so on its own? Two reasons tell against the just state incurring such an obligation.

First, the decision whether to pursue aggressor accountability properly lies within the discretion of the just state. Larry May traces this position back to Grotius, who held that although punishment is generally permitted, one does not fail to do what one ought to do by choosing to forgo punishment.⁷¹ Bellamy concurs with the Grotian view:

It is important to distinguish between entitlements and obligations. Entitlements are things that the victors may choose to do, but are not committing a wrong if they choose not to. It is hard to see why a state that is unjustly attacked does wrong if, after defending itself, it chooses not to prosecute suspected war criminals (absent a global process)....⁷²

⁷⁰ May, *After War Ends*, 20, 36.

⁷¹ *Ibid.*, 37.

⁷² Bellamy, "The Responsibilities of Victory," 624.

As Christopher Wellman points out, a state's decision whether to pursue justice in domestic cases is "squarely within a state's legitimate sphere of sovereignty over its exercise of the criminal law."⁷³ There's no reason to think the same doesn't hold true regarding aggressor state postwar accountability.

One might reply by arguing that victims have a right that the unjust regime be held accountable. But in response to this charge, Wellman argues that citizens don't have a right that every criminal be punished.⁷⁴ Rather, the state has a broad obligation to protect the citizens' basic rights – a function the state can perform even though it may not hold every criminal accountable. Just as the state can prosecute a criminal even though the victim wishes otherwise, so too the state can forgo prosecution even though the victim desires it. In such cases, the just state might have compelling reason to dispense with prosecution, which leads us to the next consideration.

Second, the just state may have compelling practical reason for not pursuing aggressor regime accountability. To begin, the pursuit of postwar justice can be expensive and time-consuming, and the just state may prefer to invest its time and resources elsewhere – such as its own postwar reconstruction. Additionally, the pursuance of postwar justice might produce festering resentment among the unjust populace, thus retarding the possibility for post-conflict peace and reconciliation.⁷⁵

⁷³ Wellman, "Amnesties and International Law," in *War: Essays in Political Philosophy*, ed. Larry May and Emily Crookston (Cambridge: Cambridge University Press, 2008b), 254.

⁷⁴ *Ibid.*, 253.

⁷⁵ See May, *After War Ends*, Ch. 2; Frowe, *The Ethics of War and Peace*, 224-26; Michael Clark and Peter Cave, "No Where to Run? Punishing War Crimes," *Res Publica* 16, no. 2 (2010): 205.

We see here a tension here between justice and accountability on the one hand, and considerations about reconciliation, peace, and self-interest on the other. We should not think that the just state is obligated to pursue the former; rather, the victorious state may justifiably exercise its discretion to pursue the latter. This is just to say that although there may be a prima facie presumption that aggressors should be held accountable, that presumption does not necessarily entail all things considered obligation to pursue such accountability. Oftentimes, countervailing considerations, in conjunction with state discretion, permit non-pursuit of postwar justice. Thus, the just state is not obligated to prosecute unjust leaders for crimes against aggression in the absence of the international community's pursuit of the matter.

7.3.4 War Crimes

When just combatants violate the *in bello* rules of war – necessity, proportionality, and discrimination – they commit war crimes. Thus, when just soldiers kill wantonly, or cause disproportionate harm while pursuing their military objectives, or make no effort to distinguish between liable and non-liable parties, they engage in moral and criminal wrongdoing. Accordingly, they should be held accountable for their culpable acts.

But who should hold these soldiers accountable? One might think the same international tribunals that try crimes of aggression should also try war crimes. Orend, for example, advocates for a permanent international tribunal to hear all *in bello* war crimes charges.⁷⁶ Although this approach might be ideal regarding

⁷⁶ Orend, *War and International Justice*, 231, 243-46.

impartiality and legitimacy, no such international tribunal currently exists to try individual soldiers for suspected war crimes.

And although in theory the ICC can hold war crimes trials, the problem is the ICC doesn't hear smaller-scale offenses. According to Article 5 of the Rome Statute, the ICC's jurisdiction extends only over "the most serious crimes of concern to the international community as a whole." And as Luban points out, Article 8 grants the court jurisdiction for war crimes only committed as part of a large-scale plan or policy.⁷⁷ Thus, when individual soldiers commit wartime criminal acts, their acts likely will fall outside the ICC's jurisdiction unless their acts concern the entire international community (highly unlikely), or if the soldiers are participating in policy-driven systematic *in bello* violations (such as a genocidal campaign). Moreover, by design the ICC is meant to be a court of last resort, with lower level crimes being tried at the state level so long as the individual state has jurisdiction over the suspects.⁷⁸ So in the end, the ICC will tend to have jurisdiction over almost no combatants suspected of violating the *in bello* rules of war.

7.3.5 The Just State's Obligation to Hold its Soldiers Accountable

If the international community lacks the jurisdiction, ability, or resolve to hold suspected war criminals from the just state accountable, does this obligation then fall to the just state itself? I think so, and there's compelling reason to support this claim.

⁷⁷ Luban, "War Crimes: The Laws of Hell," in May and Crookston, *War: Essays in Political Philosophy*, 274.

⁷⁸ See 1998 Rome Statute, Article 17(a)(b). See also J. Angelo Corlett, "US Responsibility for War Crimes in Iraq," *Res Publica* 16, no. 2 (2010): 232-33.

To begin, one can make the simple argument that because war criminals deserve to be held accountable, and because the just state clearly holds jurisdiction and authority over its combatants in a way that others do not, then the just state must hold its criminal combatants accountable. Otherwise, the wrongdoers would go unpunished. So as a matter of justice, the just state should hold them accountable.

But one might wonder, why shouldn't we think it within the just state's discretion whether to prosecute their troops? After all, that's what was argued regarding the prosecution of unjust leadership. In response, it should be pointed out that there's an important difference between not holding one's aggressor accountable on the one hand, and harboring and shielding suspected criminals employed by oneself on the other. Whereas the former seems to admit of discretion, the latter does not.

By arming and equipping men and women for war, states incur a special obligation to hold their soldiers individually responsible should they commit crimes while acting in the state's name. Because just combatants are deployed to fight on their state's behalf, when those combatants wrongly harm others, the just state has an obligation to the victims specifically – and to the international community more generally – to hold the perpetrators accountable. Individual soldiers are morally and criminally liable for their actions, and since they acted in their state's name, their state must hold them accountable for their individual wrongdoing.

But this solution is less than ideal. In the absence of a truly impartial international tribunal, there will always be concerns about partiality and leniency.

There's good reason for skepticism about whether just states will be keen to pursue their own soldiers. Unfortunately, this approach seems the best available – even though far from ideal. Should just states fail to hold their criminal soldiers accountable, those states are morally at fault.

7.4 Political Reconstruction

One final issue remains, and that's determining whether victorious just states have a postwar obligation to help defeated states in need of political reconstruction. In other words, in cases of toppled or collapsed aggressor regimes, what are the victor's responsibilities? Is politically reconstructing the defeated state an obligation?

Some theorists draw a soft line on this issue, suggesting that just war victors are *permitted* to politically rehabilitate their defeated adversaries in order to prevent future aggression.⁷⁹ But that's a prudential matter. My focus is not on what the just state is permitted to do, but rather what the just state is required to do.

There are, however, some commentators who draw a harder line on the issue and argue that victorious states are *obligated* to politically reconstruct their defeated foes in cases of defunct regimes. Gary Bass, for example, writes:

The defeat of a dictatorial regime will sometimes leave a population that wants political change but cannot by itself create a stable and peaceful political system. So the victors will have at least a right, and *perhaps an outright duty*, to assist in political ... reconstruction.⁸⁰

⁷⁹ Orend, *War and International Justice*, 225; Bass, "Jus Post Bellum," 412.

⁸⁰ Bass, "Jus Post Bellum," 403, my emphasis.

Note Bass's tentative conclusion that just victors *might* have an outright duty to politically reconstruct the defeated state. Walzer, on the other hand, is less tentative in declaring the victorious state's obligation:

Once immediate necessities are provided, the critical obligation of the invading and occupying forces is political reconstruction. ... It is a difficult obligation because what is required is the creation of a regime that can dispense with its creators – that can, literally, order them to leave. The goal of reconstruction is a sovereign state, legitimate in the eyes of its own citizens, and an equal member of the international society of states.⁸¹

Note also that whereas Bass says the victors must *assist* in political reconstruction, Walzer's language suggests the just state is critically obligated to *create* a new regime. So the question we need to consider is, what role – if any – must a just state perform during the aggressor state's transition to a new government?

7.4.1 Impartiality and Legitimacy, Revisited

As Walzer rightly points out in the quote above, political reconstruction raises concerns about both internal and external legitimacy. In the case of external legitimacy, the concern is that the just state will act in its own interests when reconstructing the vanquished state. The just state may, for example, install a self-serving puppet regime aimed at representing the just state's interests rather than the local populace's. Worse still, the resulting government might be viewed as illegitimate in the eyes of the world community.

Coady nicely captures this worry about political colonization by highlighting the Soviet political restructuring of East Germany following victory over the Nazi

⁸¹ Walzer, "The Aftermath of War," 44.

regime.⁸² Similarly, reflecting on the overthrow of Pol Pot's heinous regime, Walzer observes:

In Cambodia, the Vietnamese shut down the killing fields, which was certainly a good thing to do, but they then went on to set up a satellite government, keyed to their own interests, which never won legitimacy either within or outside of Cambodia and brought no closure to the country's internal conflicts.⁸³

Paul Robinson shares Walzer's judgment, noting, "We didn't want the Vietnamese government to rehabilitate Cambodia."⁸⁴ The concern expressed in these quotes is the same: victorious states cannot be trusted to politically reconstruct defeated states in an impartial manner. Too often, the temptations of imperialism – or at least of partiality – will be too great. And even if the victor state doesn't attempt to install its own quasi-satellite government, it may still act in other self-interested ways, such as funneling home lucrative government contracts (i.e., profiteering).⁸⁵

In addition to raising external legitimacy concerns, political reconstruction by the victorious state also raises internal legitimacy concerns, which is to say, how the defeated populace views its own political reconstruction. The key issue underlying this worry is the defeated populace's sovereignty. Although suspended during war, the defeated citizenry's sovereignty must be restored at war's end – or at least as soon as possible. Importantly, this includes their right to self-determination and political autonomy. Pursuant with these sovereignty rights, the just state should not unilaterally and independently seat a government, as Walzer

⁸² Coady, "The Just Post Bellum," 57, 62.

⁸³ Walzer, "The Triumph of Just War Theory," in *Arguing About War*," 19-20.

⁸⁴ Robinson, "Is There an Obligation to Rebuild?" 107.

⁸⁵ Evans, "Moral Responsibility and the Conflicting Demands," 150; Walzer, "Just and Unjust Occupations," 62; Bass, "*Jus Post Bellum*," 391, 408; Coady, "The Jus Post Bellum," 54.

seems to have suggested. Instead, Coady strikes the approach, suggesting the just state should aim “to contribute to an independent political life” for the defeated enemy.⁸⁶ Otherwise, they may view an externally installed regime as illegitimate.

7.4.2 International Political Reconstruction

These concerns about impartiality and legitimacy are similar to those previously discussed in the section about postwar accountability for crimes of aggression. So unsurprisingly, the best approach for allaying these concerns in the case of political reconstruction is the same as that advocated for regarding crimes of aggression: international community involvement.

The best way to ensure that the defeated state’s new government is legitimate in the eyes of both the international community and the vanquished state citizenry is to have the process conducted under the oversight of an impartial, international entity, most likely the U.N., but perhaps under a regional multinational organization as well, such as NATO or the African Union. Under the guidance and watchful eyes of a broad and impartial community, the defeated citizenry could install its own government – one considered both internally and externally legitimate.⁸⁷

So let’s suppose the international community does take the lead role in politically restructuring the vanquished state. If so, would any obligations fall specifically to the just state? Perhaps in cases where the just state is occupying the defeated state, one might think the just combatants would be obligated to provide

⁸⁶ Coady, “The Jus Post Bellum,” 56.

⁸⁷ This approach is embraced, among others, by Bellamy, “The Responsibilities of Victory,” 623; Lazar, “Skepticism about *Jus Post Bellum*,” 215; Bass, “Jus Post Bellum,” 403.

safety and security during the governmental transition. Yet as discussed (6.1.5), providing security is already a required function during occupation, so this isn't a new obligation in general. However, it's reasonable to think the just forces must take on additional obligations necessary to facilitate international oversight such as providing safe passage for committee staff members, as well as providing additional security during elections if the latter are held soon enough and prior to the just combatants' withdrawal. Beyond these two possible functions, it's difficult to see why the just state would be obligated to play any additional role.

Finally, we should ask what the victors' responsibilities might be should the international community choose not to be involved.⁸⁸ I think in this case, the simple but unattractive answer is: nothing. As previously argued, victorious states are not wedded to postwar situations indefinitely. There are time, expense, and danger limits to what's required of victims who defend themselves, both in individual- and national-defense situations. Just combatants should be required to make reasonable effort to help stabilize a defeated society and protect vulnerable people. Yet at some point, the just combatants will be justified in withdrawing. They are not obligated to stay for purposes of political reconstruction. Should the international community choose not to get involved at that point, the local citizenry must take up the responsibility to solve its own political problems in the wake of its state's disastrous war. That is part and parcel of what it means to be a sovereign people.

⁸⁸ As Gheciu and Welsh point out, historically the U.N. has lacked resolve on many operational issues. The U.N. also has a questionable track record when it comes to peace building efforts in war torn societies. See Alexandra Gheciu and Jennifer Welsh, "The Imperative to Rebuild: Assessing the Normative Case for Postconflict Reconstruction," *Ethics and International Affairs* 23, no. 2 (2009): 135-36.

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