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Proportionality and Necessity in Jus in Bello ⓐ

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Abstract and Keywords

In this chapter, the author explores the requirement of proportionality in the killing of civilians in war. The work first examines the general notion of proportionality in defensive harming. It then explores proportionality in the resort to war and explains why the traditional theory of just war claims that proportionality in individual acts of war must be different. The author argues that the traditional theory's claim is a mistake and that when a war lacks just aims, individual acts of harming can seldom be proportionate. Finally, the author considers proportionality as a constraint on violence in a war with just aims, claiming that, in some instances, judgments of proportionality in the conduct of war can be surprisingly precise, though much depends on assumptions about certain fundamental issues in moral theory, such as whether there is an 'agent-relative permission' to give some degree of priority to one's own life.

Keywords: proportionality, necessity in defence, jus in bello, jus ad bellum, just war, collateral damage, civilian immunity

1. Introduction

In the traditional theory of the just war, the requirements of proportionality and necessity appear twice, once among the principles governing the resort to war (*jus ad bellum*) and again among the principles governing the conduct of war (*jus in bello*). The theory insists, in other words, not only that a war itself be proportionate and necessary but also that each individual act of war be proportionate and necessary.

My topic in this chapter will be the *in bello* proportionality and necessity constraints. I will focus primarily on proportionality, offering a few remarks on necessity at the end. I

will begin by providing a general characterisation of the difference between proportionality and necessity. I will then, in Section 2, give a brief account of *ad bellum* proportionality, which will be essential for explaining why, in my view, the traditional accounts of *in bello* proportionality and necessity are mistaken—at least as a matter of morality, if not of law.

Whether an instance of defensive action (which we may take to include both wars and acts of war) is proportionate is a matter of the relation between the bad effects it causes and those it prevents. The assessment of proportionality thus requires a comparison between the bad effects (mainly harms to individuals) that the act will cause to occur with those that the act will prevent from being caused by others. If the bad effects the act will cause are not excessive in relation to those it will prevent, the act is proportionate. Comparisons with other means of defence or with acts with other aims are irrelevant to proportionality.

It is the necessity constraint that requires comparisons between an act of defence and alternative means of achieving the same defensive aim. In what is perhaps its most familiar formulation, the necessity constraint is that an act of defence is permissible only if there is no less harmful means of defence. I will explain in the final section why this and other common formulations of the necessity constraint are inadequate.

2. Proportionality in *Jus ad Bellum*

These brief characterisations of proportionality and necessity are considerable oversimplifications. Some of the complexities in the notion of proportionality emerge when we consider proportionality in the resort to war. *Ad bellum* proportionality weighs the harms that war inflicts against those it prevents but, according to the traditional theory of the just war, not all the harms inflicted count. To my knowledge, no traditional just war theorist has ever argued that the victims of an aggressive war might be morally prohibited from engaging in defensive war on the ground that their doing so would cause disproportionate harm to the aggressing combatants. They have assumed that all combatants are morally liable to any harms that might impair their ability to contribute to their side's war—that is, any harms at all—and that harms to which people are liable do not count in the assessment of proportionality. (They would not, until quite recently, have used the term 'liability', but would instead have said that all combatants are 'noninnocent' and that harms to the noninnocent do not count in the assessment of proportionality in war.) The only harms that might make war disproportionate, on this traditional view, are those inflicted on people who are not liable to them—that is,

noncombatants or civilians. Moreover, since the intentional harming of people who are not liable to be harmed is prohibited by the requirement of discrimination, proportionality is assumed to be concerned with harms inflicted on innocent civilians as a *side effect* of attacks on military targets (what is often referred to euphemistically as 'collateral damage'). A clear instance in which war could be disproportionate in this way would be if defensive war against unjust aggression had a high probability of escalation to nuclear war, which would kill millions or billions of people in countries not involved in the conflict.

The idea that harms to combatants do not count in the assessment of proportionality is, however, mistaken.[1] In most instances in which individual self-defence or defence of others is disproportionate outside the context of war, the explanation is not that the defensive action causes harm to innocent bystanders as a side effect but that it causes harm to the threatener that is excessive in relation to the threat he poses and thus exceeds the harm to which he is liable. But if defensive harm inflicted on threateners can be disproportionate outside the context of war, it can also be disproportionate in war. Although actual cases of this sort are rare, it is possible that there could be unjust wars with aims that would be so limited and comparatively trivial that none of the soldiers involved in their implementation would be liable to be killed, although they might be liable to certain lesser harms. More importantly, it can sometimes be known that certain soldiers on the unjust side are both morally innocent and almost certain not to make any significant contribution to their side's unjust war. It might be proportionate to capture such a soldier but disproportionate to kill him, unless he came to pose a significant threat in resisting capture.[2]

The foregoing remarks presuppose a distinction between two forms of proportionality—namely, what are often referred to as narrow and wide proportionality.[3] Narrow proportionality is a constraint on a liability justification for the infliction of harm. When a threatener is morally liable to harm that is inflicted on him, the harm is proportionate in the narrow sense. When the harm inflicted exceeds that to which he is liable, it is disproportionate in the narrow sense. Wide proportionality, by contrast, governs harms to which the victims are not liable. It is a constraint on a lesser-evil justification for the infliction of harm. The infliction of harm on a nonliable person can be justified in this way when inflicting it is necessary to prevent a substantially greater amount of harm from being suffered by others who are also not liable to that harm. When the infliction of harm on a nonliable person can be justified as the lesser evil, it is proportionate in the wide sense. When it exceeds what can be justified in this way, it is disproportionate in the wide sense. It is possible that harm that exceeds that to which a person is liable, and is thus disproportionate in the narrow sense, can nevertheless be justified as the lesser evil, and therefore be proportionate in the wide sense. (Although a lesser-evil justification is

concerned with consequences, impartially considered, it is nevertheless a nonconsequentialist form of justification. It recognises that there are deontological constraints on action but is acknowledged by non-absolutist deontologists as capable of overriding them.)

In war, there are liability justifications for the infliction of certain harms and lesser-evil justifications for the infliction of other harms. The standards of justification are different in these cases. Whereas a liability justification permits the infliction of harm greater than that which is prevented, a lesser-evil justification permits only the infliction of significantly less harm than that which is prevented. In other words, wide proportionality is a more stringent constraint than narrow proportionality. For this reason, among others, these two forms of proportionality must be kept distinct.

Having considered the harms that war might inflict, consider next those it might prevent. I say 'might' because one cannot, in advance of acting, have precise knowledge of what harms a war would cause or prevent. At most, one can have some information about probabilities, such as the probabilities that aggression will cause different forms and degrees of harm in the absence of defensive war, the probability that defensive war will succeed, the different probabilities that war will inflict different degrees of harm on innocent bystanders as a side effect, and so on. So, when it is said that proportionality depends on the amount of harm war would prevent, this could refer to the amount that it is *most likely* to prevent, the amount that it is *intended* to prevent, the amount that it *actually does* prevent, or the average of all the different harms it might prevent when each such harm is weighted for the probability of its occurrence.

It may be that more than one of these considerations is relevant. Suppose, for example, that the harm one reasonably expects to prevent is very great but the harm one in fact prevents is tiny, or that the harm one expects to inflict is tiny but the harm one actually inflicts is very great. When such divergences occur, it may be that different senses of proportionality are important for different reasons—for example, one depending on probabilities ('evidence-relative proportionality') and another based on what actually happens ('fact-relative proportionality').[4] I will not attempt to adjudicate among the various options here, although each has its advocates. I will instead follow custom and write as if it were known both what harms war would inflict and what harms it would prevent.

Thus far I have, for brevity of exposition, said that in the assessment of proportionality, what weighs against the harms that war inflicts are the *harms* it *prevents*. This is an oversimplification. In *ad bellum* proportionality, what mainly weighs against the harms war causes is the achievement of the just cause for war. Of course, since most just war is defensive in one way or another (national self-defence, defence of an ally, defence of

foreign citizens against their own government, and so on), the just cause normally consists in the prevention of harm or of the continuation of harm, which can include the removal of obstacles to the acquisition of benefits. But there are aims that can be a just cause for war other than the prevention of wrongful harm. These include the rectification of wrongs (for example, the recovery of territories or freedoms lost when earlier defensive action failed) and the prevention of effects that are bad only impersonally (for example, preventing a state from adopting a policy that would greatly lower the quality of life in the future but, because of the Non-Identity Problem, would not be worse for anyone who ever lives).[5] I will refer to good effects that are constitutive of the achievement of a just cause for war as 'just-cause goods'.

It is universally recognised that just-cause goods count in the assessment of *ad bellum* proportionality. Assuming that aggressing combatants are liable to attack, just-cause goods weigh against harms inflicted on them in the assessment of narrow proportionality. And they also weigh against harms inflicted on innocent bystanders as a side effect in wide proportionality. Indeed, the achievement of the same just-cause good can offset both harms to which combatants are liable and harms to which noncombatants are not liable—just as, in individual self-defence, the prevention of serious harm to an innocent victim can provide both a liability justification for harming the threatener as a means of defence and a lesser-evil justification for causing much lesser harm to an innocent bystander as a side effect.

Yet it is acknowledged by virtually all just war theorists, whatever their conception of just cause may be, that not all good effects that might be produced by war are just-cause goods.[6] In my view, only the prevention or rectification of a moral *wrong* (including, of course, the wrongful infliction of harm) can be a just cause for war. And even the prevention or rectification of a wrong can be a just cause only when those whom it is causally necessary to attack are liable to attack because of their responsibility for the wrong that is to be prevented or corrected. In short, a just cause for war is a liability justification for the resort to war, although there must also be a lesser-evil justification for the inevitable infliction of harms on people who are not liable to them.[7] (This is the account of just-cause goods that I favor. Some just war theorists accept that there could be a just cause for war even when some whom it would be necessary to attack as a means of achieving it would not be liable to attack. Some of these theorists claim that there could be a just cause even when it would be impermissible to pursue it because no one was liable to be attacked as a means of pursuing it.)

On this or any other plausible account of what can be a just cause for war, there are some good effects that a war might produce that would not be elements of the achievement of a just cause—for example, the exhilaration that some soldiers experience in combat. We can call such good effects 'non–just-cause goods'.

Suppose a country has no just cause for war but nevertheless goes to war to pursue aims that are unjust. One might wonder whether, if this war produces a range of non–just-cause goods as side effects, it could in principle be proportionate. But this question presupposes that the notion of proportionality is univocal, whereas the answer may be different depending on whether the question refers to narrow or wide proportionality. As regards narrow proportionality, the answer is 'no'. This is because, in the absence of a just cause, none of those who are attacked in the war is liable to attack, at least according to the account of just cause sketched earlier. According to that account, none of the harms inflicted can be proportionate in the narrow sense because no one is liable to them.

The answer in the case of wide proportionality is more difficult. One might think the question is irrelevant since the war is already ruled out as impermissible on the ground that its aims are unjust. Suppose, however, that the non–just-cause goods produced as a side effect are so extensive that, even though the war is intended to achieve unjust aims, there could be a lesser-evil justification for fighting the war as a means of producing those good effects. In that case, one might concede that the war is proportionate in the wide sense even if one believes it is impermissible because of its intended aims.

Suppose that a country that will not fight for unjust aims has a lesser-evil justification for fighting a war to produce non–just-cause goods. Because there is no just cause, this war requires attacking people who are not liable to attack; yet the harms it inflicts on them are morally outweighed by the prevention of much greater harms to other people who are also not liable to them. Because there is a lesser-evil justification for the harms inflicted in such a war, the war is proportionate in the wide sense. Because it lacks a just cause, this war is unjust. Yet it is morally justified. Although such wars are very rare, it seems that they are possible. Suppose, for example, that there is famine in one state. An adjacent state could mitigate or relieve the famine, but only at the cost of imposing great hardship—although not starvation—on its own people. Suppose it is therefore justified in refusing to help. It might nevertheless be justifiable for the state in which people are starving to use military force to seize food from the adjacent state.

Finally, in a war that has a just cause and does not pursue any aims other than those constitutive of the just cause, non–just-cause goods do not count in narrow proportionality but may count in wide proportionality.[8] Narrow proportionality is a constraint on a liability justification, and the justification for harming people as a means of achieving a just cause is a liability justification. Those responsible for the wrong to be prevented or rectified are liable to attack; otherwise, there is no just cause. Yet these people are not liable to attack as a means of producing non–just-cause goods. If they were, those good effects would be just-cause goods. To harm these people as a means of

producing non–just-cause goods in addition to just-cause goods would therefore be to harm them beyond their liability. It would be disproportionate in the narrow sense.

There might, however, be different justifications for inflicting different harms on the same person. There might, for example, be a liability justification for harming an unjust combatant as a means of pursuing the just cause and also a lesser-evil justification for harming him in another way as a side effect (or even, in extreme circumstances, as a means) of producing some non–just-cause good. (For completeness, it may be worth noting that there could be both a liability justification and a lesser-evil justification for inflicting the same harm on the same person, in which case the justification would be overdetermined.)

It is a familiar idea in just war theory that it can be permissible to harm an innocent civilian as a side effect of attacking a military target.[9] When this is permissible, the reason is most often that the harm is proportionate in the wide sense in relation to the contribution the attack makes to the achievement of the just cause. Yet it is also possible that, in a war intended to achieve a just cause, harm caused to innocent civilians as a side effect could also be offset by non–just-cause goods. Suppose that military action by the just side causes, as a side effect, some innocent civilians on the unjust side to suffer certain economic losses. Yet other military action by the just side causes civilians on the unjust side to receive certain economic benefits, again as a side effect. It seems that the economic losses can be offset in wide proportionality by the economic gains, even though the latter are non–just-cause goods.

If the victims and the beneficiaries are the same people, it may be that the harms can be offset by benefits of the same magnitude—that is, the benefits may not need to be greater than the harms for the infliction of the harms to be proportionate in the wide sense. Yet if, as is likely, the victims and the beneficiaries are different people, it seems that the lesser-evil standard applies—that is, that the harm to some may be offset only by a substantially greater benefit to others, even when the benefit consists in the prevention of harm.

3. Proportionality in *Jus in Bello*

In summary, there are three elements of traditional just war theory's view of *ad bellum* proportionality that are important for our purposes. First, the only form of proportionality in war is wide proportionality. Second, in a war with a just cause, harms to innocent civilians can be offset in wide proportionality both by just-cause goods and, in some instances, by non–just-cause goods. Third, because a war fought for aims that are unjust

is highly unlikely to achieve just-cause goods as a side effect (if any are even possible in the context) and because it is also highly unlikely to produce enough non–just-cause goods as a side effect to offset the inevitable harms to innocent people, it is virtually impossible for a war fought for unjust aims to be proportionate in the wide sense. Hence it seems that, in a war in which one side has a just cause and the other fights for unjust aims, only the just side's war can be proportionate.

But if the unjust side's war is inevitably disproportionate, it seems that many or most of the acts of war that together constitute that war must also be disproportionate. For if all the acts of war that together constitute one side's war were proportionate, that would seem to guarantee that the war as a whole must be proportionate. Yet traditional just war theory denies this. It maintains instead that it is possible for every act of war by combatants on the unjust side to satisfy the *in bello* proportionality constraint, even though their war itself is disproportionate.[10]

The explanation of how traditional just war theory can consistently claim that a war that is disproportionate can consist entirely of acts that are proportionate is that the theory presupposes that the good effects that can offset the harms caused to innocent civilians by individual acts of war are neither just-cause goods nor non–just-cause goods as ordinarily understood. Indeed, there is, according to the theory, only one good effect that weighs against the harms inflicted by any act of war in determining whether that act is proportionate: namely, military advantage.[11] In this matter, the traditional theory is in agreement with the law of war, which is quite explicit. The clearest statement of *in bello* proportionality in law is in Article 51(5) of Additional Protocol I of the 1977 Geneva Conventions, which prohibits any 'attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'.[12]

The problem with this restriction on the good effects that are allowed to count in wide *in bello* proportionality is that military advantage is in itself neither impartially good nor impartially bad. Whatever value it has is instrumental and depends on the value of whatever the military advantage is advantageous *for*. Military advantage is impartially good only when it is instrumental to the achievement of a just or at least morally justified aim. When forces pursuing unjust aims gain a military advantage, that is impartially *bad*.

A military advantage for the Nazis may, of course, be good *for the Nazis*, but that kind of relative good cannot weigh against or offset the infliction of harms on people who are not liable to them. Effects that are good only in this relative way, and not impartially, are irrelevant to proportionality. No one supposes, for example, that the benefits that a man derives from inheriting a fortune weigh against the harm of death in the determination of

whether his murdering his wealthy uncle is proportionate in the wide sense. It is not that the question of proportionality cannot arise in such a case, for there could in principle be a lesser-evil justification for the murder of his uncle. It is, rather, that the pure benefits he would gain from his uncle's death are irrelevant even in a lesser-evil justification. Only effects that are impartially good count in a lesser-evil justification for harming a nonliable person.

Given that there is this obvious objection to the idea that only military advantage weighs against harms inflicted on innocent civilians in *in bello* proportionality, one must wonder why both traditional just war theory and the law of war have embraced this idea. The explanation is that both are committed to the independence of *jus in bello* from *jus ad bellum*.[13] Whether a combatant acts permissibly in the conduct of war is independent of whether his war is just or unjust. An unjust combatant whose war lacks a just cause and who fights for aims that are unjust acts permissibly provided that he obeys the principles of *jus in bello*. But he can fight in obedience to those principles only if they are satisfiable in the absence of a just cause. Hence *in bello* proportionality cannot weigh unintended harms to civilians only against the contribution that an act of war makes to the achievement of a just cause because then no acts of war by unjust combatants could satisfy the *in bello* proportionality constraint. And it would be absurd to suppose that *in bello* proportionality can weigh harms inflicted on civilians against any impartially good effects *except* just-cause goods—that is, that the only good effects that *cannot* count in *in bello* proportionality are the only good effects that *can* count in justifying the resort to war.

Yet any understanding of *in bello* proportionality that allows just-cause goods to count along with other impartially good effects would give just combatants a moral advantage by making their acts of war more likely to be able to satisfy the *in bello* proportionality constraint than those by unjust combatants. Traditional just war theory and the law of war are, however, committed to the view that all combatants are moral and legal equals. Neither just nor unjust combatants are in a morally or legally advantaged position in the conduct of war.

The main reason for this is that both moral and legal theorists want to promulgate and inculcate principles that can, in practice, successfully constrain the action of combatants on both sides.[14] But because no principles, moral or legal, will prevent people from fighting unjust wars, there *will* be unjust combatants who *will* fight. When they do so, it is obviously desirable to motivate them to restrain their action in certain ways. Telling them that it is permissible for them to fight provided that they refrain from acting in certain ways may arguably be more effective in constraining their action than simply telling them

that all or virtually all of their acts of war are impermissible so that the only permissible course of action for them is to stop fighting.

One reason for this might be that most unjust combatants mistakenly believe that they are *just* combatants and thus, to the extent that they seek to abide by moral principles, will apply those principles to their own conduct on the assumption that the aims for which they perceive themselves to be fighting are just. In these circumstances, it may well be that they will exercise greater restraint if they think they must weigh the harms that their action might cause to civilians against the military advantage it might provide rather than against the contribution that they think the action would make to the achievement of an imagined just cause—because people may be less morally inhibited about causing harm to innocent people (that is, people who are not liable to any harm at all) when they believe they are serving the cause of justice.

Hence just war theorists and international lawyers have settled on military advantage as the one effect of military action against which harms caused to civilians are to be measured in the assessment of *in bello* proportionality. It is, in one sense, a natural measure of proportionality because it is the immediate aim of virtually all military action that harms civilians as a side effect. It also seems a neutral measure because, in general, it is no more available to just combatants than to unjust combatants. Yet military advantage is not in fact a neutral measure because it is only impartially good when it is gained by just combatants (or by combatants fighting in a war that is unjust but nevertheless morally justified because it is the lesser evil). When it is gained by combatants fighting for unjust aims, it is impartially bad and cannot, in the assessment of *in bello* proportionality, offset harms that those combatants may cause to civilians. It is not coherent to suppose that military action could be morally permissible despite causing harm to innocent civilians on the ground that the harm is offset by the fact that the action better enables the combatants who cause it to achieve unjust aims.

As a matter of morality, wide *in bello* proportionality has to weigh the harms that an act of war inflicts on people who are not liable to them against the act's impartially good effects—mainly the contribution the act makes to the achievement of a just cause, but also, in some instances, certain non–just-cause goods as well. It must, in other words, test whether harms to innocent civilians are proportionate in the same way that traditional just war theory requires in the determination of wide *ad bellum* proportionality. This means that what traditional just war theorists have been unwilling to say to unjust combatants is in fact true—namely, that most of their acts of war are morally impermissible. That these acts are impermissible may be overdetermined by a variety of considerations. But one reason they are generally impermissible is that, even if they are intended to attack only military targets, the harms they inflict on innocent civilians as a side effect are disproportionate in the wide sense because these acts have few or no

impartially good effects by which these harms could be offset. The harms cannot be justified on the ground that they are the lesser evil in the circumstances.

It may be that the consequences would be worse if combatants came to accept this understanding of wide *in bello* proportionality rather than the orthodox account that weighs harms inflicted against military advantage. But, even if that were so, it would be irrelevant to the truth of the view.

This leaves open the question of what the law of *in bello* proportionality ought to be. I can think of four options, although there may be others. One is for the law simply to restate the truth of morality.[15] The implication would be that, in general, only combatants who fight for just or justified aims can engage in acts of war that are proportionate. The exceptions would be acts of war by unjust combatants that would cause no harm to innocent civilians or that would produce sufficiently extensive non–just-cause goods as a side effect to justify the harms the acts would cause to civilians as the lesser evil.

The second option is to keep the law as it is while acknowledging, although perhaps rather quietly, that the legal measure of *in bello* proportionality has no moral significance in its application to unjust combatants. Once it is conceded that harms to innocent people cannot really be offset by a military advantage in the pursuit of unjust aims, a problem in the application of this view becomes conspicuous—namely, determining how great a military advantage would be necessary to provide legal justification for the killing of a certain number of innocent civilians. Any response to this problem must, at least in one important sense, be arbitrary in its application to combatants who fight for unjust aims.

The third option would avoid this latter problem. According to this third suggestion, *in bello* proportionality is a relation between the harm that military action would cause to innocent civilians and the harm that it would prevent the combatants who inflict it from suffering. For example, the killing of one civilian as a side effect might be proportionate if it were an unavoidable effect of saving the lives of two combatants. The attractions of this option are that the relevant effects are obviously commensurable and that it confines the relevant good and bad effects to the battlefield, making no reference to the ends for which the conflict is fought.

Finally, a fourth option is to assess what combatants might reasonably believe to be the just cause of their war and then to weigh the harms an act of war inflicts on innocent civilians against the contribution the act might make to the achievement of that aim. Suppose, for example, that combatants believe that their war's aim is to capture or destroy weapons of mass destruction that an enemy state is otherwise likely to use unjustly, when, in fact, the enemy state has no weapons of mass destruction. An act of war by these combatants might be proportionate in an evidence-relative sense if it *would*

have made a sufficiently significant contribution to preventing the enemy state from using weapons of mass destruction *if it had had them*.

In my view, none of these options is really viable. I have sought elsewhere to show why the third and fourth options are hopeless.[16] At present, the least bad of the possibilities is probably to keep the law as it is, if only because the law itself fails to provide reliable and authoritative guidance to combatants in determining whether they are fighting in a just and legal war or in an unjust and illegal war. If international legal institutions could provide such guidance, that might make it possible for the law to achieve closer congruence with morality.[17] The law might then acknowledge that any military action by unjust combatants that causes harm to civilians is highly likely to be disproportionate in the wide sense, so that any such action would be presumptively illegal. That it would be illegal need not entail that it would also be criminal and therefore punishable. But the law might hold that the more harm unjust combatants cause to innocent civilians in the course of military action, the more likely it is that their action will pass a threshold for criminal disproportionality. It is also possible that the notion of military advantage could have a role here because unjust combatants' disregard for the lives and well-being of civilians would be more egregious the greater the disparity between the harm an act of war inflicts and the military benefits it provides. It is worse, at least in one way, to sacrifice the lives of innocent people for the sake of trivial relative benefits than to sacrifice them for relative benefits of greater importance.[18]

4. *In Bello* Proportionality in Its Application to Just Combatants

Although what I claim is the correct account of wide *in bello* proportionality (as a matter of morality rather than law) may seem problematic in its application to acts of war by unjust combatants, it is intuitively highly plausible in its application to acts of war by just combatants who harm innocent civilians as a side effect. It implies that even if an act of war makes a contribution to the achievement of a just cause, and even if it is intended to do so, any harms it causes to innocent civilians are disproportionate unless there is a lesser-evil justification for inflicting them—that is, unless the harms to innocent people that the act prevents are substantially greater than those it causes. This proportionality standard presupposes the rejection of both absolutism and consequentialism. Unlike absolutism, it accepts that it can be permissible to inflict harm on innocent people, even intentionally—although it is generally assumed that, to justify harming innocent people as an intended means of preventing harm to others, the harm prevented must be greater

than the harm it would be necessary to prevent to justify the infliction of the same harm on innocent people as a side effect. But it also insists, contrary to traditional consequentialism, that it is insufficient to justify an act that inflicts harm on innocent people that the act would prevent more harm to innocent people than it would cause. The harm prevented must instead be substantially greater.

Skeptics about proportionality often object that although one can make such claims about comparisons between harms inflicted and harms prevented in the abstract, the necessary comparisons are almost impossibly difficult to make in the context of war, not just because of epistemic problems but also because the relevant effects of different types are only very imprecisely comparable. This is clearly true in many cases—for example, when one has to weigh the killing or wounding of a large number of innocent people as a side effect against the preservation of certain political freedoms of a much larger number of innocent people. Yet there are cases in which the harms inflicted and those averted are of the same type or types. In these cases, it is possible to make surprisingly precise judgments about wide *in bello* proportionality.[19]

The various invasions of Gaza by Israel in recent years are good examples of this. In each instance, the justification that the Israeli government offered was that the invasions were necessary to prevent Palestinian militants from killing Israeli civilians. The proportionality calculus therefore required a comparison between the number of innocent Palestinian civilians killed as a side effect and the number of innocent Israeli civilians prevented from being killed. (The Gaza wars raise a special issue of *ad bellum* necessity. Preventing the killing of innocent Israeli civilians is a just cause for war but can justify the resort to war only if there is no morally better means of addressing the terrorist threat. It is arguable that there is an alternative means that is both less harmful and, in the long term, far more effective than war—namely, responding appropriately to the Palestinians' legitimate grievances, which would require, among other things, allowing them to have a state in the territories that Israel currently occupies. This option does not, I think, require the Israelis to sacrifice anything to which they are morally entitled. I will, however, put this issue aside in the following discussion.)

The best way to think about wide *in bello* proportionality in wars in which the just cause is simply the prevention of the wrongful killing of innocent civilians is to consider our beliefs about parallel issues in the morality of individual self- and other-defence. It is generally agreed that the most common justification for self-defensive harming is a liability justification—that is, a justification that appeals to the fact that a threatener has made himself morally liable to be harmed by virtue of his responsibility for threat of wrongful harm to another.[20] Because this form of justification is agent-neutral, it seems that the amount of harm it permits a third party to cause to innocent bystanders as a side effect of defending another person is the same as the amount that that person is justified

in causing as a side effect of self-defence. Yet there may be other justifications for defensive action that apply in some cases that have different implications for 'other-defence' by third parties. According to one such view, which I will discuss below, third parties may not be permitted to cause as much harm to innocent bystanders as a side effect of defending another person as that person is permitted cause in self-defence. And there is another view according to which at least certain third parties may be permitted to cause more harm to innocent bystanders as a side effect of defending another person than that person is permitted to cause in self-defence.

Suppose that Victim will be wrongly killed by Threatener unless she acts in self-defence. Assume that Threatener is morally liable to whatever Victim must do to him to eliminate the threat he poses. There are, however, innocent bystanders present, and Victim's only effective means of defence will kill some of them as a side effect. People's intuitions about how many bystanders Victim may permissibly kill as a side effect of defending herself differ. Some people, myself included, believe that it is not permissible for her to kill any, even as a side effect rather than as a means of saving her own life.[21] One reason some of us believe this is that we think the moral reason not to kill an innocent person is in general stronger than the moral reason to save an innocent person's life. The choice that Victim must make is between killing an innocent person (Bystander), thereby saving an innocent person (herself), and allowing that innocent person to be killed. If the reason not to kill is stronger than the reason to save, the presumption is that Victim ought not to kill Bystander as a side effect of saving herself. This is certainly true of defence by a third party. Suppose that Victim is unable to defend herself but that Third Party, who is not specially related to any of the others, can effectively defend her, although only by killing Bystander as a side effect. It seems clear that this would be wrong. Or, suppose again that Victim can act in self-defence but that Third Party can, without directly harming her, prevent her from doing so, thereby preventing her from killing Bystander. It is arguable that it is permissible, and perhaps even required, for Third Party to do this, even though it would result in Victim's being killed by Threatener.

Some philosophers have argued, however, that self-defence is morally different from defence by a third party in that each person has an 'agent-relative permission' to give some degree of priority to her own life over that of another equally innocent person. These philosophers have appealed to the claim that people have an agent-relative permission in an effort to explain the permissibility of killing a nonresponsible threatener in self-defence.[22] Because such a person is wholly nonresponsible for the threat he poses, it is difficult to defend the claim that he is morally liable to be killed. Yet, unless he is killed, he will kill another equally nonresponsible and nonliable person. If the potential victim has an agent-relative permission, it could explain and justify the common view that it is permissible for her to kill the nonresponsible threatener in self-defence. But if there

can be an agent-relative permission to kill a nonliable person as a *means* of self-defence, it seems that there must also be an agent-relative permission to kill a nonliable person as a *side effect* of self-defence.[23]

Almost everyone accepts that there is an agent-relative permission to save oneself rather than save two other people to whom one is unrelated. It is more controversial, however, to suppose that there can be such a permission to *kill* a wholly innocent or nonliable person in the course of saving one's own life. And it is, of course, even more controversial to suppose that there might be an agent-relative permission to kill two, or three, innocent bystanders as a side effect of saving oneself. Defenders of the agent-relative permission recognise that its scope is limited. Few, I suspect, would defend the claim that each person has an agent-relative permission to kill more than two innocent bystanders as a side effect of saving her own life, whether in self-defence or self-preservation.

One question that arises here is whether, if a person does have an agent-relative permission to kill an innocent bystander as a side effect of self-preservative action, that permission can be transferred to a third party who might then act on the person's behalf. Suppose that Victim has an agent-relative permission to kill Bystander as a side effect of defending herself against Threatener but is unable to defend herself. She hires Bodyguard to protect her. In doing so, does she effectively transfer her agent-relative permission to Bodyguard, so that he, acting as her agent, is permitted to kill Bystander as a side effect of preventing Threatener from killing her? There is a case for thinking that the permission is genuinely *agent*-relative and thus cannot extend to anyone else.[24] But I will not take a position on this question here.

There is another way, though, to defend the view that at least *some* third parties may be permitted to do in defence of an innocent victim as much as the victim is agent-relatively permitted to do in her own defence. This is to appeal to the duties and permissions that people have to protect the well-being of certain people to whom they are specially related in certain ways.[25] Perhaps the morally most significant special relation is the parent–child relation. Because of the moral significance of the relation, parents have special duties to protect the well-being of their children. Suppose again that Victim has an agent-relative permission to kill Bystander as a side effect of defending herself against Threatener but is unable to defend herself. If Third Party is Victim's parent, his special duty to protect her may make it permissible for him to do as much in her defence as she is agent-relatively permitted to do. It may, for example, be permissible for him to kill Bystander as a side effect of defending Victim. Indeed, it might be that certain special relations, such as the parent–child relation, are morally *more* significant than self-identity or the difference between self and others. On that assumption, it might, in principle, be permissible for Victim's parent to cause more harm to innocent bystanders in defending Victim than she

would be permitted to cause in her own defence. It might be, for example, that she has an agent-relative permission to kill at most one innocent bystander as a side effect, whereas her parent is permitted to kill two.

These views about what potential victims and third parties are permitted to do might combine in various ways. Some of the possibilities are:

1. Individuals have no agent-relative permission and no third party may cause more harm to innocent bystanders as a side effect of defending a potential victim than the victim is permitted to cause in self-defence.

2. Individuals have no agent-relative permission, but a third party who is specially related to a potential victim is permitted to cause more harm to innocent bystanders as a side effect of defending the victim than the victim is permitted to cause in self-defence.

3. Individuals have an agent-relative permission, but it cannot be transferred to a third party and no specially related third party is permitted to cause more harm to innocent bystanders as a side effect of defending a potential victim than the victim would be permitted to cause in self-defence *if she had no agent-relative permission*.

4. Individuals have an agent-relative permission that can be transferred to a third party, and a specially related third party may cause as much harm to innocent bystanders as a side effect of defending a potential victim as the potential victim is agent-relatively permitted to cause.

5. Individuals have an agent-relative permission that can be transferred, and a specially related third party may cause *even more* harm to innocent bystanders in defending a potential victim than the victim is agent-relatively permitted to cause.

These do not exhaust the possibilities, but they are sufficient for our purposes.

The application of these views to *in bello* proportionality in wars such as those in Gaza is not entirely straightforward. Our question is how much harm combatants whose just cause is to prevent innocent civilians on their own side from being killed may inflict as a side effect on innocent civilians on the unjust side. *If* people have an agent-relative permission and *if* it can be transferred to a third party defender, we can assume that civilians transfer their agent-relative permission to the soldiers whose job it is defend them. But even though soldiers are specially related through co-citizenship to the civilians they defend, and even though some special relations may make it permissible for third parties to do in 'other-defence' as much as or more than potential victims are permitted (whether agent-relatively or not) to do in self-defence, co-citizenship does not seem to be a very significant special relation. Certainly, it is substantially less significant than the parent–child relation, which I used to illustrate the point that special relations can be a factor in the permissibility of third-party defence.

One question here is whether the moral effect of a transferred agent-relative permission (assuming there are such) and the moral effect of a special relation are additive. I will assume that they are. It is not unreasonable to suppose, for example, that soldiers who are defending the inhabitants of their home town are permitted to cause more harm to innocent civilians as a side effect of defending their friends and neighbors than foreign mercenaries would be permitted to cause.

The other important question is whether mere co-citizenship is a sufficiently important special relation to make any difference to how much harm soldiers are permitted to cause to innocent civilians as a side effect of defending their civilian co-citizens. My own view is that whereas co-citizenship is highly important for certain distributional issues involving institutions (such as the provision of free health care and education for some but not others), it is largely irrelevant to the weight that unintended killings of innocent people have in *in bello* proportionality. Let n be the minimum number of innocent people to whom a person is related by co-citizenship that it is permissible for that person to save at the cost of killing one innocent non-citizen as a side effect. I find it implausible to suppose that it is not permissible, other things being equal, for that same person to save n non-citizens at the cost of killing one innocent non-citizen as a side effect—that is, that the number of non-citizens saved would have to be greater than n to justify killing a non-citizen as a side effect. But this is, of course, controversial.

We can now consider the issue of wide *in bello* proportionality on the basis of assumptions we have considered—both those that are most permissive and those that are most restrictive. The most permissive assumptions are (1) that individuals have an agent-relative permission to give some priority to their own life, (2) that this makes it permissible for them to kill up to two innocent bystanders as an unavoidable side effect of saving their own life, (3) that the agent-relative permission is transferrable to third parties, (4) that soldiers are recipients of their fellow citizens' agent-relative permissions, and (5) that the relation of co-citizenship is sufficiently important to make it permissible for them to kill more innocent bystanders as a side effect of defending the life of a fellow citizen than that citizen is permitted to kill as a side effect of self-defence. Assumptions 1–4 imply that it is permissible for a soldier to kill up to two innocent civilians as a side effect of preventing the killing of one civilian fellow citizen. And we can suppose that assumption 5 implies that it can be permissible for a soldier to kill as many as three innocent enemy civilians as a side effect of saving one civilian fellow citizen. On the basis of these permissive assumptions, one can conclude that an act of war by a just combatant that kills three innocent civilians must save the life of at least one of the combatant's civilian fellow citizens to be proportionate.

It is usually, of course, impossible to make such fine-grained judgments about the effects of a single act of war. In the most recent Gaza war, for example, the presumed saving of

the lives of Israeli civilians came not from the elimination of specific threats to specific individuals but from the combined effects of Israeli military action in destroying missile launchers and tunnels and killing Hamas militants. In such a war fought to prevent the killing of innocent civilians, judgments of *in bello* proportionality may therefore, in general, be best derived from the most objective possible judgment of *ad bellum* proportionality made after the war has concluded. If the war has killed $3n$ civilians but can be reliably judged to have saved more than n innocent civilians on the just side, the war can be judged to have been proportionate according to the permissive assumptions stated earlier. And one can presume on that basis that most individual acts constitutive of the war were proportionate as well. Only if some act of war killed civilians but made little or no contribution to the overall strategy for protecting civilians could it be singled out as objectively or fact-relatively disproportionate. (Some acts of war can be disproportionate even when the war as a whole is proportionate because other acts of war often produce 'surplus' good effects beyond what is necessary to render them proportionate.)

According to the permissive assumptions, then, in a war whose just cause is the prevention of the killing of innocent civilians, an act of war, to be proportionate, must save one civilian for every three it kills as a side effect. Consider now the most restrictive and, to my mind, more plausible assumptions. These are (1) that individuals have no agent-relative permission to give priority to their own life over that of another innocent person when doing so would involve killing, (2) that it is therefore not permissible for a person to defend or save her own life when that would unavoidably involve killing one or more innocent bystanders as a side effect, and (3) the relation of co-citizenship is insufficiently significant to make it permissible for soldiers to cause more harm to enemy civilians as a side effect of defending one of their civilian fellow citizens than that person is permitted to cause as a side effect of defending herself. According to these assumptions, soldiers on the just side are not permitted to kill even one innocent enemy civilian as a side effect of saving one of their civilian fellow citizens.

There is, of course, *some* number of their civilian fellow citizens that it would be proportionate for soldiers to save at the cost of killing one innocent enemy civilian as a side effect. We might refer to a highly familiar thought experiment for guidance here—namely, the Trolley Problem. In this example, a runaway trolley is headed for five innocent people who are trapped on the track. A bystander can divert it onto a branch track where one innocent person is trapped. Most people intuitively believe that it is permissible to divert the trolley, killing one as a side effect of saving five. The many philosophers who have used this example or one of the many variants in their work have presumably retained the original number of five people on the main track because that is the lowest number that people can be expected to accept as sufficient to justify the killing

of one innocent bystander as a side effect. If the number of people who could be saved were reduced to four, or to three, presumably significantly fewer people would accept that it would be permissible to kill one innocent person as a side effect of saving them. If this speculation is correct, it suggests that common sense moral thought accepts that the constraint against killing an innocent person, even as a side effect, can be overridden only when the killing is necessary to save five or more innocent people. Indeed, many people think that it is necessary to the permissibility of killing the one in the Trolley case that the killing occurs through the redirection of a preexisting threat rather than through the creation of a new threat.[26] They think that if those on the main track could be saved only by detonating a bomb that would both destroy the trolley and kill an innocent bystander, more than five would have to be saved to make it permissible to detonate the bomb. Since most 'collateral' killings of innocent civilians in war occur as a result of the creation of new threats, consideration of the Trolley Problem suggests that many people's intuitions seem to commit them to the view that it can be proportionate for a just combatant to kill an innocent civilian on the unjust side only if doing so would be a side effect of the saving of *six or more* innocent civilians on his own side. This will no doubt strike many people as excessively restrictive. But they then face the challenge of reconciling a more permissive view with common intuitions about the Trolley Problem.

These claims about wide *in bello* proportionality presuppose that the standard of proportionality in war is the same as the standard of proportionality in individual self- and other-defence. Yet many people believe, to the contrary, that wide proportionality in war is substantially less stringent than wide proportionality in private defence or even in law enforcement. Although I cannot argue for this here, I have argued elsewhere that it is a mistake to suppose that the moral principles governing killing in war are any different from those governing killing outside the context of war.[27] The moral justifications for killing are the same in war as in other contexts, and the constraints on those justifications are the same as well. No new moral principles come into effect in conditions of war, and the standard of proportionality in killing does not change.

There is obviously much more to be said about *in bello* proportionality than there is space to say here. Another dimension of wide proportionality that I have not discussed is the extent to which the prevention of harm to just combatants counts among the good effects against which the killing of innocent civilians as a side effect weighs in the determination of proportionality. I will offer only a couple of remarks on this issue.

One might think that, when just combatants fight only for a just cause and only by permissible means, they do nothing to make themselves liable to be harmed, so that the prevention of harms to them must count the same in wide proportionality as the prevention of equivalent harms to innocent civilians. But it also seems that, when they become soldiers, they accept a professional role that comes with duties to accept risks to

themselves as a means of avoiding harming innocent bystanders in the course of fulfilling their other duties, such as their duty to protect their civilian fellow citizens.[28] It is thus possible that harms to just combatants have somewhat less weight in wide proportionality than equivalent harms to innocent civilians. The duty to accept risks may, however, be to some extent offset by the fact that self-defence by just combatants is instrumental to the fulfillment of their duty to protect their fellow citizens.

There is, however, another reason for doubting that the prevention of harms to just combatants can always offset harms these combatants would otherwise cause as a side effect to civilians. When civilians are threatened with being wrongly killed, there is a limit to the amount of harm that it can be proportionate to inflict on innocent bystanders as a side effect of preventing the killings. But when soldiers intervene to save the threatened civilians at some risk to themselves, they thereby increase the overall amount of harm that the unjust side will try to inflict on innocent people (as they are themselves innocent in the relevant sense). We can ask whether their decision to put themselves at risk can increase the amount of harm they may permissibly cause to innocent bystanders relative to what it would be if they could intervene in complete safety.

Suppose, for example, that just combatants can save 100 of their civilian fellow citizens but only in a way that will kill 20 innocent enemy civilians as a side effect, which we can stipulate is the maximum number it is proportionate for them to kill (that is, it is proportionate to kill an innocent bystander as a side effect of saving five other innocent people but not as a side effect of saving fewer than five). If the just combatants intervene to save the hundred, however, ten of them will be killed by unjust combatants unless they engage in self-defensive action that will kill two more innocent enemy civilians as a side effect. It may seem that, if they intervene, they will then be preventing 110 innocent people from being wrongly killed, so that their killing 22 innocent bystanders as a side effect will be proportionate (since they save five for everyone one they kill as a side effect). But this, I think, is a mistake. The only people who are initially at risk are the 100 innocent civilians. If the just combatants expose themselves to risk as a means of saving the 100 and then kill two innocent bystanders as a side effect of averting the risk to which they have exposed themselves, they will in effect have killed 22 innocent civilians as a side effect of pursuing their means of saving the 100. And killing 22 as a side effect of saving 100 is, by our earlier stipulation, disproportionate. In the circumstances, therefore, the just combatants ought not to intervene to save the 100 unless they are willing to allow ten among themselves to be killed in the course of doing so.[29]

Suppose, however, that the same just combatants are epistemically justified in believing that they can save the 100 civilians in a way that will unavoidably kill the 20 enemy civilians as a side effect but without exposing themselves to any risk of being killed. They therefore undertake what they reasonably believe will be a proportionate rescue mission.

But well into the mission they are ambushed in a way that they could not have foreseen. Ten of them will be killed unless they engage in defensive action that will kill two enemy civilians as a side effect. Whether or not they engage in self-defense, they, or the survivors among them, will still be able to save the 100 at the cost of killing 20. It may seem that what I have argued implies that they must not engage in defensive action, thus allowing ten of their number to be killed. But in fact I think that in *these* circumstances, it is permissible for them to save the ten at the cost of killing the two. This is because assessments of proportionality must always be entirely prospective. The choice they must make now is not whether to save the 100 at the cost of killing 20 *and* making it the case that ten others will be killed unless they kill two more. Rather, their choice is simply whether to save ten innocent people at the cost of killing two others as a side effect, which we have stipulated is proportionate.[30]

5. *In Bello* Necessity

I will conclude with a very brief discussion of *in bello* necessity.[31] It is often thought that what this principle says is that an act of war is permissible only if there is no less harmful means of achieving the same aim (which, for purposes of discussion, we can assume is a defensive aim). There are, however, two problems with this formulation of the necessity constraint. One is that it fails to distinguish between harms inflicted on those who are liable to those harms and harms inflicted on those who are not liable to them. Suppose, for example, that there are two ways that just combatants can prevent ten innocent people from being wrongly killed. One is to kill the two unjust combatants who are culpably attempting to kill the ten. The other is to incapacitate the two unjust combatants without harming them, although that will unavoidably kill an innocent bystander as a side effect. Assume that both options are proportionate. Although the second would cause less harm, it would clearly be wrong to choose it rather than the first.

The second problem is that this formulation of the necessity constraint fails to take account of the fact that different means of defence may have different probabilities of success. Suppose that just combatants have two possible means of trying to prevent the wrongful killing of 100 civilians. These means are mutually exclusive in the sense that pursing one is certain to provoke the enemy to make the other impossible. The first of these means would be certain to save 100 innocent civilians but would also be certain to kill one innocent bystander as a side effect. The other would have an 80 per cent probability of successfully defending the 100 civilians but would not kill any innocent bystander. While the first means would cause more harm—harm, moreover, that would be inflicted on someone who would not be liable to it—its significantly greater probability of

success shields it from the charge of causing unnecessary harm because the harm it would cause is an unavoidable concomitant of its greater probability of success.

A more plausible formulation of the necessity constraint, which also frequently appears in the just war literature, explicitly takes account of the probability of success. According to this view, an act of war is permissible only if there is no alternative act of war that (1) would have an equal or higher probability of achieving the same aim or another equally important aim and (2) whose bad effects would be less bad, taking into account both considerations of liability and considerations of agency (such as the distinction between harming as a means and harming as a side effect).

Yet this understanding of the necessity constraint is also unacceptable. Suppose again that just combatants have two mutually exclusive means of attempting to prevent 100 innocent civilians from being wrongly killed by unjust combatants. The first would require killing ten unjust combatants and would have a 99 per cent probability of successfully defending the lives of the 100 civilians. The second would have a 100 percent probability of saving the 100 civilians, would not involve harming or killing any unjust combatants, but would kill two innocent bystanders as a side effect. Assume that both these options are proportionate (the first in the narrow sense and the second in the wide sense). The only ground for choosing between them is necessity. According to the second interpretation of the necessity constraint, the second option is necessary because there is no other option that promises to be as effective in achieving the just defensive aim. One might say, echoing what I said earlier, that the harm to the two innocent bystanders is necessary because it is an unavoidable concomitant of the second option's greater probability of success.

It seems clear, however, that the first option is morally better than the second. Although the first option has a slightly lower probability of saving the 100 civilians, and even though it would kill more people, and even though it would kill them as an intended means rather than as a side effect, it is morally better because its slightly lower probability of success is outweighed by the fact that it would not inflict any harms to which the victims were not liable, whereas the second option would kill two people who are not liable to any harm. In cases such as this, in which neither option would involve greater cost to the agents than the other, it would be perverse for the necessity constraint to rule out the morally better option. And the morally better option is not necessarily the one that has the highest probability of successfully achieving the just aim. Rather, an act's probability of success must be weighed against the harms the act would inflict on victims who would not be liable to those harms.

I suspect that many people have been misled by the thought that the *necessity* condition must permit whatever means is *necessary* for the achievement of a just aim, where a

means is understood to be necessary, even if it is not certain to achieve the aim, if it has a higher probability of achieving the aim than any other possible means. But necessity cannot plausibly be understood in this way, as the example just considered shows. It has to be sensitive to tradeoffs between the harm prevented and the harm caused, even when the harms that might be caused by alternative means would all be proportionate. Leaving aside considerations of cost to the agent, what the necessity constraint requires is that one choose, from among the proportionate defensive options, the one that is overall morally best. This is what we would naturally expect in the moral constraint on defensive harming that requires comparisons among different possible means of defence.

Like the wide principle of *in bello* proportionality, this more complex principle of necessity cannot be coherently applied to many acts of war conducted by unjust combatants. This is because one cannot coherently trade off the probability of success in achieving unjust aims against harms to which the victims are not liable. There are, however, certain rather simple cases in which a crude form of necessity constraint applies to the action of unjust combatants. If, for example, unjust combatants have two options for the achievement of a military aim and each has an equal probability of success but one would cause more harm to innocent bystanders than the other, it is a genuine moral requirement that *if* the unjust combatants are going to do wrong by pursuing one of these options, they *ought* to choose the one that would cause less harm to innocent bystanders. This is an implication of the simple requirement, which is a form of necessity requirement, never to cause harm wholly wantonly or gratuitously.

Acknowledgements

Notes:

([1]) Compare Gabriella Blum, 'The Dispensable Lives of Soldiers', *Journal of Legal Analysis* 2 (2010), 115–170.

([2]) Jeff McMahan, 'What Rights May Be Defended by Means of War?' in *The Morality of Defensive War*, edited by Cécile Fabre and Seth Lazar (Oxford: Oxford University Press, 2014).

(^{3}) See Jeff McMahan, *Killing in War* (Oxford: Clarendon Press, 2009), 20–24.

(^{4}) I briefly explore this possibility in a review of Helen Frowe's book, *Defensive Killing*, forthcoming in *Ethics*. My thinking about the relevance of probabilities to proportionality has been greatly influenced by unpublished work by Patrick Tomlin.

(^{5}) The relevance to the morality of war of effects that are comparatively bad but not worse for any particular people is the topic of work in progress by Michael Robillard. On the Non-Identity Problem, see Derek Parfit, *Reasons and Persons* (Oxford: Oxford University Press, 1984), part 4.

(^{6}) See, for example, Jeff McMahan and Robert McKim, 'The Just War and the Gulf War', *Canadian Journal of Philosophy* 23 (1993), 501–541; Thomas Hurka, 'Proportionality in the Morality of War', *Philosophy and Public Affairs* 33 (2005), 34–66; and Kamm, *Ethics for Enemies*, chapter 3.

(^{7}) Jeff McMahan, 'Proportionality and Just Cause: A Comment on Kamm', *Journal of Moral Philosophy* 11 (2014), 428–453.

(^{8}) This implicitly repudiates the position for which I argued in 'Just Cause for War', *Ethics and International Affairs* 19 (2005), 1–21. That article was written before I came to understand the importance of distinguishing between narrow and wide proportionality.

(^{9}) Just war theory has, for many centuries, generally assumed that it makes a difference to the permissibility of harming innocent people that the harm is a side effect rather than an intended means. This assumption has recently been forcefully challenged. For one influential challenge, see Judith Jarvis Thomson, 'Self-Defense', *Philosophy and Public Affairs* 20 (1991), 283–310, esp. 289–296.

(^{10}) In an as-yet-unpublished paper ('Proportionality in War: A Surprising Finding'), Patrick Tomlin ingeniously demonstrates that in a war in which the harms necessary for victory are overdetermined, it could be that every act of war is proportionate while the war as a whole is disproportionate. This would not, however, be for the reasons given by traditional just war theory. He also shows that, granting certain widely accepted assumptions in population ethics, it is possible that there could be a war in which every act of war is disproportionate but the war as a whole is proportionate. Again, however, this would not be for reasons deriving from traditional just war theory.

(^{11}) See Shue's chapter, in this volume. The assumption that harms to civilians must be weighed against military advantage is found in discussions in moral philosophy in which issues in the morality of war are merely illustrative. See, for example, T. M. Scanlon,

Moral Dimensions: Permissibility, Meaning, Blame (Cambridge, MA: Harvard University Press, 2008), 28–32.

([12]) '1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts', in *Documents on the Laws of War*, edited by Adam Roberts and Richard Guelff (Oxford: Oxford University Press, 1982), 416.

([13]) As Michael Walzer puts it, judgments about *jus ad bellum* and judgments about *jus in bello* 'are logically independent'. Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977), 21. For further discussion, see the essays in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, edited by David Rodin and Henry Shue (New York: Oxford University Press, 2008).

([14]) See, for example, Henry Shue, 'Do We Need a "Morality of War"?', in *Just and Unjust Warriors*, edited by Rodin and Shue; and Janina Dill and Henry Shue, 'Limiting the Killing in War: Military Necessity and the St. Petersburg Assumption', *Ethics and International Affairs* 26 (2012), 311–333.

([15]) See David Rodin, 'Morality and Law in War', in Hew Strachan and Sibylle Scheipers, eds., *The Changing Character of War* (Oxford: Oxford University Press, 2011).

([16]) Jeff McMahan, 'War Crimes and Immoral Action in War', in *The Constitution of Criminal Law* edited by Antony Duff et al. (Oxford: Oxford University Press, 2013), 181–183.

([17]) See Jeff McMahan, 'The Prevention of Unjust Wars', in *Reading Walzer*, edited by Yitzhak Benbaji and Naomi Sussman (London: Routledge, 2013).

([18]) Two theorists who have been developing suggestions along these lines are Adil Haque and Seth Lazar. See Haque, *Law and Morality at War* (Oxford: Oxford University Press, forthcoming) and Lazar, *Sparing Civilians* (Oxford: Oxford University Press, 2015).

([19]) In the following paragraphs, I draw on some ideas that appear in Jeff McMahan, 'Gaza: Is Israel Fighting a Just War?' *Prospect Magazine* online (5 August 2014). Available at http://www.prospectmagazine.co.uk/philosophy/gaza-is-israel-and-hamass-conflict-a-just-war

([20]) See, for example, Jonathan Quong, 'Liability to Defensive Harm', *Philosophy and Public Affairs* 40 (2012), 45–77; and Helen Frowe, *Defensive Killing* (Oxford: Oxford University Press, 2014).

(^{21}) Thomson, 'Self-Defense'; and Michael Otsuka, 'Killing the Innocent in Self-Defense', *Philosophy and Public Affairs* 23 (1994), 74–94.

(^{22}) Nancy Davis, 'Abortion and Self-Defense', *Philosophy and Public Affairs* 13 (1984), 175–207; and Jonathan Quong, 'Killing in Self-Defense', *Ethics* 119 (2009), 507–537.

(^{23}) For discussion, see Jeff McMahan, 'Self-Defense Against Justified Threateners', in *How We Fight: Ethics in War*, edited by Helen Frowe and Gerald Lang (Oxford: Oxford University Press, 2014), 104–137.

(^{24}) Jonathan Quong, 'Agent-Relative Prerogatives to Do Harm', *Criminal Law and Philosophy* (forthcoming); Seth Lazar, 'Associative Duties and the Ethics of Killing', *Journal of Practical Ethics* 1 (2013), 3–48; and Seth Lazar, 'Authorization and the Morality of War', *Australasian Journal of Philosophy* (forthcoming, 2015).

(^{25}) Jeff McMahan, *The Ethics of Killing: Problems at the Margins of Life* (New York: Oxford University Press, 2002), 217–228. For a discussion of the relevance of special relations to the morality of war, see Lazar, 'Associative Duties and the Ethics of Killing'.

(^{26}) Judith Jarvis Thomson, 'The Trolley Problem', *Yale Law Journal* 94 (1985), 1395–1415.

(^{27}) Jeff McMahan, 'Rethinking the 'Just War', Part 2', *New York Times Opinionator* (November 12, 2012). Available at http://opinionator.blogs.nytimes.com/2012/11/12/rethinking-the-just-war-part-2/?_r=0

(^{28}) For discussion, see Jeff McMahan, 'The Just Distribution of Harm Between Combatants and Noncombatants', *Philosophy and Public Affairs* 38 (2010), 366–369; and Gerhard Øverland, 'High Fliers: Who Should Bear the Risk of Humanitarian Intervention?', in *New Wars and New Soldiers: Military Ethics in the Contemporary World*, edited by Paolo Tripodi and Jessica Wolfendale (Farnham, Surry: Ashgate, 2011).

(^{29}) For a further dimension of the problem that I cannot discuss here, see Gerhard Øverland, 'Moral Obstacles: An Alternative to the Doctrine of Double Effect', *Ethics* 124 (2014), 481–506; and Alec Walen, 'Transcending the Means Principle', *Law and Philosophy* 33 (2014), 427–464.

(^{30}) For a defence of the claim that proportionality is entirely prospective, see Jeff McMahan, 'Proportionality and Time', *Ethics* 125 (2015), 696–719.

(^{31}) For a much more detailed and comprehensive discussion of the requirement of necessity, see Seth Lazar, 'Necessity in Self-Defense and War', *Philosophy and Public*

Affairs 40 (2012), 3–44. Also see Jeff McMahan, 'The Limits of Self-Defense', in *The Ethics of Self-Defense*, edited by Christian Coons and Michael Eric Weber (New York: Oxford University Press, forthcoming).

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