Proportionality in Self-Defense and War
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NOTE TO STANFORD POLITICAL THEORY WORKSHOP
This version of the paper is updated from what was originally circulated. Roughly the
first third of the paper has been revised. Feel no obligation to re-read, if you read the first
draft. But use this version if you have yet to read the paper in preparation for Friday’s
workshop.

Introduction
Proportionality is a widely recognized constraint on acts of punishment, acts of self-
and other-defense, and acts of war. While common sense morality recognizes constraints
on acts of these types that are primarily deontological in character, proportionality is
thought to be a constraint that is concerned solely with consequences. But I will argue
that it too incorporates various essentially deontological elements.

I will not consider proportionality in punishment except to note a couple of respects
in which it differs from proportionality in self-defense and war.

Ad bellum and in bello proportionality
One difference between proportionality in self-defense and proportionality in war is
that self-defense is usually a single act or brief series of acts, causing a single overall
harm to the attacker. But war is protracted, with many constitutive acts.

Because of this, there are two applications of both the proportionality and necessity
requirements in war. They apply both to the resort to war (and the continuation of war)
as well as to individual acts of war. A principle of proportionality is thus included
among the principles governing the resort to war (jus ad bellum) and among the
principles governing the conduct of war (jus in bello).

A rough approximation of what the ad bellum principle says is that the resort to war
is permissible only if the relevant expected bad effects of the war would not be excessive
in relation to the relevant expected good effects. To assess what the relevant good and
bad effects would be, one must compare going to war with what would happen if one
were to do nothing to achieve the just cause for war.

Similarly, in bello proportionality judgments require that we compare doing some
act of war with doing nothing to achieve the aim of that act. The act of war is
proportionate if its expected bad effects would not be excessive in relation to its expected
good effects.

Interestingly, in the law of war, there is a proportionality restriction on the conduct
of war but not on war as a whole. That is, only morality, not law, imposes an ad bellum
proportionality constraint. This is probably because ad bellum proportionality is so
difficult to calculate that it is simply not possible to formulate a sufficiently determinate
principle for purposes of codification. Any statement of a jus ad bellum proportionality
requirement would have to be so vague as to be legally unenforceable.
Ad bellum proportionality: unconditional and conditional threats

Unjust combatants pose two kinds of threat, one unconditional, the other conditional. The unconditional threat is what they will do – what wrongful harms they will inflict – if they are unopposed. The threat to achieve their ends is one they pose unconditionally.

The conditional threat is what they will do if their victims seek to prevent them from achieving their ends. Their threatened means is military attack, which is potentially lethal on a large scale. But this is conditional on resistance to their having what they want.

Sometimes the unconditionally threatened harm is neither lethal nor even physical. Sometimes unjust aggressors seek to gain only territory or natural resources, or to impose some degree of conformity with their favored political, economic, or religious doctrines. In these cases, unjust aggressors will kill people only if they meet with resistance. In other cases, their aims are essentially violent – as, for example, in the case of genocidal aggressors, such as the Nazis.

It is clear that the prevention of unconditionally threatened harms is a good effect that weighs against the harms that would be caused by war in determining whether war is a proportionate response to the threat. But the conditional harms will not occur unless the side with the just cause resorts to war. So how do the harms that are only conditionally threatened figure in the assessment of proportionality? Are they among the harms to be prevented by war, or among those caused by the resort to war?

It may seem that those who have a just cause cannot truthfully say that they go to war in order to prevent these harms, for the harms will occur only if they resort to war. In jus ad bellum, therefore, it seems that the prevention of the harms threatened conditionally by unjust combatants does not count among the expected goods to be achieved by war. These harms must instead count among the harms caused by the resort to war. They therefore count against the resort to war, since the only completely effective way to prevent them is not to go to war.

The harms threatened by unjust combatants therefore seem to divide into two categories for the purpose of assessing proportionality: those that war aims to prevent (that is, those unconditionally threatened) and those that the resort to war will provoke, or partly cause (those conditionally threatened).

But just combatants in war do not, of course, intend to cause or provoke the harms that unjust combatants conditionally threaten. They intend instead to prevent them. Initial military action by just combatants that is intended to prevent unconditionally threatened harms will foreseeably provoke attempts to inflict conditionally threatened harms. Anticipating that, the just combatants can also intend for their initial military action to thwart, to the extent possible, the infliction of the conditionally threatened harms it will foreseeably provoke (for example, by destroying as many of the unjust combatants’ weapons as possible). And all subsequent military action by just combatants will also be intended to prevent both unconditionally and conditionally threatened harms by unjust combatants. Since it thus seems that every act of war by just combatants is intended to prevent the conditionally threatened harms as well as those unconditionally threatened, it seems that the prevention of conditionally threatened harms is a good effect that counts in favor of war.
Both claims are true: wrongful harms conditionally threatened by unjust combatants are a consequence of the resort to war and thus have negative weight in the assessment of proportionality; yet their prevention by means of war counts positively in that assessment. Because the victims of wrongful harms by unjust combatants are not liable to suffer these harms, the harms appear on the negative side of the ledger in the determination of whether the resort to war would be proportionate. Yet the prevention of such harms by the military action of just combatants also counts as a good effect in the determination of proportionality, despite the fact that the resort to war itself provokes the harms that it is also intended to prevent. On balance, of course, conditionally intended harms by unjust combatants count against the resort to war by just combatants, since just war can never be completely successful in preventing unjust combatants from causing wrongful harm. But only those conditionally threatened harms that cannot be prevented by the military action of just combatants count against the resort to war.

If the conditionally threatened harms that could not be prevented by military action were bad enough, they could make it disproportionate for the state aggressed against to go to war even in national self-defense. But whether this is true seems to depend on whether the just combatants who would be the principal potential victims of these harms freely choose, as individuals, to fight and thus to assume the relevant risks. Wrongful harms conditionally threatened by unjust combatants cannot make it impermissible for just combatants to expose themselves to the risk of those harms for the sake of their compatriots if they freely choose to do so. But the prospect of those harms can make it impermissible, because disproportionate, for a government to compel its soldiers to expose themselves to them. Whether defensive action is proportionate may thus depend on the consent of the potential victims.

To conclude this brief discussion of conditionally and unconditionally threatened harms, it is perhaps worth stating the obvious point that war is less likely to be proportionate when waged against conditionally violent aggressors than when waged against unconditionally violent aggressors.

An alleged contrast between proportionality in self-defense and war

In both moral philosophy and law, discussions of individual self-defense tend to focus on the harms that the defender intentionally inflicts on the attacker.

But traditional just war theory and the law of war assume, by contrast, that for both ad bellum proportionality and in bello proportionality, the relevant bad effects that are to be weighed against the good are harms inflicted on innocent civilian bystanders, usually as side effects of military action.

This is, however, an illusory contrast. Both types of harm – to attackers who are potentially liable to some form of defensive harm and to innocent bystanders – are relevant to proportionality in both self-defense and war.

Narrow and wide proportionality in self-defense

Here is a case of individual self-defense that involved effects both on the attackers and on innocent bystanders. In 1984, Bernard Goetz shot four men on the New York subway who had approached him in a menacing way and asked that he give them money. The main focus at trial was on the harm he caused to those who threatened him. The panhandlers did act in at least an implicitly threatening manner and thus had made
themselves potentially liable to certain harms. The question was whether the harm he caused was excessive – that is, disproportionate – in relation to their degree of liability, as determined by the magnitude and probability of the harm they threatened and the degree to which they were morally responsible for the threat they posed.

Call this the question of narrow proportionality, or proportionality\(_n\).

But Goetz’s action threatened not only those who had harassed him but also innocent bystanders – the other passengers trapped with him in the confined space of a subway car. The question whether the risks he imposed on those innocent people were excessive in relation to the threat he faced is the question of wide proportionality, or proportionality\(_w\). Proportionality\(_w\) is concerned with the risk or harm that an act of self-defense imposes on innocent people (that is, nonliable people).

There are, therefore, two proportionality restrictions on individual self- and other-defense: one, the narrow requirement, concerned with the harm inflicted on the person or persons who are liable to be harmed because of their moral responsibility for a threat of wrongful harm, and another, the wide requirement, concerned with risks or harms imposed on innocent bystanders, usually but not necessarily as a side effect of the defensive action taken against those who are liable to attack.

Because these two forms of proportionality are so different, it is best to see them as distinct dimensions of proportionality, rather than trying to combine them in a single requirement.

Henceforth, variants of “proportionality” that end with the subscript \(_n\) (for example, proportionate\(_n\)) will refer to narrow proportionality, while those that end with the subscript \(_w\) (such as disproportionate\(_w\)) will refer to wide proportionality.

**Proportionality\(_w\) in self-defense**

There are at least two reasons why proportionality\(_w\) has tended to be ignored in discussions of individual self- and other-defense. One derives from the fact that not all individuals who threaten us are liable to be killed. An attacker who threatens nonlethal harm may be liable only to a nonlethal defensive response. If so, the harm inflicted on him can be excessive in relation to his liability. This is therefore a significant issue in cases of individual self- and other-defense.

Second, acts of individual self-defense do not in general cause significant side effect harms to innocent bystanders. Or, rather, what harmful side effects they often do have, such as causing grief to the relatives or friends of the attacker who has been injured or killed, are generally not considered relevant to proportionality. Hence the side effects of individual self-defense are generally assumed not to be an issue. But, as the Goetz case shows, acts of self- and other-defense must be proportionate in both senses. And the same is true of wars and acts of war.

**Proportionality\(_n\) in war**

Just as discussions of individual self-defense have tended to ignore proportionality\(_w\), so, as I noted, discussions of war have tended to ignore proportionality\(_n\), or even to reject the idea that war or acts of war could be
disproportionate. Traditional just war theory, in particular, has tended not to recognize the category of proportionality at all, though the reasons for this are different in its account of *jus in bello* from those in its account of *jus ad bellum*. (Recall that the law of war does not even recognize proportionality in *jus ad bellum*.)

The explanation of why traditional just war theory has not recognized proportionality in *jus ad bellum* probably derives from the fact that it conceives of war as a relation between states, not as a complex set of relations among individual persons. The aggressor is the enemy state. *Ad bellum* proportionality is therefore assessed in terms of harm to the aggressor state, and it is difficult to measure and compare harms to states. Perhaps more importantly, it is easy to assume that the killing of a great many of a state’s combatants may be only a moderate harm to the state. Even the killing of every individual member of the state’s armed forces would not, considered on its own rather than by reference to what it might render the state vulnerable to, be even close to a mortal harm with respect to the state itself.

In the morality of *jus in bello*, the traditional theory claims that combatant status alone is sufficient to make a person liable to be killed at any time during a state of war. If that is so, almost any harms inflicted on combatants in the course of combat are harms to which they are likely to be liable, and harms to which people are morally liable are necessarily proportionate (because narrow proportionality is internal to liability).

This, I think, explains why traditional just war theorists tend to believe the only harms that count in assessments of proportionality in war are those inflicted on innocent bystanders (that is, in their view, civilians).

**Possible example of a war that was disproportionate:** the Falklands War

An example of a war that was arguably disproportionate is the Falklands War. Given that the islands had been under British rule for almost 150 years and their inhabitants wished to be British subjects rather than Argentine, it seems clear that the Argentine invasion was unjust. Yet the number of Argentine combatants killed (about 650) and wounded (nearly 1100) in the war was roughly equivalent to the total number of the islands’ inhabitants (about 1800). It seems, moreover, that the conditions of ordinary life among the Falklands Islanders would have been little different under Argentine sovereignty. It is therefore arguable that Britain’s achievement of its just cause was insufficiently important for the harms inflicted on Argentine combatants to have been proportionate – that is, that the harms they suffered were excessive in relation to their liability.

Defenders of the British war argued that it was necessary to deter other similar threats to sovereignty in the future and if the war could reasonably have been expected to have such a deterrent effect, that was a further good that should have weighed against the harms to Argentine combatants in reaching a narrow proportionality judgment. But it is difficult even with hindsight to determine whether any government has subsequently been tempted to conduct a similar invasion but been deterred by the thought that the victim might respond as Britain did.

Other defenders of the British war have subsequently noted that it had the further good effect of helping to bring about the downfall of the regime of the Argentine generals. That was certainly a good side effect of the war. But were the Argentine sailors morally liable to be killed for the sake of that good? If not, it is doubtful that that
effect could count in the narrow proportionality calculation. This is because people cannot be 
liable to be killed for the prevention of bad effects – such as the continued rule of 
the generals – for which they would not be morally responsible. One can be liable to 
be harmed only for the prevention or correction of wrongs or harms for which one is 
morally responsible.

**Proportionality and numbers**

It would, however, clearly have been permissible to kill one Argentine combatant if 
that would have been sufficient to preserve British sovereignty. And this seems to be a 
liability judgment, not a claim about necessity. That combatant would not have been 
wronged by being killed.

For whether a wrongdoer is liable to be killed depends not just on the degree of his 
responsibility but also on the magnitude of the wrongful harm that can be prevented by 
killing him. This is because of the essentially instrumental character of liability. (I am 
here assuming that killing the combatant would operate defensively. If so, that shows 
that his causal contribution to the threat to the Falklands was very great. If we assume 
that killing him would operate differently to preserve British sovereignty, for example by 
using the killing opportunistically as a means, then it is unlikely that he would be liable to 
that and the justification for killing him, if there were one, would have to be a necessity 
or lesser evil justification. I will say more about this later.)

But this raises a problem. If each Argentine combatant was potentially liable to be 
killed, it seems that all were. If all were liable to be killed, then a war fought against 
them would be narrowly proportionate.

But numbers can affect liability and, therefore, narrow proportionality.

In some cases, they don’t. For example, if 1000 culpable threateners will kill me 
unless I kill all of them, it’s permissible, and proportionate, for me to kill them all. Each 
of them would otherwise kill me; each one is liable to be killed. We don’t add them 
together and say: “there are too many for it to be permissible to kill them all.”

But the case of the Argentine combatants was different in two respects. (1) First, 
most of them were presumably not fully culpable. Various mitigating conditions 
probably applied to most of them. (2) Second, each of them made only a small 
contribution to the threat to Britain’s sovereignty. Indeed, the more of them there were, 
the less important each’s contribution was.

Both these considerations are relevant to what an individual may be liable to. If a 
person makes only a small causal contribution to a threat, it is unlikely that killing him 
could be proportionate. If the killing would operate defensively, its effect in reducing 
the threat would be insufficient to justify killing. If it would operate opportunistically, as 
terrorist killings are supposed to, it would still be likely to be disproportionate, though 
for a different reason – namely, that the constraint against opportunistic killing is stronger 
than against killing that does not use a person’s death strategically as a means.

If killing only one would have preserved British sovereignty, killing him would 
probably have been narrowly proportionate. But if it had been necessary to kill 10,000, 
or 100,000, that may not have been narrowly proportionate. For not only would each 
have had excuses but also each one’s causal contribution to the threat would have been 
tiny. In those conditions, none of the 100,000 would have been liable to be killed.
So, from the fact that each might be liable to be killed on his own, it doesn’t follow that all might be liable to be killed together. Numbers can change the conditions that are relevant to liability.

**Minimal responsibility, proportionality, and numbers**

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-defense. 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. (It is easier to imagine that the threatener is the one who bears some responsibility; but one could just as coherently stipulate that it is the potential victim.) In these circumstances, the minimally responsible threatener is liable to be killed. Perhaps if there were some way to divide the unavoidable harm between them, the responsible person would be liable only to suffer the greater share of it, though not all. Or if there were some other relevant and important difference between the two, the one’s responsibility for their predicament might be outweighed. But in the circumstances as described, the responsibility of the one, though minimal, is nevertheless decisive.

This seems unfair, as there is a glaring disproportion between the minimal degree of the threatener’s responsibility and the magnitude of the harm he must suffer. But what this shows is only that the concept of liability is quite different from the concept of desert. Whether one deserves to be harmed is independent of whether harm is avoidable, and what one deserves depends only on what one has done, not on what others have done or on what their options are. Liability, by contrast, arises only when harm is unavoidable and must be distributed. Whether one is liable to harm depends not only on what one has done but also on what others have done. Even if one bears some responsibility for an unavoidable harm that cannot be divided, one may not be liable to suffer the harm if someone else is more responsible.

Some have thought that this appeal to the comparative dimension of liability provides a basis for holding minimally responsible civilians on the unjust side liable to be killed. Suppose that each of a large number of such civilians makes a tiny causal contribution to his or her country’s unjust war. If enough of these civilians are killed, this could have a defensive effect through the elimination of a sufficient number of small contributions to the war. In the extreme case, suppose that killing all the civilians of the enemy state who are responsible for contributing, however slightly, to the unjust war would eliminate financial and logistical support for the unjust combatants, who would then have to stop fighting. Suppose further that this is the only way to prevent any further killing of just combatants and just civilians. Does it follow that all these unjust civilians are liable to be killed?

In this kind of case, in which individuals each make only a small causal contribution to wrongful harms and each is only minimally responsible for his or her contribution, the number of individuals has to make a difference to proportionality. I indicated earlier, however, that numbers do not seem to make a difference to proportionality if each threatener is fully culpable and poses a lethal threat. How is it
that these two differences determine whether or not numbers count in assessing proportionality? How could it be that, if there were only one minimally responsible threatener, he might be liable to be killed, but if there were 1000, it would not be the case that all would be liable to be killed (and, indeed, might be the case that none was liable to be killed)? How can numbers affect individual liability? (Note that much depends on whether the minimally responsible threatener poses a lethal threat or whether he makes only a small contribution to a lethal threat. In the first case, killing him defensively would eliminate the threat; in the second it would not.)

In some cases, as I noted above, the numbers affect the degree of each individual’s causal contribution to a threat. In such cases, the more people there are who contribute to a threat, the less each individual’s contribution is; and the less each contributes, the less effective killing him will be, in defensive terms, in reducing the threat. And the less good killing him will do, the weaker his liability is. But the case I have described involving minimally responsible threateners who are also minimal contributors is not like this.

One way to try to explain why killing 1000 minimally responsible threateners in self-defense is disproportionate is to claim that, unlike deserved harms, harms to which people are liable but that they do not deserve are always intrinsically bad as well as bad for the victim: there is always a moral reason not to inflict them. A person’s liability to suffer a harm does not render his suffering it morally inert. Thus, as the number of people who are liable to be killed increases, so does badness of their deaths. Eventually the effects on well-being outweigh considerations of liability. The problem with this suggestion, however, is that it should apply not just to those who are liable on the basis of minimal responsibility but also to those who are fully culpable. Even if harms to those who are fully culpable have less weight than equivalent harms to those who are only minimally responsible, this suggestion still implies that if the number of fully culpable threateners becomes large enough, it will become disproportionate to kill them in self-defense, so that I must allow them to kill me instead.

An alternative and perhaps more plausible explanation of why numbers are relevant to proportionality in the case of minimally responsible threateners is that the killing of such a person leaves a moral “remainder” in a way that killing a culpable threatener does not. Suppose that a minimally responsible threatener will cause me to be paralyzed unless I cause him to be paralyzed instead. If I am wholly lacking in responsibility for the situation and other things are equal, the comparative dimension of liability implies that he is liable to be paralyzed. But now suppose that I have the option of dividing the burden between us. I could, for example, defend myself in a way that would preserve his ability to use his arms, but only at the cost of having one of my fingers become permanently paralyzed. In that case, he may be liable only to be paralyzed below the arms, and I must accept the paralysis of a finger. This is true, however, only on the assumption that he is minimally responsible. If he were a culpable threatener, he might be liable to total paralysis even if I could share the burden with him.

The assumption that in this second case he is liable only to paralysis below the arms is compatible with his being liable to total paralysis in the original case in which there is no option of dividing the burden. Yet even in the original case, I seem to have a reason to provide the minimally responsible threatener partial compensation for his paralysis, in order to make the final outcome as close as possible to what it would have been if I had been able to share the burden ex ante. (If this is right, we may have to reject the common
assumption that there can be no liability to pay compensation for harming a person in a way to which he was liable.)

If this is right, it may provide an explanation of the relevance of numbers to proportionality$_n$ in cases involving minimally responsible threateners. Even if each minimally responsible threatener would be liable to be killed on his own, each killing would leave a moral “remainder,” based on the fact that it would have been more just to divide the burden had that been possible. These remainders add up so that, given sufficient numbers, they may eventually outweigh the defender’s claim to priority. This would not be the case, however, were the threateners fully culpable, for in that case the initial distribution of the entire harm to each culpable threatener is ideally just.

Whether or not this is the correct explanation of the relevance of numbers to proportionality$_n$ in defense against minimally responsible threateners, it is intuitively clear that the numbers are relevant. Assuming that most unjust civilians make a significantly lesser causal contribution to threats of wrongful harm faced by combatants and civilians on the just side, so that killing them is much less effective in defensive terms than killing unjust combatants, and assuming that unjust civilians also bear a lesser degree of responsibility for the threats posed by unjust combatants than those combatants themselves do, it is clear that what I have called the comparative dimension of liability has far greater application in the case of unjust combatants than in the case of unjust civilians.

**Should narrow and wide proportionality be assessed separately?**

The two forms of proportionality are distinct. Each can be satisfied while the other is not. For example, using a stun grenade to prevent a mugging is narrowly proportionate but disproportionate in the wide sense if the shock waves would also topple an innocent bystander to her death. And killing a pickpocket would be narrowly disproportionate even if it had not side effects and hence would be proportionate in the wide sense.

And the two are distinct for other reasons. Harms count differently in the two. Harm to a Culpable Threat that is narrowly proportionate could be disproportionate in the wide sense if caused to an innocent bystander, even when the harm averted would be the same.

A related point: harm that exceeds that averted can be narrowly proportionate if the Threat is culpable but cannot be proportionate in the wide sense. (Possible exception: some special relations: might one inflict harm on an innocent bystander that exceeds that which one thereby averts from befalling one’s child?)

Yet narrow and wide can be combined. A person may be liable to harm up to a certain threshold so that to harm him up to that point is narrowly proportionate. Harm to him beyond the threshold is like harm to an innocent person and must satisfy wide proportionality. But it can satisfy that, whether the harm is inflicted intentionally or as a side effect.

This presupposes that at least some harms can be disaggregated into additive component harms.

**Objective and subjective**
A central issue in the Goetz trial was whether narrow proportionality was to be assessed in relation to what Goetz sincerely believed about the threat he faced or in relation to what the facts were. And there is a third possibility: assessing proportionality in relation to what it was reasonable for him to believe in the circumstances.

Some people think that one of these standards is correct and the others are incorrect. I think that, both in morality and in law, different standards are appropriate in different contexts, or for different purposes.

1. Belief relative: If our concern is to guide action ex ante, the relevant principles must tell people what to do given the beliefs they actually have.

2. Evidence-relative: If our concern is to apportion blame ex post, we should be guided by what it was reasonable or epistemically justifiable for people to believe. If people have acted on the basis of true beliefs that they held unreasonably, they may be blameworthy even if they did what was objectively right. If they have acted on the basis of false beliefs that were nevertheless reasonable for them to have, they may be blameless even if they has acted impermissibly in the fact-relative (objective) sense. If they acted on the basis of false beliefs that were unreasonable — that is, if they had been more responsible, they would have had true beliefs — they are culpable if they acted wrongly even if they did what would have been right if their actual beliefs had been true.

3. Fact-relative: If our concern is to determine whether people are liable to defensive action or to compensate the victims, it may be important to determine whether their own action is objectively justified in response to the threat they face.

Proportionality and proportionality in punishment

Proportionality in punishment is commonly understood to require that the harm inflicted not exceed what the wrongdoer deserves. And desert is sensitive to more than just the relation between the harm the wrongdoer has caused and that which he will suffer through punishment. It takes account of certain facts about the wrongdoer, such as what he knew, what he ought to have known, what his intentions were, whether he was reckless or negligent, whether he acted under duress, and so on.

Many theorists assume that proportionality in self-defense and war is a simpler matter, in that it compares only the harms one causes and the harms one thereby prevents. But proportionality in self-defense and war — or, strictly speaking, one form of it — is also sensitive to the same facts about agents that proportionality in punishment is sensitive to, as well as to facts about outcomes and probabilities.

The difference is that in self-defense and war, proportionality isn’t a matter of desert but of liability.

The justification for the infliction of deserved harm is non-instrumental. There is not requirement that deserved harm should produce some further good. Deserved harm isn’t subject to a necessity constraint. It’s an end in itself. According to one common view, while harms that are deserved are bad for those on whom they’re inflicted, they’re nevertheless intrinsically and impersonally good.
But people are *liable* to be harmed only if harming them is necessary or unavoidable for the achievement of a good – usually the prevention or correction of a wrong for which they are responsible.

It is worth stressing that although we normally appeal to people’s liability to justify harms that we *intentionally* inflict on them, it is also possible for people to be liable to suffer harms as an unintended side effect. In other words, harms to which people are liable do not have to *means* to a good end; they can also be unavoidable side effects of the achievement of that end.

The fact that harms to which people are liable are always necessary for the achievement of some good effect (again, usually the prevention of a harm) helps to explain the familiar point that the infliction of a certain harm may be disproportionate as *punishment* for wrongdoing, while the infliction of that same harm could be a proportionate *defense* against becoming the victim of that *same act*, particularly if the wrongdoer is acting culpably.

For example, killing might be proportionate as a means of self-defense but not as a punishment for the same act.

**Miscellaneous observations about narrow and wide proportionality**

1. In narrow proportionality, the harm one causes may exceed the harm one thereby averts. But this is not the case in wide proportionality. The expected harm to innocent bystanders caused as a side effect may not exceed the expected harm one prevents.

2. Narrow proportionality is retrospective (like punishment, which depends on desert), but also prospective (unlike retributive punishment). As I noted, a person is liable to be harmed only if harming him is necessary to produce some good. Since the aim of defense is the prevention of harm, proportionality in defense is *necessarily* at least in part forward-looking.

   But wide proportionality is *wholly* prospective. This is because the relevant harms are those caused to people war are not liable to suffer them. Hence there can be no question of looking back to action that might have determined the degree of their liability.

Some critics of Israel’s invasion of Gaza say that the harms Israel caused to Palestinian civilians were disproportionate in relation to the civilian casualties that Israel had suffered from the attacks by Hamas. But wide proportionality is not a relation between the harm one causes and the harm one has suffered in the past. Proportionality is not a matter of tit-for-tat. It is a relation between the harm one causes and the harm one thereby prevents innocent people from *in the future*.

The relevance to wide proportionality of earlier casualties among Israeli civilians is only that the number of such casualties provided *evidence* of the threat that Israel would have faced in the future. If the prospects at least for the near future were that Hamas would be unlikely to do more harm than it was doing, that meant that Israel’s reaction was indeed disproportionate in the wide sense. It is not permissible, for example, to attack a missile launch site that would otherwise predictably kill one innocent child if the attack itself would predictably kill 10 innocent children. Israel’s claim, however, was
that the past attacks demonstrated *intent* to kill innocent people and Israel could not otherwise guarantee or reasonably expect that Hamas would remain limited to the use of crude, inaccurate, short-range missiles.

**Which effects are relevant to proportionality?**

Thomas Hurka argues that the only good effects that are relevant to proportionality are either (1) those constitutive of the achievement of the just causes (either independent just causes or conditional just causes)\(^1\) or (2) those that are side effects of the *achievement of a just cause*, not (3) those that are side effects of the *means* to the achievement of the just cause.

This account gives plausible answers to questions about proportionality in many cases. But because it fails to distinguish between narrow and wide proportionality and thus does not consider the relevance of liability to proportionality, or the relation between just cause and liability, it sometimes gives the right answer for the wrong reason.

Acts of individuals self- or other-defense, wars, and acts of war have both good and bad effects. Not all such effects count in the narrow proportionality calculation. Nor do they all necessarily count in the wide proportionality calculation. And even among those that do count, they sometimes have different weights. These are complicated matters. I will say a little about them here.

**Effects relevant to narrow proportionality**

Consider first narrow proportionality in war. In both *jus ad bellum* and *jus in bello*, only those good effects that are constitutive of the achievement of the just cause can weigh against the harms caused to those who are liable to be harmed. The achievement of other goods cannot make intentionally attacking those who are liable to attack proportionate. That is because the people attacked have not done anything to make themselves liable to be harmed for the sake of achieving those other goods. They are liable only to harms necessary to prevent or correct wrongs for which they are responsible.

Suppose for the sake of argument that the Falklands War was disproportionate in the narrow sense. But now imagine that circumstances had been different. Suppose that it have been predictable prior to the war that a British victory would stimulate patriotic pride, which in turn would greatly enhance economic productivity in Britain in a way that would have ripple effects throughout the world that would bring economic benefits to millions of people. Argentine combatants were not liable to be killed for the sake of those goods. For they were not responsible for the absence of the incentives necessary for the relevant forms of economic stimulation. Those economic benefits would therefore have been irrelevant to the narrow proportionality calculation.

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(Possible exception: those who are responsible for the wrongs whose prevention constitutes a just cause may also be responsible for other wrongs whose prevention does not constitute a just cause. If the war or certain acts of war would prevent or correct those wrongs, and the harms caused would be suffered only by those responsible for the wrongs and would not exceed their liability, then the prevention of those wrongs could also be relevant to narrow proportionality.)

Here is a case of individual self-defense that illustrates the same point (and possibly other points as well). Suppose that the only way one can prevent a pickpocket from fleeing with one’s wallet, which contains $100, is to kill him. To kill him would be disproportionate in the narrow sense. But suppose that killing the pickpocket would make it possible to save the lives of two innocent people by making his organs available for transplantation. That good side effect could not make it proportionate in the narrow sense to kill the pickpocket. For the pickpocket has not done anything to make himself liable to be harmed as a means of achieving that good. He is not responsible for the two people’s need for an organ transplant.

It may seem that I am making a mistake here, which is obscured by the rather extreme nature of the examples I have discussed. Consider a less extreme example. Suppose that a person threatens me in some way but that the only means by which I can avert the threatened harm would involve inflicting a harm on the threatener that would be disproportionate in the narrow sense – that is, it would be excessive in relation to his liability, or exceed the degree of harm to which he has made himself liable. If my defensive action would have no relevant effects other than inflicting that harm on him and preventing him from inflicting a lesser harm on me, it seems that I may not act in self-defense, but must instead submit to the wrongful harm.

But suppose that the harm to him that would be necessary for my own defense would be just barely disproportionate. If it were only a little less – say, less by amount x – my defensive action would not be disproportionate. Now add a further detail to the example: in addition to harming the threatening person, my defensive action would, as a side effect, prevent a significant though unrelated harm to an innocent bystander. Suppose again, for example, that my defensive action would create a loud explosive noise that would frighten away a nearby mugger who would otherwise have punched the bystander and stolen his wallet. Assume that the amount of harm my defensive action would prevent the bystander from suffering would be significantly greater than amount x – that is, significantly greater than the amount by which the harm my action would inflict on the threatener would be disproportionate. In that case, surely, my action would be proportionate. If good side effects of defensive action can weigh against side effects involving harm to innocent people, surely they can weigh against harms to those who are not innocent.

I think, however, that to say that my action would be proportionate is to obscure the moral complexities in the example. The correct conclusion to draw is that my defensive action would be permissible even though it would be disproportionate in the narrow sense. This means that the satisfaction of the narrow proportionate requirement is not a necessary condition of permissible harming. But this should not be surprising. Because rights are not absolute, it is sometimes permissible to harm a person who is not liable to
be harmed, and even permissible to harm him intentionally, as a means of achieving a
good end. A fortiori, it is sometimes permissible to harm a person by more than the
amount of harm that he has made himself liable to suffer. In the first case, the victim has
a right not to be harmed at all, but it is overridden. In the second, the victim has a right
not to be harmed by more than a certain amount, but it is overridden. When a person’s
right not to be harmed in a certain way is overridden, he is harmed in a way to which he
is not liable. He is innocent in relation to that harm. The justification for overriding a
right not to be harmed – that is, for harming a person who is innocent in relation to that
harm – is a necessity or lesser evil justification. As most people understand a necessity
justification for an act of harming an innocent person, the harm the act prevents must be
significantly greater than the harm it causes.

What this means is that the justification for my defensive action has two distinct
dimensions. Most of the harm my act inflicts on the threatener is harm to which his own
action has made him liable. That harm is justified by reference to his liability for the
threat he poses to me. But the remainder of the harm my act causes him – amount \( x \) – is
beyond what he is liable to suffer. He has a right not to be caused this further harm, yet I
inflict it on him intentionally, as a means of achieving my end. If my action is
nevertheless justified, all things considered, that is because the harm that, as a side
effect, it prevents from innocent bystander from suffering is sufficient to outweigh the
intentional infliction on the threatener of a degree of harm, \( x \), to which he is not liable.

Because the infliction of \( x \) amount of harm on the threatener beyond the harm to
which he is liable is, in effect, the infliction of harm on an innocent person, the
justification for the infliction of that additional harm is a matter of wide proportionality.
This is just to say that a harm inflicted on a noninnocent person beyond that to which he
is liable counts in the same way as a harm inflicted on an innocent person. If the
infliction of that harm is proportionate in the wide sense in relation to the prevention of
the harm to the innocent bystander as a side effect, my act of self-defense will be
permissible overall. Although the harm it inflicts on the threatener exceeds that to which
he is liable, so that the act is disproportionate in the narrow sense, the portion of the harm
that exceeds the amount that is narrowly proportionate is nevertheless proportionate in
the wide sense in relation to the harm that the act prevents the bystander from suffering.
To say that that element of the harm caused is proportionate in the wide sense is just to
say that there is a necessity or lesser evil justification for inflicting it.

**Effects relevant to wide proportionality**

It may seem that all good effects count in the wide proportionality calculation. Good side effects can weigh against and cancel out corresponding bad side effects. If, for
example, an act of defense would have an innocent bystander as a side effect but would
also benefit him in a way that would fully compensate him for the harm, the two effects
would presumably cancel out, making the act proportionate in the wide sense.

But that is not quite right. There are restrictions.

Suppose that the only way I can prevent the pickpocket from taking my wallet is to
stun him with a concussion grenade. And suppose this is proportionate in the narrow
sense. But suppose the detonation of the grenade will have as a side effect the toppling of
an innocent bystander off a bridge to her death. This makes the defensive action
disproportionate in the wide sense. But suppose further the bystander’s organs could then be used to save the life of a person who will otherwise die. Can this make the defensive action proportionate in the wide sense? Is the killing of the innocent bystander canceled out in the wide proportionality calculation by the fact that it enables another innocent person to be saved? Intuitively, it does not.

One explanation of why it does not is that even though the killing of the innocent bystander is an unintended side effect, it nevertheless functions causally as a *means* to the good effect of saving the other innocent person. 2

**Killing and letting die**

But change the example so that my detonating the concussion grenade in my own defense not only topples one innocent bystander to her death but also, as an independent side effect, scares off a man who was about to commit a murder.

Intuitively, this too seems insufficient to render my defensive act proportionate in the wide sense. One possible explanation is that saving a life cannot counterbalance a killing, even when the killing is not the cause of the saving. For there is a moral asymmetry between killing and letting die: it is in most cases more seriously wrong to kill an innocent person than not to save an innocent person; therefore a saving cannot morally counterbalance a killing.

This seems to be important: *wide proportionality is not just a matter of comparing consequences; it is also sensitive to whether those consequences are the result of doing or of allowing.*

Another possible though more contentious explanation might be that the bad side effects greatly outweigh the *intended* good, even though they are counterbalanced by good *side effects*. In other words, wide proportionality may depend not only on the relation between good and bad side effects but also on the relation between the bad side effects and the intended good – for example, the just cause for war. (I will return to this below in the section headed “Can unjust combatants satisfy the *in bello* proportionality requirements?”).

(Consider a further hypothetical example. Suppose one could save 10 innocent people by an act that would also kill 10 innocent people as a side effect. That act would be disproportionate, impermissible. But suppose that it would also prevent the deaths of 5 innocent people as a side effect. In this case the bad side effects would not exceed the intended good, and the intended and unintended good effects would together significantly exceed the bad. But the act still seems impermissible. I suspect the reason again has to do with the asymmetry between killing and letting die. The killing of 10 innocent people, even when unintended, cannot outweigh the saving of 15.)

**Intention**

The distinction between narrow and wide proportionality also intersects with the distinction between effects that are intended and those that are unintended, though foreseen, yielding four categories.

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2 See Frances Kamm’s work on the relevance to permissibility of causal relations among the effects of action.
(1) Intended harms to those who are potentially liable to some harm (the normal case of narrow proportionality).

(2) Unintended harms to those who are potentially liable to some harm.

(3) Intended harms to those who are innocent, or not liable. These, if justifiable at all, must be justified by an appeal to necessity, or lesser evil.

(4) Unintended harms to the innocent. (the normal case of wide proportionality). Again, the justification must appeal to necessity or lesser evil.

In short, proportionality in the infliction of harm is sensitive both to liability on the part of the victim and intention on the part of the agent. Even in proportionality, there is the familiar interaction between an agent-centered factor and a victim-centered factor.

Sometimes in war civilians are not liable to intentional attack but may nevertheless be liable to suffer the unintended side effects of an attack on a military target. In some cases, for example, in which some civilians bear some degree of responsibility for the wrongful acts of their leaders, they may be liable to suffer certain harms if these harms are inflicted unintentionally even if they would not be liable to suffer them if they were inflicted intentionally. In other words, harms that would be disproportionate in the narrow sense if inflicted intentionally may nevertheless be proportionate in the narrow sense if inflicted as an unintended side effect.

(Those who are skeptical of the idea that civilians can be liable to suffer harm in war might reflect that most people seem to accept that civilians can be liable to the infliction of lesser harms in war. Most people think, for example, that at least certain adult civilians may have no legitimate complaint if they have to suffer certain effects of economic sanctions, or certain burdens of occupation. Sometimes civilians seem to be liable to bear burdens imposed on them intentionally, such as the burden of paying reparations to victims of their country’s unjust war.)

The relevance of the way in which side effects are caused

I have noted that judgments of wide proportionality are sensitive to whether harms to innocent people are the result of doing or allowing, and whether they are intended or unintended. But there are further distinctions among modes of agency that seem relevant as well. It seems, for example, that harms that are done or caused in certain ways have greater weight than the same harms do when done or caused in different ways.

One familiar way in which the deaths of innocent people result as a side effect of military action in war is that combatants attack a concentration of enemy combatants, but the weapons they use predictably kill a certain number of innocent bystanders as a direct side effect. Imagine a case of this sort in which we have unrealistically precise information about the consequences. Suppose that if just combatants conduct an artillery strike that will kill 10 unjust combatants, they will thereby prevent 20 innocent civilians from being killed. But the artillery strike will also blow up and kill 10 different innocent civilians as an unavoidable side effect. Suppose we think this action would be disproportionate in the wide sense. (If we think that, it is presumably because of the moral asymmetry between killing and letting die.)
Now compare this case with a similar one in which the numbers are the same but causal relations are different. In the second version, the 10 unjust combatants are medics who alternate between combat and surgery. If they are not killed today, each will perform a life-saving surgery on an innocent person tomorrow. No one else can perform these surgeries, so if the medic-combatants are killed, their patients will die. The choices, then, are these: if just combatants do not attack, unjust combatants will kill 20 innocent civilians. If the just combatants attack, they will kill the 10 medic-combatants, who are liable to be killed, thereby saving 20 innocent civilians, but 10 innocent people who would have been saved by the medics will die. In this case, it seems that killing the medic-combatants would not be disproportionate. Since the numbers are the same as in the first case, the difference must be that in the second case the just combatants do not themselves kill the 10 innocent people but merely prevent them from being saved.

It seems, therefore, that the deaths of innocent people have less weight in the wide proportionality calculation if they occur because the people are prevented from being saved than if the people are killed.

Harms that are a predictable consequence of one’s own action in war may also be discounted in the wide proportionality calculation if they are actually caused by others. This is the familiar phenomenon of harms that are the result of “intervening agency.” Suppose, for example, that just combatants are considering taking a course of military action against their enemy but the enemy credibly threatens that if they take that action, the enemy will commit some atrocity against innocent people. Such an effect cannot be excluded from the determination of whether the military action would be proportionate in the wide sense. Unjust adversaries can make an otherwise justified military action against them disproportionate in the wide sense, and therefore impermissible, if they can credibly threaten to commit a sufficiently terrible atrocity in the event that the action is taken. Many people resist the idea that deeply immoral people can in this way limit the moral options that others can have. They argue that when an unjust adversary threatens to commit an atrocity if otherwise justified action is taken against him, that cannot affect the permissibility of taking action against him, and that if he commits the atrocity, all responsibility for it will be his. I think this simply cannot be right. If the atrocity will occur if the action is taken but not if it is not, that fact cannot be irrelevant to the permissibility of the action. But terrible effects that would be caused by others do not have the same weight in assessing wide proportionality as comparable effects that would be directly caused by one’s own action. In short, the weight of bad effects provoked by one’s own action but actually caused by the intervening action of others is discounted to some degree, but not to zero. The extent to which they are appropriately discounted may vary with other factors as well. What the precise discount rate should be is an open question.

Presumably good effects that are produced in the same way must be similarly discounted in the assessment of wide proportionality. If, for example, an act of war would have harmful side effects but also prompt other people to prevent harms that they would not otherwise prevent, or produce goods effects that they would not otherwise produce, then the good effects brought about through these other people’s agency would weigh against the harmful side effects but their weight would be discounted.
Certain side effects of violent defensive action are generally regarded as irrelevant to wide proportionality. Suppose, for example, that if one kills a culpable attacker in self-defense, the attacker’s many friends and relatives will be utterly prostrated with grief and their lives will be impoverished by his absence. Most people think that such considerations are completely irrelevant. But even if they are insufficient to make a difference in this case, effects of this sort can make a moral difference in other cases. Suppose, for example, that one will be killed by a culpable attacker unless one acts in self-defense. One has two options. If one kills the attacker, one will be certain to survive. Alternatively, there is a nonlethal defensive option that would offer a near but not absolute certainty of survival. In the absence of countervailing considerations, it seems that it would be permissible to kill him. But suppose that a great many innocent people will be emotionally devastated if he is killed. In that case, it is at least arguable that to kill him would be impermissible and one ought instead to opt for nonlethal defensive alternative. (If this were true, that would not show that to kill the attacker would be disproportionate in the wide sense. The reason that killing him would be wrong would not be a matter of proportionality at all. I will indicate in the next section what sort of principle would condemn the killing. The point here is just that the effects on friends and relatives would not be morally irrelevant or without practical moral significance.)

Such effects are also, I believe, relevant to the permissibility of punishment. Suppose for the sake of argument that it is possible for people to deserve to die. And suppose that there is a choice between executing a criminal who does objectively deserve to die and sentencing him to life imprisonment. Both penalties would be equally effective for purposes of defense and deterrence but only execution would demand of retribution. Suppose, however, that the criminal’s innocent parents and children would suffer to a much greater degree if he is executed than if he is imprisoned for the rest of his life. I think this consideration could make execution impermissible. (Again, this would not be a matter of proportionality but of tradeoffs between different values.)

Before concluding this section, it is worth mentioning one type of side effect that seems intuitively to have no weight in the determination of wide proportionality. Suppose that an act of war in a just war would harm innocent people as a side effect but would also, for whatever reason (I will not attempt to devise a plausible scenario), greatly increase the value of the stock portfolios of wealthy people on the opposing, unjust side. It seems that even though the increases in wealth of people on the unjust side would be good side effects, they cannot weigh against and thus cancel out harmful side effects suffered by innocent people.

This example illustrates the general point that once the bad side effects of a war (or act of war) have been weighed against the just aim, further questions arise concerning justice, fairness, equality, and so on in the distribution of good and bad side effects may arise.

The baseline for comparison and the relation between proportionality and necessity

Acts of individual self- and other-defense are subject to both a requirement of proportionality and a requirement of necessity. The principles of *jus ad bellum* include
both a principle of proportionality and a principle of necessity. The same is true of the
principles of *jus in bello*. Proportionality and necessity are both concerned with
consequences. And both are comparative, but in different ways. Before explaining the
difference between the comparisons these two constraints require, I should, to avoid
misunderstanding, distinguish explicitly between necessity as a *constraint* and necessity
as a *justification*. Necessity as a constraint on an act that causes harm insists that there
not be a different, less harmful means of achieving one’s just aim. Necessity as a
justification asserts that an act that causes harm is necessary to avoid or avert an even
greater harm. That is, a necessity justification is a lesser evil justification. In law,
necessity can be a defense to a criminal charge that takes the form of a justification rather
than an excuse.

To elucidate the difference between the constraints of proportionality and necessity,
I will discuss the *ad bellum* versions of the two principles. But my claims also apply,
mutatis mutandis, to *in bello* proportionality. A simple statement of the difference
between proportionality and necessity is that proportionality compares going to war with
not going to war, while necessity compares going to war with alternative means of
achieving the just cause for war. Proportionality asserts, very roughly, that if the bad
effects of going to war would outweigh the good – with both sets of effects being
assessed by comparison with not going to war – then war would be disproportionate
and hence impermissible. (This is, obviously, a statement of the wide *ad bellum* requirement,
which is, as I noted earlier, far more difficult to satisfy than the narrow *ad bellum*
requirement. The latter is generally assumed to be easily satisfiable in a just war and I
will not consider it further here.)

This understanding of the comparison that is involved in assessing wide
proportionality raises a problem that, to my knowledge, was not noticed until relatively
recently. This that not going to war necessarily involves doing something else. But
there are indefinitely many courses of action that people could pursue rather than going to
war. Which of the alternative courses of action is the one that ought to be compared with
going to war for the purpose of determining whether war would be proportionate?

One possible way to narrow the field of possibilities is to rule out the comparisons
that are independently required by the requirement of necessity. To determine whether
war satisfies the necessity requirement, it must be compared with other possible ways of
trying to achieve the just cause. If there is no alternative to war that has as high a
probability of achieving the just cause, the option of going to war then satisfies the
requirement of necessity. Note that for war to be necessary in the relevant sense, it does
not have to be the *only* possible means of achieving the just cause. Nor must it have a
100 percent probability of achieving the just cause. It must simply have a higher
probability than any other means of achieving the just cause.

If war is in the relevant sense necessary for the achievement of the just cause, it has
already been compared to the other possible ways of trying to achieve the just cause. So

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3 The issue of the nature of the relevant comparison was first raised, again to the best of my
knowledge, by Robert McKim and me in “The Just War and the Gulf War,” *Canadian Journal of
Philosophy* 23 (1993), pp. 506-10, though what we said about the issue is, I now believe, mistaken. For
subsequent discussion, see Hurka, “Proportionality in the Morality of War” and David Mellow,
perhaps proportionality should require a comparison between going to war and an
alternative that does not involve going to war and is not an alternative means of trying to
achieve the just cause. That is, the relevant comparison for proportionality is between
going to war and taking no action at all to achieve the just cause.

But that still leaves a great many possible comparisons. Consider some of the
possibilities.

(1) Compare going to war with what one would be most disposed to do other than
attempt to achieve the just cause (or what one would in fact have done if the just cause
for war had not arisen at all).

This is too permissive. Suppose that if a just cause for war had not arisen, a
country’s government would have embarked on a campaign of genocide against a
domestic minority population. But one of its allies has been unjustly attacked and it is
willing to forgo the campaign of genocide in order to deploy its troops instead in the
defense of its ally. In that case, its resort to war would almost certainly be proportionate
in the wide sense no matter how many innocent people it would kill as a side effect.

(2) A more restrictive suggestion is that going to war should be compared with that
course of action, among the permissible alternatives to pursuing the just cause, that one
would be most disposed to follow.

This is more promising but seems rather arbitrary. Why should proportionality be
assessed relative to one’s contingent inclinations among options?

There is also a threat of a regress. For an alternative to be permissible, it must itself
be proportionate. How is proportionality to be calculated in the alternative?

(3) Compare war with the best of the alternative courses of action that would not
involve the pursuit of the just cause.

This is too demanding. War is not disproportionate just because one could instead
have eradicated malaria in a certain area with the same resources. Proportionality is not a
requirement to maximize the good.

(4) Compare war with doing nothing at all.

This is absurd. A country and its people cannot do nothing at all. If they tried, the
result would be an immediate catastrophe, thus making war automatically proportionate.

Here I can only gesture in the direction of a possible solution to this problem of
identifying the relevant counterfactual comparison. I think it must involve a restriction of
the range of relevant consequences. The comparison must not be between entire possible
worlds but only between the harms caused by the resort to war and the events constitutive
of the unfulfillment of the just cause (for example, the loss of territory or political
sovereignty), together with the further causal consequences of the just cause being
unfulfilled. Other good or bad effects that those who might go to war would produce if
they do not go to war are irrelevant in the assessment of proportionality.
(Note that proportionality seems to require a counterfactual conception of harm rather than a temporal comparative conception.)

**Additional principles governing self-defense and war**

(1) As I have stated it, the requirement of necessity has limited significance. War is very often the option that has the highest probability of achieving the just cause. But even if war is necessary in that sense and is clearly proportionate, it does not follow that war is permissible. For there are likely to be nonbelligerent alternatives that would have a lower probability of achieving the just cause, or would achieve the just cause less fully or completely, but would also cause significantly less harm than war would. It may be an open question whether ought to pursue such an alternative rather than going to war.

It may be clearer to illustrate this claim with an artificially simplified example. Suppose that 100 innocent people will be killed unless one acts in their defense. Act A1 has a 100 percent probability of saving all 100 people but would kill 5 innocent bystanders as an unintended side effect. Assume that A1 would be proportionate in the wide sense. And assume that there is no other possible act that would have a 100 percent probability of saving all 100 innocent people. In that case, A1 would seem to be a necessary and proportionate means of saving the 100 people.

But suppose that there are two other possible acts, A2 and A3.

A2 would have a 99 percent probability of saving all 100 people but would kill only 1 innocent bystander as a side effect.

A3 would have a 100 percent probability of saving 99 of the 100 innocent people but would allow one of them to be killed. But it too would kill only 1 innocent bystander as a side effect.

It is reasonable to believe that if either or both of these alternative acts are possible and all other things are equal (for example, neither A2 nor A3 would be worse for the agent or others), it would be impermissible to do A1, despite its being necessary (in the sense given earlier) for saving the 100 innocent people and proportionate in the wide sense.

This shows that the morality of defensive action is governed by at least one principle other than those of necessity and proportionality. This third principle governs trade-offs between the probability and completeness of the achievement of a just defensive aim and harms caused as a side effect of the effort to achieve the just aim.

One possibility, of course, is that my initial statement of the requirement of necessity is mistaken and that it is precisely that principle that governs trade-offs between the just cause and bad side effects. To say that war is necessary is, on this understanding, not to say that it has a higher probability than any alternative of achieving the just cause. It is rather to say that war offers the best compromise between the achievement of the just cause and the minimization of bad side effects. But I think that we achieve greater conceptual clarity if we keep these two issues distinct.

(2) Next consider a choice between two acts of war. If just combatants do act A1, they will prevent 100 innocent civilians from being killed but will foreseeably but unintentionally kill 5 different innocent civilians as a side effect. Assume that this would be proportionate in the wide sense. Assume also that just combatants are innocent in the relevant sense of not being morally liable to be attacked or killed. Given that assumption,
there is no alternative to A1 that would save the 100 civilians but kill fewer innocent people. A1, then, is both necessary and proportionate.

But suppose a different act, A2, would also prevent the 100 innocent civilians from being killed. While it would not kill any innocent people as a side effect, it would predictably enable unjust combatants to kill 6 of the just combatants. It would, in other words, require some of the just combatants to sacrifice their lives. Both A1 and A2 have a 100 percent probability of preventing the 100 innocent civilians from being killed. But if the just combatants do A1, they will kill 5 innocent civilians as a side effect, while if they do A2, 6 of them will be killed by unjust combatants.

It is certainly arguable that the just combatants ought to do A2 rather than A1, even though it will involve the deaths of a greater number of innocent people. For if they do A2 they will merely allow innocent people to be killed, while if they do A1 they will kill innocent people. And many people believe that it is also better if harms in war are suffered by combatants rather than by noncombatants.

But if the just combatants ought to do A2 rather than A1, so that A1 is impermissible if A2 is possible, this shows the need for a further principle governing defensive action in war. For A1 is by hypothesis both necessary and proportionate.

We may therefore distinguish four principles that govern the morality of defensive action, both in individual self- and other-defense and in war. They are:

1. Narrow proportionality.
2. Wide proportionality.
4. A principle governing trade-offs between the probability and completeness of the achievement of the just aim of defensive action and harms caused to innocent people as a side effect.
5. A principle governing the distribution of harm between defenders and bystanders.

A further note on the necessity constraint

The principle of necessity is generally thought to compare going to war with alternative means of achieving the just cause that do not involve going to war, such as diplomatic initiatives, economic sanctions, and so on. But it also requires that we compare going to war in one way with other ways of fighting a war to achieve the just cause. If two different ways of fighting a war would each have roughly the same probability of achieving the just cause but one would cause less harm than the other, the one that would cause the greater amount of harm is ruled out by the requirement of necessity.

There are, however, various possible details, some rather subtle, that must be taken into account. Just as the determination of proportionality has to take into account the distinction between harms to which people are liable and harm to which the victims are not liable (which I think should be done by distinguishing between narrow and wide principles of proportionality), so the application of the necessity constraint must assign

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different weights to harms to different people, depending on whether or not they are potentially liable to be harmed. According to most traditional thought about the necessity constraint, which has usually be stated rather simplistically as a requirement of “last resort,” harms that war would inflict on enemy combatants do not have as much weight as harms that would be inflicted on innocent people, and some just war theorists have seemed to think that harms to enemy combatants or to those who are liable to attack do not count at all in determining whether war is necessary in the relevant sense. This last suggestion is clearly false, for harms beyond those necessary to achieve the just cause are harms to which no one can be liable, even if there are people who would be liable to be harmed if further harms were necessary for the achievement of the just cause. Still, the traditional thinkers have been right to suppose that when we consider whether there are “less harmful alternatives” to war or to fighting a war in a particular way, the avoidance of harm to the innocent has priority over the avoidance of harm to those who are potentially liable to be harmed.

It may be, indeed, that it is necessary to distinguish between distinct narrow and wide necessity requirements, in the same way that it is necessary to distinguish between corresponding narrow and wide versions of proportionality. But I will not pursue this possibility here.

There are, however, related issues, one of which I will mention now. Suppose that there are two different ways of fighting a war for a just cause. Both would have roughly the same high probability of achieving the just cause. A war fought in one way, W1, would cause certain harms to innocent people as a side effect, but these harms would be proportionate (in the wide sense) in relation to the importance of achieving the just cause. They would also be partially offset by the fact that W1 would also produce some benefits to innocent people as side effects. A war fought in another way, W2, would cause greater harm to innocent people as a side effect but those harms would also be proportionate in relation to the importance of achieving the just cause. While W2 would cause greater harm to innocent people than W1, it would also produce much greater benefits to other innocent people as side effects than W1 would. (Bear in mind, again, that “benefits” can include the prevention of harms.)

The question is which of these two ways of fighting a war would “cause the least harm,” be “less destructive,” or whatever the relevant condition is for determining what is necessary in the relevant sense? Although W2 would be better for innocent people in the aggregate, W1 would involve doing or causing less harm to innocent people. In general, doing or causing harm is morally more seriously objectionable than failing to provide benefits, including the prevention of harms. It therefore seems that W1 satisfies the requirement of necessity while W2 does not, for W1 would cause less harm to innocent people. This is true even though W2 would be better for innocent people overall.

Two possible qualifications. First, it may make a difference if the innocent people who would receive the side effect benefits are the same individuals as those who would suffer the side effect harms. If each person affected by W1 would be harmed to a greater degree by W2 but would also be benefited by even more by W2, that might make it

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I owe my awareness of this complication to an illuminating discussion with Larry Temkin, Frances Kamm, and Shelly Kagan.
permissible to pursue W2 rather than W1 – though some theorists, such as Seana Shiffrin, disagree. Second, the ratios between harms and preventions of harm may also matter. Suppose, for example, that W2 would kill twice as many innocent people as W1, that W1 would, as a side effect, save half as many innocent people as it would kill, but that W2 would, as a side effect, save five times as many people as it would kill. In these conditions, W2 might be permissible (and therefore satisfy the necessary constraint). For it has the same ratio of people killed to people saved as diverting the trolley does in the standard trolley case.

Can unjust combatants satisfy the in bello proportionality requirements?

It is an assumption of traditional just war theory that unjust combatants – combatants who fight in a war that lacks a just cause – are at no disadvantage vis-à-vis just combatants in their ability to satisfy the wide and narrow proportionality constraints. It is, however, difficult to see how this could be true. It is obvious that no war that is unjust because it lacks a just cause can satisfy either the ad bellum necessity requirement or the ad bellum proportionality requirements. For what it means to say that a war satisfies the necessity requirement is that it is necessary for the achievement of the just cause, in the sense that there is no alternative course of action with as high a probability of achieving the just cause. Similarly, what it means to say that a war is proportionate in the wide sense is that the expected harms it will cause to innocent people as side effects will not be excessive in relation to the moral importance of achieving the just cause. Because the ad bellum necessity and proportionality requirements have this implied reference to the just cause, issues of necessity and proportionality simply do not arise in the absence of a just cause.

The same is true, I claim of in bello necessity and proportionality. To say that an act of war is necessary is to say that it offers the highest probability among the various acts of war possible in the circumstances of making a certain contribution to the achievement of the just cause (or, to be precise, that it has the highest expected instrumental value in producing one of a set of outcomes that are equal best among the available contributions to the achievement of the just cause). If there is no just cause, no act of war can be necessary in the relevant sense.

The in bello requirements of proportionality make the same implied reference to the just cause. Assuming that just combatants are fighting by permissible means in the service of a just cause, they have done nothing to make themselves morally liable to attack. They are innocent in the relevant sense. There is therefore a clear sense in which any harm inflicted on them by unjust combatants must be disproportionate in the narrow sense, in that it necessarily exceeds the harm to which they are liable – that is, none at all.

Nor can acts of war that cause harm to innocent bystanders as a side effect be proportionate in the wide sense. For such an act to be proportionate in the wide sense, the harm it would cause to innocent bystanders would have to be not excessive in relation to the contribution the act would make to the achievement of a just cause. Since there is no just cause, the question of wide in bello proportionality simply does not arise.

Consider a case outside the context of war. Suppose that an act of murder will cause a certain harm to one innocent bystander as a side effect but will also, as a further side effect, benefit a second innocent bystander by more than it will harm the first. Could we
say that the act of murder would be proportionate in the wide sense? I think not. To say that would be nonsensical. The wide proportionality calculation is not just a comparison between an act’s good and bad side effects. It must at least begin by assessing bad side effects in relation to a just aim — or at least a good aim — that provides the reason for the action and the potential justification for the infliction of harm as a side effect. Again, in the absence of a just or good aim, the question of wide proportionality simply does not arise.

A defender of the traditional theory of the just war might argue that acts of war by unjust combatants are unlike murder in one crucial respect: namely, they are genuinely defensive, in that they involve the defense of the unjust combatants’ lives. The good effects that can be weighed against the harms to innocent civilians consist in the preservation of the unjust combatants’ lives. It is not, however, always true that acts of war by unjust combatants are defensive. A surprise attack that initiates an unjust war is not defensive, as the unjust combatants who conduct it were not at the time under threat from anyone. But even in cases in which acts of war by unjust combatants are self-defense, that is insufficient to make it coherent to say that the harm they cause to innocent bystanders as a side effect can be proportionate in the wide sense. Suppose that a murderer in the middle of a killing spree finds himself under potentially lethal attack by the police. Suppose further that if he defends himself against the police, his action will unavoidably harm one innocent bystander as a side effect but will also, as a further side effect, benefit a second innocent bystander by more than it will harm the first. Does it make sense to suppose that his killing a police officer in self-defense would be proportionate in the wide sense? Again I think not. For the act of self-defense is itself impermissible: he has no right of self-defense against the police. The preservation of his own life in this way is thus not a good that weighs either in a narrow proportionality calculation against the killing of the police or in a wide proportionality calculation against the harm his defensive action would cause to the innocent bystander. It is hard to make sense at all of the idea that action that is impermissible because its aims are unjust could nevertheless be proportionate.

Traditional just war theorists, who have claimed that the principles of *jus in bello* are independent of the principles of *jus ad bellum* so that the requirements of *jus in bello* are equally satisfiable by just and unjust combatants alike, face a dilemma. If they continue to maintain that the principles of *jus in bello* make no reference to the just cause for war, any statement they might provide of, for example, the wide *in bello* proportionality requirement that has substantive content is unlikely to make sense morally. Traditional theorists tend to appeal to something like the understanding of *in bello* proportionality articulated in Article 51 of the 1977 Geneva Additional Protocol 1, which says that harms caused to innocent civilians as a side effect of an act of war must be weighed against “the concrete and direct military advantage anticipated” from the act. But military advantage has no value that is independent of the goals that the military action serves. If those goals are unjust, it makes no sense to suppose that one could determine whether an act of war would be proportionate in the wide sense by weighing the harms it would cause to innocent people as a side effect against the instrumental gains it would make toward the achievement of the unjust goals. One cannot weigh bad side effects against bad intended effects in an effort to determine permissibility.
I have already indicated why the traditional account of *in bello* proportionality cannot be salvaged by appealing to the idea that the good of self-preservation by unjust combatants is what weighs against the harms their acts of war cause to innocent bystanders. The only alternative, it seems, is to concede that *in bello* proportionality judgments must weigh the harms caused against the good of achieving the just cause, in the way that *ad bellum* proportionality judgments clearly do. But this concession presupposes the abandonment of the traditional doctrine of the separation of *jus in bello* from *jus ad bellum*.

**In bello proportionality in law**

This leaves a serious problem for the law. If what I have argued thus far is right, the only acts of war by unjust combatants that can be morally proportionate are those that have the goal of preventing just combatants from pursuing their just cause by impermissible means. Otherwise the issue of proportionality simply does not arise in the case of acts of war by unjust combatants. Yet the law should aim to constrain the action of unjust combatants in war. It cannot realistically do this by simply condemning everything they do. Part of the reason for this is that most of them will believe, erroneously, that they are in fact just combatants. We therefore require a neutral *in bello* law identifies certain acts of war as legally permissible and others as legally impermissible. It would be useful if military action by unjust combatants could be held to some standard of proportionality, in particular a standard of *in bello* proportionality that could motivate them to make efforts to avoid harming and killing innocent bystanders. At present we try to do this by urging all combatants to engage in a form of reasoning that, at least for unjust combatants, cannot be coherently carried out— that is, reasoning that weighs the harming of innocent people against the ostensible good of military advantage. The problem in the case of unjust combatants is not so much that harms to innocent people and military advantage are incommensurable; it is, rather, that military advantage is not a good at all and thus cannot be weighed against harms to the innocent in order to determine whether an act that has both effects is permissible.

The problem, therefore, is not just that any workable *in bello* law will have to diverge from *in bello* morality; it is also that it may be impossible to identify a workable understanding of *in bello* proportionality that makes any sense at all when applied to the action of unjust combatants.

**Alternatives**

1. What it would be permissible to do if one had an extremely important just cause

2. What it would be permissible to do if one had a minimally important just cause

3. If what unjust combatants believed about their cause were true

This makes sense only if the unjust combatants’ mistake is factual rather than normative. If they believe their action will save the lives of many innocent people, they can assess proportionality relative to that aim.

But this does not work if their mistake is normative. If they correctly believe that their side’s aim is to exterminate the Jews and they think this is good, they cannot coherently weigh the lives of other innocent bystanders against the good of killing Jews
in order to reach a conclusion about whether the allegedly good effects of their action will outweigh the bad.

(4) If what just combatants could reasonably believe about their cause were true.

Since Britain had a just cause (though perhaps not for war), it is reasonable to regard its combatants as innocent in the relevant sense. If so, their deaths are relevant to proportionality, rather than proportionality. See “Proportionality in the Afghanistan War.” As I note there, “this presupposes, controversially, that status as a just or unjust combatant cannot depend on whether one’s war is proportionate. For assessments of narrow and wide proportionality depend on a prior determination of the status of combatants.”

If their war was disproportionate, that does not make them unjust combatants; those who fight for a just cause in a war that is either disproportionate or unnecessary fall between the categories: they are neither unjust combatants nor just combatants.

If a war for an unjust cause can be opposed only by disproportionate means, are both wars unjust? There seems to be a moral asymmetry between the two wars.