

Proportionality in War: A Return to Traditional *Jus in Bello* Conditions?

The revisionist just war theory's movement away from the assertion that all combatants are liable to be killed in virtue of posing a threat to one another has given rise to a vast number of difficult questions, including questions regarding what counts as a proportionate action in war. The difficulty and sheer number of these questions has led many just war theorists to move to a position of contingent pacifism, ultimately suggesting that combatants can be expected to engage in these difficult moral evaluations each time they are required to engage with the enemy. In this paper, I argue that the relationship between *jus in bello* proportionality and other *jus in bello* conditions can successfully capture the way lesser evil and liability justifications combine to provide all-things-considered judgments for actions in war. Showing that the relationship between liability justification and lesser evil justification for actions in war can be meaningfully and straightforwardly captured by the familiar *jus in bello* conditions is also meant to show that revisionist theories of war can in fact give us *useful and practical* answers to difficult problems that arise in war. In other words, if we can show that *jus in bello* conditions do in many circumstances capture the all-things-considered judgment derived from careful examination of the way liability justification and lesser evil justification work in ordinary cases and cases of war, then we have a response to the common criticism that revisionist theories of war oversimplify complex situations and in that way fail to provide combatants with useful guidance.

I start by discussing proportionality in war and its relationship to the overall question of what counts as just in war. I ask what sorts of problems arise for proportionality calculations once a liability-based approach (or responsibility-based approach) to proportionality and just war theory has been accepted.

Second, I give a quick survey of the positions others have taken with respect to proportionality in war and the question of the relationship between liability and lesser evil justification in war. I explain what reasons we have to think that both liability justification and lesser evil justification might work together to explain what combatants may or may not do in war.

Third, I explain how the traditional *jus in bello* conditions and the separation of labor between them might be helpful in understanding exactly how these two justifications are meant to work together to account for some of our intuitions regarding the more difficult cases of collective action and limited or minimal moral responsibility. I also explain why the proposal put forth here can answer at least some of the common criticisms of reductionist/revisionist theories of war that proceed from analogies to ordinary cases.

Finally, I examine some consequences of my view, in particular to contingent pacifism. The consequences of my view are particularly important when it comes to providing reasons to think that committing to a more complex picture of justification for actions in war does not need to commit one to pacifism. In other words, by attempting to restate the complex relationship of liability and lesser evil justification in terms of *jus in bello* conditions and their interplay the hope is that the familiarity and ubiquity of these conditions give us reasons to think it is possible to fight well on a large scale and that therefore at least one common argument for contingent pacifism fails.

I. Proportionality, Justification and *Jus in Bello*

Generally speaking we say that a harmful action is proportionate if the harm it causes is less than the harm it seeks to avert. Traditionally, in just war theory, the condition of proportionality was almost exclusively focused on the issue of “collateral damage,” in other words on whether or not unintentionally but foreseeably killing a certain number of civilians was proportional to some purportedly good aim. The exclusive focus on the harm caused to civilians in the traditional just war theory was a direct result of seeing all combatants as liable to harm, because they all equally fit the traditional criterion of liability, namely posing a threat.¹ More recently scholars have widely rejected this criterion of liability, in favor of the responsibility-based account of liability that suggests that one is liable to harm only if one is morally responsible for posing an unjustified threat.² With this understanding of liability in hand, the related question of proportionality becomes more complicated. This is in part because it becomes clear that not all combatants are liable to be harmed, for example those combatants that are posing a justified threat in virtue of the justness of their cause. In addition, since the liability to harm depends on the level of harm and the responsibility for that harm, it becomes obvious that not even all the combatants that are liable to harm are liable to be killed, and so we end up with various sets of agents in war, whose varying liability to harm suggests a rather more complicated criterion of proportionality and justness in war than the traditional one.³

The realities of war further stress how important these issues are, in part because we have good reason to think that the majority of active participants in war will neither be fully innocent nor fully culpable. This is largely a result of the fact that much of the liability to harm that arises out of actions in war arises out of collective actions in war. In fact, the most complicated and probably most relevant considerations for proportionality in war regard cases where there are multiple agents and/or where their moral responsibility is minimal, where being minimally morally responsible is to not be culpable, in virtue of having a strong epistemic or other excuse for their action. The set of considerations that comes into play in deciding who may or may not be killed in trying to avert the objectively harmful action of a set of minimally responsible aggressors is vast. They include the extent of the threatened harm, the moral responsibility for that extent of the harm, chances that the harm will actually occur, and others. But the complexity of the issue does not simply arise from the fact that there are many considerations to take into account, the complexity also arises from the fact that grounding the analysis of proportionality simply in the idea of liability (and liability justification) leads to apparently contradictory inferences.

Consider one such problem that has been widely discussed in the literature: that of a minimally

¹ Simply put, on the traditional view, all combatants pose a threat that all or almost all civilians in virtue of being civilians do not and thus

² Jeff McMahan, *Killing in War*, and other recent McMahan articles.

³ There is a straightforward sense in which we ought not to be speaking of liability to harm, since that defensive action to which one is liable are not harm in the same sense as those to which they are not liable. I nonetheless speak of liability to harm and justifying harm greater than the harm one is liable to (mostly to avoid overly cumbersome language).

responsible driver.⁴ This driver has maintained her car well, is obeying the speed limit and is in spite of having taken all of the precautions posing a lethal threat to an innocent bystander. One can argue, and many have, that this driver is liable to at least some amount of defensive harm since unlike the innocent bystander she is not fully innocent, her moral responsibility for the threat arising out of having engaged in a risky activity. The issue becomes complicated when we consider whether or not the innocent bystander may, if necessary, kill this minimally responsible driver in self-defense and whether that can be justified simply by appealing to her liability? Those that believe that we can justify killing in this case and ground it in liability most often point to the relative difference in liability between the innocent bystander and the minimally responsible driver.⁵ The intuition that this justification of lethal self-defense can be grounded in liability to harm becomes shaky however when the case of the minimally responsible driver is contrasted with two other cases. On one comparison, we may consider what may be done to a fully culpable murderer in self-defense. On at least the first pass, it seems that the harm which is justified (namely lethal self-defense) is exactly the same in both cases, even though the moral responsibility and thus liability seem vastly different. Probably more problematically, and more relevantly for our purposes of deciding what action is justified in war, consider a case where there are multiple such aggressors. While it seems right that we may, in self-defense, kill a rather large (or any) number of fully culpable murderers, this intuition does not hold when we consider what may be done to, for example, 15 minimally responsible threateners.⁶ And yet, if what justified why we may kill a single minimally responsible threatener was her liability, it seems like we should be equally justified in killing the 15 (or 1500). Each of our comparative examples points to a set of related problems: What could explain how in spite of varying liability we can justify the same amount of harm (namely death in the case of lethal self-defense) and what could explain why we think we are justified in killing a vast number of fully culpable aggressors, but not a large number of minimally responsible threateners? Before I move on, it is important to note that these questions are question about what we ought to do (all things considered), not simply questions about what would be a proportionate action.

These worries/considerations have led some scholars to turn to the more traditional justifications of proportionality to make sense of these problems- namely lesser evil justifications. Some have, for example, used the lesser evil justification to explain how the addition of harms to minimally responsible agents might add up more quickly than the addition of harms (beyond those to which they are liable) to fully culpable agents. I believe that the basic intuition behind appealing to the lesser evil justification of harm to account for the problems that arise from relying simply on liability justification is right. However, I am not persuaded that the accounts that have been offered up to now give a complete picture of the way these two justifications are meant to work together to inform our actions.

My desiderata for a successful account include: We need an account that is responsibility based, but yet

⁴ McMahan, Proportionality article. Bazargan The Liability of Minimally responsible moral threats? (others)

⁵ If this scenarios doesn't evoke the same intuition, presumably similar scenarios with less than fully culpable threats give rise to the same problems.

⁶ For a much more developed and sophisticated analysis of these cases and their comparisons, see McMahan "The Relevance to Proportionality of the Number of Aggressors."

can explain how lesser evil justification might work to account for the mixed intuitions above. In other words, our account should at least hint at a theoretical/pre-theoretical justification for why we think we are entitled to simultaneously appeal to these apparently/traditionally incompatible types of normative justification. Second, we need an account that can in fact be used (prospectively) to decide difficult cases.⁷ By this I mean that an account that is more familiar and usable by an officer or even a combatant in the field is preferable to the one that is less accessible. This is in part because we would ideally want to be able to answer those pacifists and practitioners that reject revisionist accounts because their complexities commit one to suggesting no war can be fought justly. In what follows, I propose an account that I think can meet these desiderata better than the alternatives. That account is grounded in and inspired by the traditional *jus in bello* conditions. I suggest that the interplay between the *jus in bello* conditions can help us keep the relationship between liability and lesser evil justifications clear in our all-things-considered judgments, and in that way can also provide us with an account that helps us apply these justifications together in difficult cases. If my account is successful, then one might argue that the traditional *jus in bello* conditions are *mutatis mutandis* justifiable tools for decision making in war. That in turn then gives us reasons to think that contingent pacifist accounts that are grounded in the worry about our ability to act justly in a world of minimally responsible threateners are flawed.

II. Proportionality and Minimally Responsible Threateners⁸

Several accounts have been offered that attempt to explain how the lesser evil and liability justifications might work together to answer some of those difficult questions regarding proportionality.

Jeff McMahan does a thorough job of discussing various ways to understand proportionality and justification in cases of minimal moral responsibility and varying numbers of aggressors.⁹ He rejects a set of theories, including the Variable Contribution Explanation, which rests primarily in the varying levels of liability to harm, the Combined Justification which tries to in a straightforward way put together lesser evil and liability justifications and the Aggregate Harm approach, which suggests that the lesser evil approach can override liability justifications. Having rejected these theories for their inability to fully answer a range of issues that come up with varying the conditions of moral responsibility for the harm and the number of aggressors, he finally settles on what he calls a Residual Injustice proposal. The Residual Injustice proposal is meant to capture both the relevance of the degree of moral responsibility for the harm we are trying to avert and the relevance of the number of aggressors. The Residual Injustice proposal is dependent on the notion of fairness; it suggests that when “some amount of harm is unavoidable, it seems that there must in principle be an ideally just distribution of harm in which different people receive no more than their fair share.”¹⁰ The fair distribution according to

⁷ Ideally, the account should also be able to explain why in some cases (very typical cases in war) we might be justified in killing specific 5 combatants of the band of 100, if killing 5 is necessary, but where all of them are equally morally responsible for the harm we are trying to avert. Finally, we also hope that a successful account would not confuse, as some have, the notions of proportionality and all-things considered justification.

⁸ McMahan’s and Bazargan’s accounts I discuss here are from unpublished drafts and as such might have significantly changed.

⁹ McMahan, “Relevance to Proportionality...”

¹⁰ P. 14 mcmahan

McMahan would proportionally capture our moral responsibility for the harm that is unavoidable; so that if I am 80% responsible and you are 20% responsible the fair distribution of harm would be 80-20. But in cases when all such harm must go to a single individual, it goes to the one with a greater level of moral responsibility (so in our case to the one 80% responsible) leaving a level of injustice, a residual injustice which seems to linger, and aggregate with each attacker. This would explain why in cases of multiple minimally morally responsible attackers there comes a time when it would not be justified to kill them, while in cases of fully culpable aggressors such time either never arrives or arrives significantly later. So McMahan argues that “when the number of minimally responsible threateners reaches that point where the residual injustice is larger than the injustice of killing the less morally responsible individual then killing becomes disproportionate- though only in a hitherto unrecognized sense, as none of the threateners is harmed beyond the amount to which he is individually liable.”¹¹

There is a number of problems with this account, some of which McMahan addresses himself, but one which he does not and which seems to me rather crucial. This account seems appealing when we speak of cases where all participants are at least partially morally responsible for the unavoidable harm. In that case, it is not shocking to assert that they are all at least to some degree liable to harm. But McMahan wants to extend this intuition to cases where there is a minimally liable party and an innocent party (like the driver case). McMahan seems to think that “it is not implausible to suppose that if it were possible for the harm d (death) to be divided between them (the innocent and the minimally morally responsible threatener), the ideally just distribution would be for the victim to suffer some harm x so that the minimally responsible threatener would suffer only $d-x$, when x would be substantially less than $d-x$.”¹² In other words, if it was possible for the innocent bystander to just have a broken arm and the minimally responsible driver to have all broken limbs and a collapsed lung then that would be better than death for the minimally responsible threatener. But this seems wrong, in part because the intuitions which worked in the case of the 80-20 responsibility split and the intuitions that works in the 20-0 responsibility split seem greatly different. In the first case, a broken arm for the 20% responsible holder can be justified by their partial moral responsibility for the situation, but that explanation is not available to us in the second case; the explanation in the second case must rest with (and fully so) some sort of a lesser evil justification. But if the lesser evil justification is what is doing the justificatory work in the second case, it does so by suggesting that surely the broken arm and the broken limbs and a collapsed lung are jointly better than death. But note that this will be the case no matter how much less than d harm we add. It is the virtue of the fact that lesser harms are better in almost any addition than death that is doing the justificatory work in the second case. The intuitive plausibility of this suggestion then doesn't rely on the same liability justification as the first case, but on a shaky analysis of lesser evil justification which seems to either suggest that an innocent bystander can be subjected to a lot of harm in the “fair distribution of harm,” or proposes a set of harms whose addition doesn't seem to really be comparable, or commensurable with death.

¹¹ p. 15

¹² p. 14

Other scholars have also tried to address the problem at hand. Saba Bazargan for example proposes what he calls “the hybrid account” which relies on both the lesser evil and the liability justifications to account for why it is impermissible to defensively kill multiple minimally responsible threats. Bazargan’s hybrid responsibility-based account of liability is composed of two claims: “the first is the proportionate responsibility based account of liability, which limits the degree of harm to which an individual is liable to the degree of responsibility she bears for the wrongful threat she poses. The second claim is the lesser evil discounting view according to which the disvalue of the defensive harm imposed on the minimally responsible threatener who bears greater responsibility ought to be discounted.”¹³ So for Bazargan the amount one is liable to is proportional to their moral responsibility. That seems absolutely right to me. If moral responsibility is going to ground liability then the extent of that moral responsibility better be able to explain the amount of harm for which one is liable. I think it is however important to note that the harm to which one is liable is not only proportional to the responsibility, but also the degree of harm they are threatening. What Bazargan then proposes is that the remaining amount of harm can go to the one who is liable to be harmed (without double counting) since it is less bad to impose harm on those that are liable than on those that are not. On this account it would be impermissible to kill multiple minimally responsible threats because each one of them was harmed to a greater degree than they were liable to, so in that sense their rights were infringed, and such infringement is on his view additive. One possible worry about Bazargan’s account is that it engages in one type of double counting- it relies on the liability justification twice, without being entitled to (after the harm that responsibility grounds has been exhausted). Bazargan responds to this by suggesting that using liability to explain the distribution of the “extra” harm to the one that is liable is justified, because liability can ground harm in two senses: an absolute sense and a relative sense. In the absolute sense, since one is morally responsible for some harm and in the relative sense because one is more morally responsible than the other actors in the scenario. This sort of a response to the double counting worry suggests that Bazargan’s second claim of the hybrid account is best understood as suggesting that the reason it is lesser evil to impose harm past that to which one is liable to is because of their status as a somewhat responsible threatener.

Finally, I turn to one other account that proposes that there is a relationship between liability and lesser evil justifications. David Rodin has argued that both are forms of justifications for proportionality and as such are justifications of harm. For Rodin “both the liability and the lesser evil justification of harm are at root rich forms of proportionality relationship between a substantially shared set of underlying normative factors.” Rodin believes that they can work together to get us to all-things-considered judgments of permissibility. And while I agree that these two sets of justification do interact to give us all-things-considered judgments of permissibility, I believe that they are not simply to be understood as proportionality calculations, and that instead they also act as tools for explaining other considerations that come into play (other than proportionality) when considering whether an action is morally permissible.

¹³ p. 7 Bazargan paper

What all these views seem to share is an understanding that lesser evil justification and liability justification both figure in different ways into deciding what sort of an action is proportionate or justified. Each one of them fails in different respects to provide us, however, with a clear understanding of how these come together to explain which actions are morally justified. McMahan's account seems to rely on a lesser evil justification without being entitled to do so. Bazargan's account gets the calculation of lesser evil wrong, in particular because it relies on liability to exhaust the question of lesser evil. There might also be worries about some of these accounts (namely McMahan's and Bazargan's) double-counting liability. And while, as we saw that Bazargan does have a response to this worry I will suggest that an account that avoids the appearance of double counting all together might be preferable. Rodin's account suggest that both justifications are forms of proportionality and in that way identifies the notion of proportionality with all-things-considered justifications. In fact, one of my main worries about all of these accounts is that they identify proportionality calculations with all things considered judgments.

III. Liability and Lesser Evil Justification and *Jus in Bello* Conditions

It is in the light of all of these problems and my desiderata for a theory of justification and proportionality of action in war that I turn to *jus in bello* conditions, since it seems to me that the way these conditions work together can be a good model for explaining the relationship between the lesser evil justification and the liability justification. The basic logic behind this approach is to show how the lesser evil justification and the liability justification figure in explaining why we would even want to impose the classic *jus in bello* conditions on justice of fighting in war and then also show how these two justifications can be then used to apply the conditions. In providing this type of analysis I will be using the *jus in bello* principles as a model which would allows us to a) acknowledge that the justifications come in *at two levels of analysis* (they explain why we impose the conditions we do and at times how we apply them), and b) allow us to at least start on an explanation how these two apparently incommensurate or incompatible analyses could work (would be allowed to work) together to account for some of our basic intuitions about fighting in war, as well as c) give us a model that is useful as a prospective tool for several reasons, including the familiarity of this approach.

Conditions that are traditionally considered (albeit not non-controversially) as conditions necessary to fight justly in war, i.e. *jus in bello* conditions, include discrimination, necessity or the requirement of minimal force, proportionality, no means *mala in se*, and right intentions. I believe that using the interplay between these conditions can be a useful guide for explaining how the two justifications work together to answer difficult moral questions. In particular, I believe that this approach can solve many of the problems that other analyses that rely on both justifications seem to suffer from.¹⁴

¹⁴ In particular, many scholars have avoided explaining what justifies them in this awkward addition of justifications that don't seem commensurate. Also as I mentioned several accounts seem to suffer from double counting or at least the appearance of double counting. Most problematic however is the fact that it is not always clear how these explanations can be utilized prospectively; these accounts do not seem to explain how these justifications "add up" to suggest that a particular action is all-things-considered justified.

The condition of discrimination requires that we discriminate between those who are not liable to be harmed and those that are liable to be harmed, in other words, to apply different considerations of proportionality (and intention) between those liable to be harmed and those not liable to be harmed. This condition is simply met when we use an appropriate measure to distinguish between the two, namely the assessment of their moral responsibility for an unjustified threat that we are trying to avert. The imposition of this condition itself is therefore explained by a liability justification and can be applied by drawing the line between those minimally responsible and those fully innocent. As I will argue later this does not mean that the harms imposed on those that are minimally responsible beyond the harms to which they are liable must be explained in the same fashion as the harms to which they are liable. It is also important to note that the assessment of the moral responsibility for an unjustified threat that we are trying to avert will greatly depend on the scope within which this is assessed. Given that I am attempting to provide an account that is meant to be useful in the field, I suggest that the scope within which we can ask whether or not one is posing an unjustified threat is significantly smaller than the war as a whole. In fact, I take it that in many instances the unjustified threat, which is to ground our assessment of one's liability to harm, must be the immediate threat, the one we are trying to avert. I take it that the scope within which one is justified and expected to evaluate liability to harm will depend on one's access to information, so that the scope within which an ordinary combatant in the field is justified in making such assessments will be smaller than the scope of her superior officer. In particular, what counts as the immediate threat we are trying to avert will very straightforwardly differ between a combatant and a superior officer engaged in strategic decisions. But I take it that it is not novel to propose that the judgments of *jus in bello* justifiability are made at different levels with different expectations.¹⁵ The hope is that suggesting such a gradation in who is entitled to make which types of assessments can preserve a certain level of epistemic certainty at all levels of decision-making.

The necessity condition has different interpretation both in legal and in philosophical literature. For my purposes here I combine the necessity condition with the minimal force requirement. On that understanding of the necessity condition, it requires that we always use the minimal amount of force or harm to achieve the desired end (including no force). This condition (understood in this way) is justified by lesser evil justification and fully so. It can override the proportionality considerations because actions that are proportional might still not be justified if the action is not also one of minimal force. An action must be necessary in the sense that if there is an action that would cause less harm and accomplish the same aim is possible (or probable) then we must perform that action rather than this one. This interpretation of the necessity condition as one of minimal force, which is justified by the lesser evil justification is not arbitrary. It is meant to separate this notion of necessity from the notion of necessity wrapped up with the notion of liability. To be liable to defensive harm of a certain level is to have a proportionate level of responsibility for an unjustified threat of harm, which we are trying to avert, and for that defensive harm to be necessary in averting the unjustified threat.

¹⁵ I think there are many interesting consequences for my analysis in Osiel and Bohrer recent papers on Proportionality in War at Multiple Levels.

The no means *mala in se* condition simply suggests that even if all other conditions are met if what is proportionate and necessary is to use torture or chemical weapons, or other “bad in themselves means” we must abstain from such an action. We traditionally think of this condition as one justified by something akin to liability justifications, even though we might also (less traditionally) explain this condition by the lesser evil justification as well.¹⁶ Classically, *mala in se* conditions are justified exactly by drawing a line of where utilitarian calculus becomes applicable. *Mala in se* condition is set in terms of what one is liable to, suggesting that there is no level of moral responsibility or culpability that would result in one being liable to these sorts of means/harms. All that matters for our purposes here is to understand that what justifies imposing this condition is not a combination of the liability or lesser evil justification.

The right intentions condition is often considered a controversial one, even in cases of *jus ad bellum*, where I take it to be more straightforward than here. To have right intentions in fighting in war, is to act for the reasons of the just aim that one is attempting to achieve. The right intentions condition, just like the proportionality condition, ought to be understood as two separate conditions; this separation is required by the discrimination condition. The claim of having right intentions in actions that harm those that are not liable to be harmed at a minimum requires that the main goals not be aimed at via such harm, i.e. that such harm is unintended. That is not required to have right intentions in actions that harm those who are liable to be harmed, at least in as much as they are liable for such harm. This split in what is required to have right intentions is dictated on liability grounds, which justified the imposition of the discrimination condition.

Finally, I turn to the notion of proportionality. My hope is that having set aside various concerns about right intentions, necessity and discrimination, the justificatory work that the notion of proportionality is left to do is clearer and more straightforward; i.e. it is easier to assess whether an action is proportionate. Having taken the discrimination condition seriously we might claim that there are actually two separate conditions of proportionality and that they are justified in different ways. There is proportionality that refers to what it would mean for an action to be proportionate with respect to those who are not liable to be harmed. This is the question of wide proportionality.¹⁷ The question is itself defined by the conditions of discrimination and right intentions, which are themselves explainable by the liability justification. However, whether or not one is acting proportionally in the wide sense is fully answerable by an appeal to the lesser evil justification. To be widely proportional the harm we are trying to avert must be much greater than the harm we might foreseeably, but unintentionally cause to those not liable to be harmed. Just like in our analysis of discrimination, who is required to make such an assessment and within which scope will differ.¹⁸

A similar albeit more complicated analysis applies in the case of narrow proportionality. The question of

¹⁶ The reasons can be restated in lesser evil terms by suggesting that the long-term consequences of using means bad in themselves are so egregious that one cannot justify using them.

¹⁷ Once again McMahan has done much of the groundwork on this distinction in his *Killing in War*.

¹⁸ I take it that while this is a difficult calculation for one to engage in, it is no more difficult than it would have been for a traditional just war theorist.

narrow proportionality is a “matter of whether the harm inflicted exceeds that to which the victim is liable.”¹⁹ One is acting narrowly proportionate when the harm that they impose on one who is liable to be harmed does not exceed their moral responsibility for that harm. Of course this is at a minimum a two-dimensional proportionality, the smaller the harm for which one is morally responsible and the smaller their moral responsibility for that harm the lesser amount of harm we can impose on them. Conversely, even the smallest amount of moral responsibility for a great harm, might be sufficient to impose a rather large amount of harm in an attempt to avoid the greater harm. The question of course is in what sense is liability to harm proportionate to moral responsibility for that harm. On one hand, the proportionality calculation might for its analysis compare this moral responsibility to that of a fully culpable individual committing the same act. On the other hand, the proportionality calculation might appeal to the moral responsibility of others in our scenario. I am using the term “amount” of moral responsibility to compare the moral responsibility of the threatener to that of a fully culpable individual threatening the same amount of harm, I am not using it in the relative sense, i.e. moral responsibility compared to that of others involved, namely because then the threatener's moral responsibility would always (when others are innocent) be 100%, by caveat.

So how does this two-pronged analysis of proportionality help us in answering those difficult questions I suggested were central to having a complete picture of justification of fighting and killing in war? In particular, how can this account explain why we might be justified in killing a single minimally responsible threatener, while we might not be justified in killing multiple minimally responsible threateners? The particular problem arises in cases like the minimally responsible driver, where there is unavoidable harm of death that has to be distributed either to the driver or to the innocent bystander. With the above account in mind, we utilize the liability justification to point to the appropriate type of proportionality analysis, and either the liability or lesser evil justification to explain what actions are proportionate. So then on this account we might suggest that we think of the harm above and beyond the harm to which the driver is liable as the same sort of harm that one would impose on the innocent. In other words, we might in cases of minimally responsible threats apply first the narrow proportionality analysis and then the wide proportionality analysis. However, the amount of harm that would need to be imposed on the person that is liable is simply smaller in cases of minimally responsible threats, assuming that the harm of death is equal since the harm that needs to be imposed is that of death minus the harm to which one is liable. This picture of proportionality is meant to be simple and easy to apply.

Given this picture of how we ought to assess whether or not an action is proportionate, it might seem that the complexities were just pushed to some of the other conditions. For example, it might seem that we now end up with a difficult question of what sorts of intentions count as right in the case where we are dealing with a minimally responsible threatener. The question arises since if the harm above that to which one is liable is genuinely to be assessed in the same way as the harm to an innocent, then we might worry that we must somehow have different intentions with respect to the harm we impose which is justified via the lesser evil

¹⁹ McMahan p.2

justification and that which is justified via the liability justification. It seems to me that for minimally responsible threateners it must be the case that in our evaluations of the proportionality we are justified in asking what sorts of intended harms we may impose on them, even though parts of the harm will be justified in the same way as for those fully innocent. In other words, while minimal moral responsibility for a harm is not sufficient to ground liability to lethal harm, it is sufficient to assert that both harms to which the threatener might be liable and harms above that *can be* intentional. This seems to be the case since if it is ever the case that we can justifiably kill a minimally responsible threatener in an effort to avert the threat, then it seems often if not always we will be using her as a means to avert that very threat.

The benefits of this approach are to be found in the fact that many of the complexities have been “pulled out” of the proportionality calculation, making it easier to apply.²⁰ In other words, this account is careful not to identify all-things-considered judgments with proportionality calculations in war and that allows us (on this account) to avoid some common problems for those proportionality calculations which are not as sensitive to the distinction between all-things-considered judgments and judgments of proportionality. For example, one worry that might arise if this analysis of proportionality was an analysis of all-things-considered judgment would be that we could end up with a world in which it would be almost always acceptable to kill a minimally responsible threatener when the other party is innocent, or worse yet that we may have to be committed to the claim that if it is possible to distribute harms between the minimally responsible threat and the innocent party we need not to. For example, imagine that S is partly morally responsible for a lethal threat of harm to P, further imagine that S is only 20% responsible comparative to a fully culpable threat in the same scenario. Imagine further that it would be necessary to inflict y amount of harm on the threat to avoid the harm, but that their moral responsibility for the lethal threat only justifies imposing $y-2$. And since liability depends in part on necessity then one will only be liable to $y-2$ harm if we can via lesser evil justify 2 units of harm. This sort of analysis then makes liability to harm dependent on the lesser evil analysis of harm, which is exactly what my account has been trying to avoid. This is why I tried to suggest that we have two notions of necessity, one internal to liability which simply asks whether the harm that one’s moral responsibility grounds (in this case $y-2$) would be necessary and not how much of that harm is necessary and another, external *jus in bello* notion of necessity which is better understood as minimal force necessity.²¹ One helpful way to think of these two necessities is as upper and lower limits on harm. So the necessity internal to liability asks whether the amount of harm that the moral responsibility of the threatener can ground (as comparative to a fully culpable threat) is necessary to avert the threat and the *jus in bello* necessity condition asks whether the overall harm that both liability and lesser evil justifications have deemed proportional is necessary. This then allows these two types of justification to remain independent. It also gives us tools to say that while it is the case than in nearly all scenarios whether the minimally responsible threat is threatening lethal harm to an innocent we will end up with all things considered

²⁰ Furthermore, this account keeps the liability and lesser evil justification separate and not interdependent, and thus begs fewer questions with respect to our entitlement to appeal to both in our all things considered judgments.

²¹ One further benefit of this is that the notion of necessity that is internal to liability is a non-consequentialist notion, it doesn’t require comparing harms to answer.

judgments that suggest killing the minimally responsible threat if necessary is justified. But remember that (like on most other accounts discussed here) it will not be the case that we may kill multiple such threateners. The second worry that was raised was that this account might encourage not distributing harms when that is possible (like McMahan's account attempts to). Regarding this second worry, it seems pretty clear that we can ask to what amount of harm is one liable to and then simply attempt to compare the various alternatives of distributing the rest of the harm that would allow for the threat of harm to be successfully averted and applying the *jus in bello* necessity condition chose the one that is least harmful.

Another benefit of this account is that it avoids what some have called double-counting. On the view presented here the rest of harm above that to which one is liable is justified by whether or not it is lesser evil. These two are kept separate since the notion of necessity internal and external to liability is kept separate and since the calculations of lesser evil are raw calculations, they need not take into account worries about qualitative differences between unintended and intended harm and then need not assert that once liability to harm or moral responsibility for the threat is what makes is lesser evil to harm the minimally responsible threat (i.e. re-using reasons that we have preempted with liability calculations).²² I further believe that we have good reasons to assume that the harm of death is equal for everyone barring extremely unusual circumstances and that we (as combatants and officers) are justified in thinking that the harm of death is equally great for all people around us. It is not highly unusual not to expect such calculations (of value of life differentials) in ordinary cases so I am not persuaded that we need to worry about such calculations in cases of war. This further simplifies our calculations of proportionality, after all we may think of harm above that to which one is liable as harm that needs to be justified the same way as the wide proportionality harm may need to be, namely by a simple analysis of lesser evil. In this way the lesser evil justification does not rely in any way on the liability justification, but both of them jointly can give us separate and additive reasons to think that killing a minimally morally responsible threatener is justified. At the same time this account explains why we might not be justified in killing multiple threateners, most likely not even three or four. This account does not require that we compare broken arms to death, nor does it attempt to roll liability and lesser evil into a single interdependent justification. Instead it explains that the liability justification explains how the conditions of proportionality and right intentions are to be applied and then in a different level of analysis relies on the liability justification or lesser evil justification to explain which actions are proportionate and which actions are justified. This account allows us to track the meaning of claims like "that action is proportionate, but not justified." It also suggests that when we say that killing of the minimally morally responsible threatener is both narrowly and widely proportionate we actually do not simply mean that the harm they are liable to was not exceeded and no innocents were harmed, but that the harm to which they were subjected above and beyond that to which they were liable was the lesser evil under the same standard that would have been used to harm an innocent. All of this ultimately matters since it informs our questions regarding what may be done to a group of attackers, where each one of them is only minimally

²² I am grateful to herlinde pauer-struder for this phrasing of the issue.

responsible for the threat. It is hopefully clear why I do not think we are justified in killing all of them to avert the threat of a single death of an innocent bystander. But in war rarely are we required to kill all to avert the threat and rarely is the threat to a single individual.

IV. Consequences of Taking the Proposal Seriously (for 5/100, MEC and Contingent Pacifism)

In the rest of this paper I (a) try to see what this account can tell us about killing 5 out of 100 minimally responsible and equally so attackers. I argue that the conditions of necessity and right intentions are much more relevant here than the condition of proportionality on its own, further explaining why it is useful not to bundle all the relevant considerations into an analysis of proportionality.

I also (b) examine what this account can tell us about whether the minimally morally responsible threatener is justified herself in self-defense and whether that might lead us back to some form of moral equality of combatants.

Finally, I (c) examine the consequences of this approach for contingent pacifism.

(a) In war it is often the case that to achieve some aim it might be sufficient and necessary that we kill only a certain proportion of minimally responsible attackers. The worry arises when we ask what justifies us in killing some particular 5 minimally responsible attackers out of a 100? According to McMahan in a case when killing one, or in our case 5 “would be sufficient to achieve the just cause, killing more than [five] would be pointless or wanton, and no one can be liable to be killed gratuitously. For a person to be liable to a harm, his suffering that harm must be either a means to or an unavoidable side effect of the prevention or correction of a wrongful harm for which he would have been to some degree responsible.” This points to a claim that liability, not just in this case, but always, is conditional, on whether or not the harm one is possibly liable to is necessary to avert or prevent the harm for which they are responsible. But all of this hides the fact that questions of necessity themselves are questions about lesser evil and minimal force. Once again keeping these separate through using a model like the *jus in bello* model proposed here would allow us to better understand exactly this idea that all liability is conditional liability, and that when we speak of liability justification for various conditions of *jus in bello* model, we are really speaking of conditional liability justification. In other words, if we are to accept McMahan’s answer to how come and why we may kill 5 out of 100 equally minimally responsible combatants, which seems to me as right, the *jus in bello* model of justification is better equipped to explain exactly this notion of conditional liability.

(b) Next, I ask what does the proposal I lay out here tell us about the rights of the minimally responsible driver with respect to her self-defense and what are the possible consequences of this view for the relative moral status of combatants in war. So one might ask whether the minimally responsible driver is justified in engaging in self-defense against the innocent bystander. I argue that she is not, and that this account preserves the moral inequality of combatants. On this account we are justified in killing a single minimally morally responsible threatener because the harm that needs to be imposed on them above the harm to which they are liable is simply less. This makes it so that killing the threatener is all-things-considered right thing to do when no other options

are available. Furthermore, on this account in saying that an action is one that is less bad is to say that it is an objectively justified action. The fact that we often think that the minimally responsible threateners have a right of self-defense is often grounded in the claim that they have an agent-relative justification to favor one's own life. But I think we ought to be careful when we consider favoring of one's own life as justificatory rather than excusatory in considering the possible self-defense of a minimally responsible threatener. I take it that if the minimally responsible threatener was to engage in self-defense she could be morally excused because of a right to favor one's own life, rather than justified because of it.

(c) Finally, I turn to an examination of some of the consequences of taking my proposal seriously for contingent pacifism. Contingent pacifists take many forms, but many accept that just war theory (in some form or another) is the appropriate way to justify war. Those pacifists that accept just war theory by and large think that such justifications of war and fighting in war are always going to fail. The reasons for this are various and the corresponding affirmation of the claim that justifications of war will always fail will be filled out by various contingent claims. Some of the prominent contingent pacifists suggest that approaching the justification of war, via the liability analysis is all-together mistaken. Scholars like Larry May, argue that in today's world it would be difficult to meet either the *jus ad bellum* or the *jus in bello* conditions. I set aside the arguments against the *jus ad bellum* and focus here, for obvious reasons on arguments for contingent pacifism that are grounded in the rejection of the view that *jus in bello* condition can be met. The argument here is nonetheless relevant since many of the arguments in support of contingent pacifism take exactly the form of rejecting the possibility of meeting the *jus in bello* conditions. Two possible arguments come to mind- one grounded in the analysis akin to the one I present here- namely those contingent pacifists that accept the liability approach, but think that this makes it close to impossible for anyone to fight the war justly and those, like May, who reject the idea that the liability approach is the best way to examine justness of fighting in war in the first place. It is interesting to note that on both sets of arguments the main point that does most of the justificatory work is the assertion that given facts of our world as it is, it will be close to impossible in most or all cases to decide who is a just target and who is not. This claim often goes hand in hand with the claim that there aren't a lot of just targets in war in general, since war seems to be mainly fought by minimally responsible agents, rather than fully culpable agents. Some, namely those that reject the responsibility based approach to just war theory all together might in fact go further and argue that the war is in fact most often fought by innocents. For example, May argues that complicity on the unjust side is not sufficient to make one liable to be attacked or killed. This is relevant since it is sometimes argued that the complicity of the combatants on the unjust side is sufficient to ground their minimal moral responsibility. By arguing that complicity is not sufficient for combatants to become legitimate targets of attack (in primary or secondary sense) and by arguing that complicity would be a primary general way (if not the only one) for soldiers on the just side to affirm the moral status of the combatants on the opposing side, one can argue that it would be wrong to kill those on the unjust side even if the side was objectively unjust.

This is where the analysis presented here I believe might help. One of the consequences of my account is that the moral inequality of combatants still stands. Not only does it still stand but in fact I argue that the

traditional, familiar, *jus in bello* analysis can in fact, *mutatis mutandis*, be utilized to explain how the liability justification and the lesser evil justification work together to give us some answers to who may or may not be killed. If many of the central arguments of contingent pacifism rely on the contingent claim that it will be hard to decide who may or may not be killed, because it is unclear who may or may not be morally responsible for some unjustified threat of harm, then showing that minimal moral responsibility together with some other factors grounding lesser evil calculations (traditionally) can help us identify targets might present an obstacle to those forms of contingent pacifism. It is important to note here that I am not suggesting that this model presents an obstacle for *jus ad bellum* based contingent pacifists, nor for those contingent pacifists who simply think that almost no combatants are minimally responsible threateners, but for those that think that it is impossible to distinguish between those minimally responsible and those not minimally responsible.

In conclusion, my hope is that the account provided here gets closer than the alternatives to meeting the desiderata I set out in the beginning for an account of fighting in war that take seriously the idea that liability and lesser evil justifications work together to give us all things considered judgments in war. I have argued that even with taking the revisionist theories of just war seriously, we may preserve *jus in bello* conditions and their usefulness and nonetheless be sensitive to all the new complexities of such a theory of war.