

The Common Defense Paradigm: A Moral Approach to the Culpable Threat Problem

By Ian Fishback

It is, however, worth making one general point that applies to all views that claim that the moral principles (if any) that govern the practice of war are different from those that govern other areas of life. This is that on these it is essential to be able to distinguish with precision between wars and other types of conflict. For on all such views, if people are attacking and killing one another, whether they are acting permissibly or are guilty of murder may depend on whether their conflict counts as war. I find this extremely implausible. But there is another possibility that is perhaps more plausible, though it is less commonly articulated. This is that there are moral principles that are not restricted to war but are such that the situations to which they apply are extremely rare outside the context of war. It is possible that the intuitions about war that prompt people to say that an entirely different morality comes into operation in a state of war are actually better understood as implications of common moral principles that *seem* inconsistent with ordinary morality only because they are intuitions about extreme circumstances that are very rare outside of war.¹

- Jeff McMahan, *Killing in War*

Philosophers subscribing to an individualist account of the morality of war claim that the individual is the fundamental unit of moral analysis and that all states rights are reducible to individual rights.² Most individualists claim that justifications for war reduce to the individual right of personal self-defense or can be explained through an analogy with personal self-defense.³ The titles of individualist books and articles fixate on self-defense,⁴ individualist moral analysis relies on intuitions derived from thought examples involving hypothetical cases of self-defense, and individualist arguments emphasize

I presented earlier drafts of this article at the International Society of Military Ethics Conference, San Diego, California, and again at the Conference on Global Justice and Ethics at New York University, New York, New York, and the ethics workshops at the University of Miami and University of Michigan. I am grateful to the participants on those occasions for their comments. For reading and commenting on drafts of the manuscript, I am particularly thankful to...

¹ Jeff McMahan, *Killing in War* (Oxford: Clarendon Press, 2009), p. 36.

² Individualists include Jeff McMahan, David Rodin, Michael Skerker, Helen Frowe, Seth Lazar, David Mapel, Cecil Fabre, and BJ Strawson. Individualists can be contrasted with statist, such as Michael Walzer, who claim that states possess some rights that are not reducible to individual rights, including a state right to national self-defense.

³ Individualists who resist the analogy still devote large portions of their arguments to comparisons between self-defense and war, but they claim that the analogy cannot survive rigorous scrutiny. David Rodin and Cheyney Ryan fall into this category. See David Rodin, *War and Self-Defense* (Oxford University Press: Oxford, 2002) and Cheyney Ryan, "Self-Defense, Pacifism, and the Possibility of Killing," *Ethics* Vol. 93, No. 3 (Apr. 1983), pp. 508-524.

⁴ Ibid, Jeff McMahan, "War as Self-Defense," *Ethics and International Affairs* 18.1 (March 2004), pp. 75-80, McMahan, "Innocence, Self-Defense, and Killing in War," *Journal of Political Philosophy* 2. 3 (September 1994), pp. 193-221; Seth Lazar, "Responsibility, Risk, and Killing in Self-Defense," *Ethics* Vol. 119, No. 4 (July 2009), pp. 699-728.

self-defense at the expense of other-defense.⁵ When individualists do treat other-defense, they sometimes deny that it has an important relationship with the right to self-defense,⁶ and they often claim that the positive duty to other-defense carries less moral weight than the negative duty to refrain from killing non-culpable agents.⁷ Extant individualist literature insists that other-defense is, at most, a relatively weak positive duty that only obtains when an agent can carry out other-defense without exposing herself to great risk.⁸ If the agent can only carry out other-defense at great personal risk, then she is permitted to act, but she is not morally required to. Such acts of other-defense are considered supererogatory, unless the agent makes a voluntary commitment to carry out other-defense.

Additionally, individualists claim that policing acts in reasonably just societies are morally different from acts of self-defense and acts of war in at least one important way: these policing acts have an institutional justification that does not obtain in personal self-defense and war.⁹ According to this view, police officers in just states are justified when they act in accord with professional rules, even if those rules lead them astray in individual cases. According to commonly accepted standards for institutional justifications, institutional justifications only obtain when there is a fair institution in place that achieves a positive moral purpose. Part of what makes an institution ‘fair’ is that it is reasonably just and restricts the costs of the institution to those agents who benefit from the moral purpose of the

⁵ Jeff McMahan, for example spends almost an entire book analyzing the wrong of killing in war, but only a few pages of that book are devoted to analyzing the wrong of allowing others to be killed in war. McMahan, *Killing in War*.

⁶ Rodin, *War and Self-Defense*, p. 32.

⁷ “Our negative duty not to kill, which is the correlate of people’s negative right not to be killed, is in general stronger than our positive duty to prevent people from being killed, which is the correlate of people’s right to be saved.” McMahan, *Killing in War*, p. 142; “Harm brought about by something we do...is, other things equal, more difficult to justify than harm brought about by something we allow to happen.” Additionally, two of Rodin’s fourteen factors that affect liability to harm are “Whether the defensive harm is brought about through doing or allowing.” David Rodin, “Justifying Harm,” *Ethics* Vol. 122, No. 1 (October 2011), 78-81. “I agree that our duty to initiate a just war is not as strong as the duty not to participate in an unjust war...” Cheyney Ryan, “Democratic Duty and the Moral Dilemmas of Soldiers,” *Ethics* Vol. 122, No. 1 (October 2011), 37.

⁸ Cecile Fabre, “Mandatory Rescue Killings,” *The Journal of Political Philosophy*, Vol. 15, No. 4 (December 2007), pp. 363-384.

⁹ Rodin, *War and Self-Defense*, pp. 173-9; McMahan, *Killing in War*, pp. 66-79.

institution.¹⁰ That is why, according to individualists, institutional justifications can obtain for police in just societies but not for combatants in war.

I agree that individuals are the fundamental unit of moral analysis, and in this argument I will assume that this claim is correct. However, I am concerned that current individualist arguments fail to capture important aspects of the morality of war. Here, as a fellow individualist, I will identify the most critical current individualist shortcomings and recommend a new approach that promises to overcome those deficiencies. Since I do not have space to address all of the shortcomings here, I will focus my argument on two flaws that I think are the progenitors of most of the other shortcomings in the current individualist account.

The first core flaw is that current individualist arguments de-emphasize the positive duty to protect (i.e. other-defense) and neglect the relationship between self-defense and other-defense. This results in a less robust analysis of the relational claims between non-culpable persons. In evidence-relative morality¹¹, self-defense and other-defense cannot be analyzed separately, nor are they reducible to the same principle. They can only be understood in relationship to each other. Specifically, as evidence of other-defense increases, the right to self-defense is increasingly restricted. As evidence of other-defense decreases, the right to self-defense is increasingly permissive.

The second core flaw is that current individualist arguments fail to capture the moral importance of institutions. Their analysis of institutional justifications is inconsistent and artificially binary. It is inconsistent because some of the most influential individualists claim that a lack of just institutions makes

¹⁰ McMahan, *Killing in War*, pp. 74-5.

¹¹ An act is fact-relative justified just when the act would be justified if we know all the morally relevant facts. An act is evidence-relative justified just when the act would be justified if the acting agent believes what the available evidence gives her reason to believe and acts as if those beliefs were true. In evidence-relative justifications, the evidence provides a justification if it gives an agent reason to believe that a moral principle is satisfied, even if the evidence leads an agent to make a fact-relative moral mistake. Parfit, D., *On What Matters: Volume One* (Oxford: Oxford University Press, 2011), pp. 150-1. Parfit discusses wrong in the fact-relative, belief-relative, and evidence-relative sense. I have slightly modified it to accommodate justifications.

acts of self- and other-defense simultaneously harder and easier to justify. It must be one or the other; it cannot be both harder and easier. It is artificially binary, because it treats the justice of institutions as an ‘all-or-nothing’ stand-alone justification. For individualists, fully- or mostly-just institutions provide a justification; all other institutions provide no justification. However, the justice of institutions is always a matter of degree and it is fallacious to utilize an all-or-nothing approach.

In order to overcome these two shortcomings I will analyze the somewhat broader moral problem of securing rights from culpable threats from the perspective of common defense. I refer to the approach as *common defense* because it incorporates self- and other-defense into a comprehensive whole. I use the terminology ‘securing rights from culpable threats’ to highlight the fact that I am addressing a topic that is narrower than human security, but broader than war. When I use the term ‘culpable threat,’ I am referring to a human agent who is morally culpable (i.e. blameworthy, or unexcused) for an unjust threat to another agent’s human rights. Primarily, my argument is concerned with moral justifications for violence intended to secure human rights from unjustified violence or background threats of unjust violence. In this respect, common defense is concerned with a subset of human security. It is concerned with all violent threats to individuals, including threats originating from the state. However, it is not concerned with threats whose underlying cause cannot be traced to humans (e.g. disease and natural disasters). It is concerned with self-defense, war, and criminal justice, including punishment. Furthermore, I assert that one uniform set of moral principles governs all acts of violence intended to secure rights from culpable threats, whether it is an act of personal self-defense, policing, or war. This is a version of the “more plausible, less commonly articulated”¹² possibility that Jeff McMahan mentions in the opening quote of this paper. One set of moral principles governs all such acts.

It is also the case that “the intuitions about war that prompt people to say that an entirely different morality comes into operation in a state of war are actually better understood as implications of common

¹² McMahan, *Killing in War*, p. 36.

moral principles that seem inconsistent with ordinary morality only because they are intuitions about extreme circumstances that are very rare outside of war.”¹³ Uniform moral principles for common defense yield different prescriptions for action when they are applied to war than they do when they are applied to ordinary domestic life. This raises the question of why the same principles yield different prescriptions. The answer lies in the relationship between self- and other-defense and the moral importance of institutions. Institutions generate evidence that others will come to the defense of agent X, therefore institutions affect the prescriptions generated by evidence-relative moral principles germane to agent X’s acts of self-defense. Thus, pace McMahan,¹⁴ there is a way to distinguish between war and other types of conflict. War is characterized by an extreme lack of institutions to arbitrate conflict; ordinary life is characterized by the presence of such institutions. Therefore, there are reasons to treat acts of killing in war differently from acts of killing in ordinary life.

1 – Framing the Culpable Threat Problem

Ordinarily, inflicting violence on a person¹⁵ is considered a grave wrong. Securing rights¹⁶ from persons who are culpable for unjust threats or actions¹⁷ (i.e. culpable threats) is normally considered a

¹³ McMahan, *Killing in War*, p. 36.

¹⁴ McMahan finds it implausible that morality can hinge on whether a conflict counts as war or not. From the opening quote: “It is, however, worth making one general point that applies to all views that claim that the moral principles (if any) that govern the practice of war are different from those that govern other areas of life. This is that on these it is essential to be able to distinguish with precision between wars and other types of conflict. For on all such views, if people are attacking and killing one another, whether they are acting permissibly or are guilty of murder may depend on whether their conflict counts as war. I find this extremely implausible.” McMahan, *Killing in War*, p. 36.

¹⁵ Hereafter, the terms ‘inflicting violence’ and ‘harm’ to refer exclusively to violence and harm carried out by humans against humans.

¹⁶ I consider rights to be morally valid claims. The following four points are worth noting. 1) Morally valid claims are normatively important because they facilitate challenging an unjust status quo. 2) Morally valid claims ought to incorporate fairness and respect for individual agents. 3) Morally valid claims ought to incorporate the costs that they impose on others. 4) Social recognition is morally important because it is imperative that morally valid claims are recognized by others. For more on this, see Annex A.

¹⁷ Securing rights from all threats is normally considered a moral imperative, but this argument is focused on treating culpable threats posed by humans. Primarily, this is concerned with unjustified violence, or rights violations with a background threat of unjust violence. In this respect, common defense is concerned with a subset of human security but is more inclusive than national security. It is concerned with all violent threats to individuals, not just those threatening the state. However, it is not concerned with threats to individuals whose underlying cause cannot

moral imperative. Assuming that securing rights is a moral imperative and that killing is sometimes necessary to secure rights, people face a moral problem. Persons must decide how to act when the reasons against inflicting violence are in tension with the reasons for securing rights. This in turn generates a need for practical (i.e. action-guiding) principles for moral persons deciding whether to carry out acts of violence intended to secure rights from culpable threats. One common approach to this problem is to claim that harming culpable threats is not morally wrong, so long as 1) the harm inflicted on culpable threats do not exceed the unjust threat they pose and 2) the harm is likely to prevent the realization of the threat or deter like threats. Accordingly, so long as rights are secured solely by killing culpable threats in the aforementioned manner, there is no moral dilemma. Unfortunately, securing rights necessarily requires harming non-culpable persons.¹⁸

Granting that, under certain conditions, harming culpable persons to secure rights is not morally wrong, there are still at least three problematic features of the culpable threat problem. First, it is, in large part, a *deterrence problem*. Human beings respond to deterrence. Or, putting the point another way, human beings respond to a lack of deterrence. The problem of securing rights from human threats is different from other aspects of human security because human threats can be deterred. Murder is deterred by effective police work and collective aggression is deterred by a strong military. Natural disasters (e.g.

be traced to humans (e.g. disease and natural disasters). It can be a theoretical framework for understanding the Responsibility to Protect Doctrine (R2P). For more on R2P, see Bellamy A., "Realizing the Responsibility to Protect," *International Studies Perspectives*, Vol. 10, Issue 2, (May 2009), pp. 111-128, and Doyle M., "International Ethics and the Responsibility to Protect," *International Studies Review*, Vol. 13, Issue 1, (March 2011), pp. 72-84.

¹⁸ I have deliberately chosen to use the term 'necessarily' here, even though it is somewhat controversial. Single acts of common defense do not necessarily involve harming non-culpable persons, although they often do. However, single actions always carry the risk of harming non-culpable persons, and once we consider these single acts together, repeated indefinitely over time, it becomes increasingly likely that non-culpable persons will be harmed. I am making the common sense assertion that, given pragmatic constraints in contemporary society, any institution that will secure rights effectively on a large scale is so likely to harm non-culpable persons that we can plausibly claim that the institution will certainly harm non-culpable persons. Those who would refute this claim assert that a criminal justice system not only could be effective without ever convicting an innocent person, but that it would never put an innocent person through the trouble of a trial. I find this highly implausible.

earthquakes and floods) cannot be deterred, but can only be prevented or mitigated.¹⁹ If enough culpable threats are allowed to escape justice in order to prevent harms to non-culpable persons, then the threats posed by culpable threats will increase to an intolerable level. Inaction invites aggression.

Second, the culpable threat problem is plagued by *unavoidable uncertainty*. There are two types of uncertainty inherent to the problem. One form of uncertainty is that it is impossible to know for certain what the consequences of action (doing) or inaction (allowing) will be. This is the classic problem with consequentialism, and it has been used to argue that consequentialism cannot provide useful action-guiding moral principles. This criticism is unconvincing though. Just because it is impossible to know for ‘certain’ what the consequences of an action will be, it does not follow that it is impossible to determine action-guiding principles from expected consequences. ‘Certain’ consequences are inaccessible to deliberating agents, but the likelihood or probability of particular consequences is accessible. The problem of uncertainty plagues the culpable threat problem, so there is always risk that culpable or non-culpable persons may be killed to no effect or too little effect. When this happens to non-culpable persons in war it is referred to as excessive collateral damage. However, if some force is not used to secure rights then there is a risk those rights will not be secured. Another form of uncertainty that common defense suffers from is inherent uncertainty about the culpability of the persons to be harmed.²⁰ An agent cannot access the culpability or excusing conditions pertinent to particular persons. There are indicators, such as persons bearing weapons, previous behavior, and relational factors. Nonetheless, it is entirely possible for an agent to honestly misidentify a threat. This means that non-culpable persons are always at risk of being mistakenly targeted by other non-culpable persons. Therefore, in the non-ideal world, non-culpable persons are at risk from culpable threats and misdirected defenders.

¹⁹ There will be some overlap between common defense and natural disasters though. Sometimes, human beings are culpable for natural disasters. Global warming and other forms of pollution are examples of this.

²⁰ For an excellent articulation of the problem of uncertainty regarding culpability and threats in personal self-defense see Frowe, H., “A Practical Account of Self-Defence,” *Law and Philosophy*, Vol. 29, No. 3 (May 2010), pp. 245-72.

Third, solutions to the culpable threat problem must be *collective* in order to be effective, therefore they are susceptible to collective action problems. For one thing, dilettante individuals acting in self-defense are going to be less effective at restricting harms to culpable threats. They will be more likely to make mistakes in a position of inherent uncertainty than trained professionals. This means that the risk of being misidentified and accidentally targeted will increase, trust will deteriorate, and security will devolve to something more akin, as a matter of degree, to an anarchical ‘state of nature’. If individuals must rely on themselves for self-defense, they will find themselves in a security dilemma, which is a variety of the prisoner’s dilemma. In violent encounters, he who strikes first often gains a considerable advantage, so aggression will triumph over restraint more often than not. Then the problem of deterrence will be exacerbated and less scrupulous individuals, seeing the benefits of such aggression, will succumb to the temptation to commit aggression themselves. Even those morally stalwart individuals who resist temptation to aggress will find themselves compelled to strike first in order to defend themselves. These pre-emptive strikes will result in an increase in indiscriminate and disproportionate violence. The way to avoid or get out of this security dilemma is to organize a collective security apparatus that secures rights effectively. Additionally, individual self-defense is unlikely to be effective at securing rights from collective aggression. Unscrupulous individuals often organize into collectives for the express purpose of committing collective aggression in order to exploit others. The only effective way to deter, thwart, and defeat such aggression and defend one’s rights is to organize for collective defense. One cannot stand effectively against many.

Furthermore, when individuals come together for collective defense a secondary set of problems arises. The first of these is a basic free rider problem. Collective defense requires the payment of high costs by some, including loss of life. Individuals have incentives to shirk paying their fair share of these costs while still gaining the benefits of securing rights. Furthermore, the most effective collective defense has some form of division of labor, where a subset of society devotes more time to preparing for defense. That subset is given resources, including dangerous weaponry and training that is too expensive to

provide for society at large. This division of labor is more effective at deterring threats. Unfortunately, it also carries serious risks. The security apparatus can deter external threats, but it can also be directed at the very people it was designed to protect. In fact, throughout history, more people have been victimized by their own government than by foreign governments.²¹ Internal and external human security are fundamentally related; increased security from one's own government often comes at the cost of decreased security from other threats and vice-versa. Finally, the collective security apparatus can be manipulated to conduct collective aggression against external political entities. Individuals concerned with justice can be manipulated to fight under the auspices of collective defense, while the political elites may have ulterior motives to commit collective aggression.

2 – Common Defense: A Practical (i.e. Action-Guiding) Approach to the Culpable Threat Problem

Now that the moral problem of securing rights from culpable threats is clear, I will use the common defense paradigm to articulate the moral facts that are germane to this complex, interrelated series of problems. Current individualist approaches are flawed because they fail to capture moral facts about complicated, large-scale sets of relational claims. In general, they are too dyadic, focusing on relational claims between a defender and a threat that miss important moral aspects of the security dilemma in the culpable threat problem. Contractualism is an extremely useful tool for handling complicated sets of inter-relational claims, especially variations of the prisoner's dilemma like the security dilemma. Therefore, contractualism should be helpful in understanding the morality the culpable threat problem. Beyond this, there are two points about contractualism that make it very helpful for articulating a doctrine of common defense. First, contractualism generates the ex ante principles that are necessary to understand evidence-relative morality. Second, contractualism emphasizes reciprocity, a central feature of rights forfeiture and a lynchpin of individualist theories on the morality of war.

²¹ See "Statistics of Democide" at www.hawaii.edu/powerkills/NOTES.HTM. See, in particular, chapter 23, "Democide Through the Years." See also Rummel, *Power Kills: Democracy as a Method of Nonviolence*. New Brunswick, NJ: Transaction Publishers, 1997.

The common defense paradigm uses a contractualist approach to highlight the relationship between self- and other-defense and the moral importance of institutions. In so doing it illuminates uniform practical (i.e. action-guiding) moral principles for agents considering using violence or background threats of violence intended to secure rights from culpable threats. Contractualism, at least since John Rawls, often draws a sharp distinction between two types of moral analysis. The first type is institutional, and it focuses on assessing the effect of social structures (i.e. institutions) and prescribes how institutions ought to be designed. The second type is interactional, and it assesses claims between individual agents and prescribes how individuals ought to act.²² The contractualists primarily concerned with institutional analysis, such as Rawls and Pogge, utilize a thought experiment in which rational hypothetical contractors agree to principles of justice from an original position behind a veil of ignorance. The principles are ex ante ‘rules of the game’. Ex post outcomes are considered ‘just’ as long as they resulted from fair play (i.e. actions in accord with the ex ante principles) and fall within an acceptable spectrum ranging from the best off to the worst off. According to these theories, just outcomes do not necessarily track individual moral desert. These forms of contractualism start from ideal theory, where all agents fully cooperate with the principles of justice, and move to non-ideal theory, where compliance with the principles of justice is inconsistent. The contractualists primarily concerned with interactional analysis, such as T. M. Scanlon, argue that individuals ought to act in accord with principles of justice that other people cannot reasonably reject. This approach focuses on non-ideal theory from the start and provides practical (i.e. action-guiding) prescriptions for individual persons deliberating how to act.

The common defense paradigm is primarily interactional analysis. It is concerned with practical (i.e. action-guiding) principles of justice that prescribe action for individual persons contemplating using violence to secure rights from culpable threats. Furthermore, given the moral problem at hand, it is best

²² I borrow the terms ‘institutional’ and ‘interactional’ assessment from Thomas Pogge, “Three Problems with Contractarian-Consequentialist Ways of Assessing Social Institutions,” in ed. Ellen Frankel Paul, Fred D. Miller, Jr., and Jeffrey Paul, *The Just Society* (Cambridge: University of Cambridge, 1995); p. 241. The distinction is common among recent contractualists though. See also John Rawls, “Two Concepts of Rules,” *The Philosophical Review*, Vol. 64, No. 1 (Jan. 1955); pp. 3-32.

to start with non-ideal theory. It is only in non-ideal theory that the notion of a ‘culpable threat’ can even be considered, since a ‘culpable threat’ is, by definition, not cooperating with the principles of justice. Additionally I am concerned with assessing the way that institutions affect individual moral agents. Institutions are assessed in light of their ability to assist individuals satisfy the principles. In terms of individual morality, institutions provide evidence but they are not moral reasons or justifications unto themselves. For these reasons, I will utilize Scanlon’s approach of defining principles of justice as those which other persons cannot reasonably reject.

However, common defense utilizes many of the tools of institutional analysis because they are helpful for describing common defense. For example, institutional contractualists focus on distributive justice, and the distributive justice approach is a good way to approach the culpable threat problem. Common defense is a matter of distributive justice, where the burden to be fairly distributed is risk of harms inflicted to secure rights from culpable threats. Although I deny that there is such a thing as an independent ‘institutional justification’, I do think institutions can be morally assessed and that the Rawlsian approach is the best available. Furthermore, I think that, at least with respect to the culpable threat problem, institutional analysis and interactional analysis yield the same underlying moral principles. That is, with respect to the culpable threat problem, the Rawlsian thought experiment yields principles that other persons cannot reasonably reject. For example, both contractualist approaches can yield ex-ante, evidence-relative principles. Common defense is primarily concerned with evidence-relative justifications, not fact-relative justifications. This is because of the interaction of the uncertainty problem with the deterrence problem. The uncertainty problem, by definition, stipulates that individual agents cannot access God’s-eye-view moral facts. This means that reasonable agents would agree to ex-ante, evidence-relative moral principles for common defense. Given the risk of harming innocents, agents might consider adopting evidence-relative principles with a presumption against acting in self- or other-defense. In so doing, they would reduce the risk of directly (i.e. doing) inflicting fact-relative unjust

harms on others. However, they would increase the risk of indirectly allowing others to inflict fact-relative unjust harms on others.

Reasonable persons, however, would reject principles that uniformly favored acts that assume the risk of allowing instead of acts that assume the risk of doing. They would reject such a principle because reasonable persons would want to secure rights from attackers and misdirected defenders. If a principle favors acts that risk ‘allowing’ too heavily, then all agents would be worse off because the culpable threats would increasingly violate human security. What good is a principle that slightly decreases the risk an agent will be killed by mistake by the police, but greatly increases the risk that an agent will be killed deliberately by a murderer? The deterrence problem would make reasonable persons even less likely to adopt a principle with a presumption against acts that risk allowing harms to come to others. If people follow such a principle, society’s lack of a credible deterrent threat would encourage persons to commit rights violations and human security threats would increase. Therefore, instead of adopting a principle that favors allowing over doing, reasonable persons would agree to evidence-relative principles that set practical (i.e. action-guiding) triggering conditions for acting in common defense so that the risks of doing and allowing are balanced in order to protect cooperators (i.e. non-culpable persons) as fairly as possible.

A few final points about this contractualist approach are in order. In my interactions with other individualists, they often complain that contractualist theories assert that 1) contractualism claims morality can be constructed, rather than discovered and 2) contractualism is unwieldy and unnecessary.²³ My response is this. First, contractualism, at least as I am using it, does not claim that humans construct morality. Contractualists are associated with a ‘fair play’ argument that claims that prior to institutions, individuals have limited positive duties to each other. However, once society creates institutions that benefit everyone, individuals have more robust positive duties grounded in reciprocity or fair play to do

²³ Jeff McMahan explicitly rejects contractualism’s usefulness in the morality of war. See McMahan, *Killing in War*, p. 36. Two exceptions are Michael Skerker and Yitzak Benbaji. Both are contractualist individualists.

their part in sustaining the institutions. In this way, according to the argument, by creating institutions, society creates or constructs new moral principles that generate stronger positive duties. This approach also claims that different societies can construct different institutions which yield different moral principles, therefore justice between such societies is a thinner concept than justice within a society. I disagree with this approach. I am a moral realist; moral principles exist and are best thought of as discovered. However societies do construct institutions that can radically change the actions that the uniform evidence-relative principles prescribe. Institutions do this by providing important evidence, not by creating new principles or altering existing ones. Therefore, the moral principles of common defense exist prior to the creation of institutions and are unaffected by the presence of institutions. Second, I do not claim that contractualism is necessary to discover morality, but I do claim that it is a useful tool for the task. Generally, the more complicated the interpersonal moral claims, the more useful contractualism is. Contractualism is particularly well suited to help with the culpable threat problem, because contractualism was originally designed, in large part, to deal with the prisoner's dilemma and the moral importance of reciprocity. The security dilemma variant of the prisoner's dilemma is central to the culpable threat problem, so contractualism is a good starting point for moral evaluations of common defense. Reciprocity is a central feature of rights forfeiture, a lynchpin of individualist theories on the morality of war.

2.1 First Principle of Common Defense: Necessity

It is only permissible to harm another in order to secure rights if the available evidence indicates that the harm is necessary to secure the rights. *Ceteris paribus*, if the right can be secured through the infliction of a lesser harm, then it is morally impermissible to secure the right through the infliction of a greater harm. Reasonable persons would be amenable to this simple lesser evil argument. Arguments that culpable persons deserve to be harmed independent of necessity, are not germane to common defense because justifiable acts of common defense must be necessary to secure rights.

2.2 Second Principle of Common Defense: Proportionality

Proportionality is sometimes cited using Henry Sidgwick's claim that it is not permissible to do "any mischief of which the conduciveness of the end is slight in comparison with the amount of mischief."²⁴ Another way of saying this is that disvalue of harms must outweigh the value of the rights secured for innocents. This is not a crude utilitarian calculus that maximizes utility though. They would not agree to apply proportionality to culpable threats who suffer harms commensurate with their culpability. It is permissible to kill one-hundred fully culpable murderers who are trying to kill one innocent. This is not a case that merely fails to violate proportionality. Rather, proportionality does not apply to this case at all.²⁵

A less commonly addressed aspect of proportionality is the distribution of risk of harms among individual non-culpable persons. Reasonable persons would also agree to a principle that distributes harms among the non-culpable as evenly as possible. They would prefer a perfectly equal distribution in which all innocents bear the same degree of harms inflicted by culpable threats and those carrying out common defense. Unfortunately, this principle is impracticable in the real world. The harms inflicted by culpable threats and the harms inflicted in the course of dealing with culpable threats cannot be evenly distributed across individuals. Culpable threats concentrate risk of harms as they see fit. Therefore, the innocent persons in close proximity to culpable threats will generally suffer greater harms than innocents

²⁴ Henry Sidgwick, *The Elements of Politics* (London, 1891), p. 254. Michael Walzer refers to Sidgwick's rule in *Just and Unjust Wars* (New York, 2006), p. 129. Also see Brant "Utilitarianism and the Rules of War."

²⁵ "Harms to multiple aggressors are not aggregated for purposes of assessing liability to defensive harm, but harms to affected parties clearly are aggregated..." David Rodin, "Justifying Harm," *Ethics* Vol. 122, No. 1 (October 2011), p. 75. Some are hesitant to agree with this point because scale seems to matter. For example, if one million culpable threats are attempting to murder one non-culpable person, some are hesitant to claim that killing the one million culpable threats is justified. See Jeff McMahan, "Duty, Obedience, Desert, and Proportionality in War: A Response," *Ethics* Vol. 122, No. 1 (October 2011), p. 153. I disagree. However, I think the intuition driving the reluctance is that it is hard to think of a real world situation where one million fully culpable threats would be trying to murder one fully innocent person. In actuality, events that take place on such a large scale, such as war, involve significant excusing conditions. In that case, it is plausible to argue that the degree of excuse would render killing the one million partially excused culpable threats disproportionate and, therefore, unjustifiable.

who are farther away. Additionally, the actual realization of harms will be the result of randomized chance. For example, sometimes bullets miss, sometimes they injure, and sometimes they kill.

The best that reasonable persons can do is to agree on principles that distribute risk of harms among innocent individuals in a maximally fair manner. This is an extension of Rawls's first principle into the non-ideal ethics of violence. According to Rawls, "Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all."²⁶ This aspect of proportionality is divided into two categories. The first is the distribution of harms *to* innocents who carry out common defense and the second is the distribution of harms inflicted on innocents *by* those who carry out common defense. With respect to the first category, reasonable persons would agree that all innocents have a positive duty to the common defense that incorporates self-defense and other-defense into a comprehensive whole.

The second category is the fair distribution of risk to other innocents by those carrying out common defense. Reasonable persons might agree on a minimax principle for the distribution of harms. Innocent persons' rights against harms would be limited in scope in the following manner.²⁷ Common defense situations arise where risk of harm to innocents is unavoidable. In such situations, the innocent have a right not to be subjected to more risk of harm than that which can be fairly distributed to other

²⁶ John Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press, 1999), p. 266.

²⁷ The relational nature of claim rights germane to common defense include rights forfeitures, rights waivers, and rights that are limited in scope. Individualists have given disproportionate weight to the former with little respect to the latter. This problem is captured in David Rodin's claim that, "...both (rights forfeiture and rights that are limited in scope) seem to be ways of articulating the same underlying moral idea: that the right to life is subject to conditions specified in terms of facts about the mutual relationship between an aggressor and defender (or more generally between any two interacting parties). Whether we choose to describe the right to life as limited in scope or as subject to forfeiture seems, from a theoretical point of view, immaterial." See Rodin, D, *War and Self-Defense* (Oxford: Oxford University Press, 2002), p. 74. The right to life as limited in scope and the right to life as subject to forfeiture overlap so long as we restrict the discussion to aggressors and defenders. However, when we discuss the relational claims between innocents, rights forfeiture and limitations in scope come apart. Rights forfeiture is ordinarily used to describe rights that are taken away from an agent because of something that agent does, even though the agent does not want to voluntarily give the right up. Limitations in scope can include much more than that, including proportionality. It does not make sense to say that persons liable to harm under proportionality forfeit their rights, because they do not do anything that merits taking their rights away. Nonetheless, they do not have a claim against being harmed by other innocents (although they still have a claim against culpable threats that make such harms necessary).

innocents. This is not a utilitarian calculus. In the first place, proportionality does not apply in the same degree to agents who waive or forfeit their right against harms. Furthermore, in cases where proportionality is applicable, the harms must be distributed as evenly among innocent people as possible, even if this results in increased overall suffering. According to proportionality, non-culpable persons are liable to the worst necessary harm that must be borne to secure rights, commensurate with the rest of the innocents in society bearing as much of the harm as they can. This is similar to Rawls's difference principle for the distribution of wealth, except that it is akin to a minimax principle, not a maximin principle. The distribution is designed to protect those at the top of the scale (suffering the most harm) and keep those at the bottom of the scale (suffering the least harm) from unjustly exploiting those at the top of the scale.

This aspect of proportionality might explain why some types of 'indiscriminate' and 'malum in se' methods of warfare are actually morally permissible. Bombing entire electric systems for large civilian populations, utilizing infra-red, pain inducing lasers on crowds, or using chemical riot agents are often morally controversial weapons and techniques. Opponents to the techniques often claim that these methods are malum in se (i.e. evil in themselves). They also claim that these methods are indiscriminate and disproportionate because they target large numbers of civilians. This analysis is misguided though. If a riot agent can lower the risk of having to kill a few innocents by imposing a greater risk of lesser harms (e.g. being incapacitated for a few hours) on more innocents, then, the riot agent may be the morally permissible weapon. Those exposed to the lesser harms of the riot agent may be morally obligated to undertake the risks inherent in the riot agent if evidence indicates that such an action will lower the risk that any innocent will suffer the greater harm of being killed.

Innocents harmed as collateral damage are often entitled to compensation in accord with the principle of proportionality. This should not be confused with the notion of rights infringement, where individuals are owed compensation because others justifiably infringe their rights. I deny that there is such a thing as rights infringement, because I deny that non-culpable persons have a right against

proportionate harms. Individuals have a morally valid claim to compensation, but it is not because the other innocents in society, including the non-culpable person or persons who actually inflict the harm, wrong the harmed innocent. As a matter of justice, reasonable agents would agree ex ante to the common defense principles that justify the action. Therefore, the harmed innocent has no claim against the individual who carries out an evidence-relative justified act of common defense. Her claims are 1) against culpable threat(s) and (2) against the whole of society. It is culpable threats generally²⁸ that wrong the innocent person. It might also be the case that specific individuals are culpable for creating the triggering conditions that justified the harm. In that case, specific persons wrong the harmed innocent. If an agent harms another innocent in the course of an act that satisfies the principles of common defense, she ought to experience regret, not guilt. Furthermore, regret is the appropriate response for all innocents in society, not just the individual or individuals who actually carry out the act of common defense. The regret is the proper reaction to the fact that something bad happened as a result of an evidence-relative justified action, even though the act was not morally wrong. Nonetheless, even though they do not wrong the harmed innocent, the other innocents in society owe the harmed innocent compensation in order to redistribute the harms inherent in common defense as maximally fairly as possible. The physical harms are concentrated unfairly in one or a few, and compensation from others is needed to offset that imbalance. Ex ante, reasonable persons would agree to guarantee compensation in order to distribute the costs of harms. The compensation is a kind of insurance scheme that redistributes uneven costs more fairly. If society owes compensation and fails to pay, then an individual's rights may be violated, because proportionality is violated. However, the infliction of the harm itself is not a 'rights infringement,' for the individual's morally valid claim (i.e. right) against harm is limited in scope to accommodate proportionate harms.

²⁸ I say culpable threats generally, because it is irrelevant whether, from a God's-eye point of view, the harm was actually necessary to defeat or deter a specific culpable threat. Rather, action in accord with common defense principles is necessary to secure rights from culpable threats generally.

There is a powerful objection that can be raised to the difference principle for liability to harm, though. The objection parallels common objections to Rawls's difference principle for the distribution of income and wealth. Some question Rawls's assertion that hypothetical contractors in the original position would be risk averse. Why is it rational for Rawls's hypothetical contractors to give up a significantly greater chance at increased wealth in a best case outcome in order to gain a guarantee that they will have a slightly better worst-case outcome? Rawls can offer a convincing reply (I think) by insisting that significant differences among individual wealth will eventually undermine the basic structure and the just distribution of basic liberties. However, I do not think that this argument carries over to the distribution of risk of harm in common defense. It is not plausible that re-allocating the risk of harms in this way will eventually undermine the basic structure or the distribution of basic liberties. Exchanging a greater risk of many slight harms (i.e. accepting increased risk that one will be harmed slightly) for a smaller risk of catastrophic harms will not result in the same power asymmetries as unequal distribution of wealth. Therefore, it is not the same threat to the basic structure. Contractors in the original position might very well accept a slight risk of greater harms in order to avoid a significantly greater risk of lesser harms. It is therefore plausible that a reasonable person cannot reject a principle other than the difference principle for liability to harm.

Reasonable persons, however, would agree to distribute the agreed upon acceptable risks (whatever magnitude they are) as evenly as possible without regard for race, sex, sexual orientation or social class. Furthermore, I agree with David Rodin that justice demands that harms that cannot or will not be compensated for are, other things being equal, harder to justify than harms that can and will be compensated for.²⁹ Noncompensable harms, such as death, are such a great disvalue that it is reasonable for many to suffer a greater risk of compensable harms (e.g. loss of a finger) in order to slightly reduce the risk that one person will die. I do not know the exact point where an exchange of greater risk of

²⁹ David Rodin, "Justifying Harm," p. 106.

slighter harms is justifiably exchanged for slighter risk of graver harms to a few. It is enough for current purposes to acknowledge that reasonable persons would agree to distribute risk as equally as possible among non-culpable persons.

2.3 Third Principle of Common Defense: Discrimination

Reasonable agents would agree that, unless an individual does something that justifies singling her out for an increased risk of harms, she should be treated in accord with proportionality. However, they would also agree that individuals can do things that single them out for disproportionate harms (i.e. harms that would ordinarily violate proportionality). These justified disproportionate harms are covered by the principle of *discrimination*. In the common defense paradigm, morally valid claims (i.e. rights) about discrimination can be divided into two categories. The first category, which is often referred to as rights forfeiture, involves relational claims between culpable threats and non-culpable defenders.³⁰ It is primarily about moral asymmetries and claims of this type usually allow for an unequal distribution of harms among agents, with culpable threats liable to much greater risk of harm than non-culpable agents. Rights forfeiture is a reciprocal concept that outlines how cooperators can justifiably treat non-cooperators. When an agent fails to act in a way that justice prescribes (i.e. fails to cooperate with the principles of reciprocity), she forfeits some of her rights that she would have had if she acted in accord with the principles of justice (i.e. cooperated with principles of reciprocity). Under certain conditions, rights forfeitures can render agents liable to disproportionate harms. The second category involves relational claims between non-culpable agents. The second category, which is often referred to as rights waiver, occurs when an agent freely volunteers to accept more than her fair share of the risk of harms inherent in the common defense. Under certain conditions, rights waivers can render agents liable to disproportionate harm.

³⁰ This type of relational claim receives the most attention in the literatures on self-defense and war. The relational claims between innocent threats and innocent defenders also receive considerable attention. The other types of relational claims between innocents dealing with culpable threats is underdeveloped though.

The concept of rights forfeiture is extremely important to current individualist accounts of ethics in war. For example, Rodin correctly asserts that the right to self-defense is relational and reciprocal. He writes, “obligations should be viewed at least in part as reciprocal. In other words, we have the obligation to refrain from behaving in certain threatening and harmful ways to others just as long as they do the same to us...”³¹ This notion of relational, reciprocity-based rights is fully compatible with contractualism and the common defense paradigm. Individualists maintain that when an agent culpably threatens another agent, that this action creates a ‘negative bond’ between the aggressor and the victim. This negative bond is a kind of moral asymmetry that grounds victim’s right to kill aggressor and aggressor’s loss of his right not to be killed by victim.³² Aggressor’s forfeiture of his right to life and victim’s right to kill aggressor describe the same normative fact in two different ways.³³ By culpably behaving in a threatening way, aggressor renders himself liable to justified violence, if and only if evidence indicates that the harms:

A) do not exceed the degree of the harms that the culpable threat is culpably threatening³⁴, and

B) will prevent the realization of the threat or deter like threats

Rights forfeiture, as individualists construe it, is a combination of deontological and consequentialist components. A) is a deontological component that simultaneously permits the prima facie wrong of disproportionately harming others and places restrictions on that disproportionate harm. It asserts that an agent’s moral rights are contingent on that agent’s respect for other agents’ rights. If an agent violates³⁵ or threatens to violate the rights of others, then she forfeits her own rights.³⁶ Rights

³¹ Rodin, D., *War and Self Defense* (Oxford: Oxford University Press, 2002), p. 78. Rodin is citing Phillip Montague’s interpretation of Locke. Montague, P., “Self-Defense and Choosing between Lives,” *Philosophical Studies*, V. 40 (1981), 207-19.

³² Ibid, 78-9. Rodin is using Cheyney Ryan’s notion of a ‘negative bond’. Ryan, C., “Self-Defense, Pacifism, and the Possibility of Killing,” 508-24.

³³ Ibid, p. 75.

³⁴ David Rodin, *War and Self-Defense* (Oxford: Clarendon Press, 2002) This is what Jeff McMahan terms ‘narrow proportionality’. See Jeff McMahan, *Killing in War* (Oxford: Clarendon Press, 2009), pp. 20-32.

³⁵ Violate is an unjust act that contradicts someone’s right; it is often held in contrast with a rights infringement, which contradicts someone’s rights justifiably. I deny that there is such a thing as rights infringement. The prescriptions associated with rights infringement are actually captured in the principle of proportionality.

forfeiture is predicated on the principle of reciprocity that is reflected in the ‘golden rule’ and Kant’s categorical imperative. However, A) is not wholly permissive, because it constrains the amount of harms that can justifiably be inflicted on a culpable threat. The culpable threat only forfeits rights of comparable degree to the rights she violates or threatens to violate. If the culpable threat only unjustly threatens to punch someone in the arm, a defender cannot justifiably inflict harms more severe than a punch in the arm. A defender cannot, for example, kill the culpable threat solely based on a discrimination justification. Rights forfeiture alone does not justify harms that exceed this deontological constraint, regardless of the consequences.

Rights forfeiture is not wholly deontological, though. A) can be interpreted, as Kant did, to mean that an agent who violates the rights of others ought to be subjected to retributive justice proportionate to her offense. Although discrimination overlaps with retributive justice, retributive justice is a distinct concept. The acts in question are also justified by the end of securing rights, so they must be expected to deter, thwart, or defeat injustice. Therefore, B) acts as a consequentialist constraint on the permissive deontological aspects of A) at the same time A) acts as a deontological constraint on the permissive consequentialist aspects of B). The consequentialist and deontological components of rights forfeiture complement and constrain each other.

I accept the concept of rights forfeiture outlined by current individualist accounts, but I think that its current form is incomplete. It is incomplete because it does not consider failures of other-defense to be robust grounds of rights forfeitures. Recall Rodin’s articulation of rights forfeiture:

...obligations should be viewed at least in part as reciprocal. In other words, we have the obligation to refrain from behaving in certain threatening and harmful ways to others just as long as they do the same to us...³⁷

Obligations should be “viewed as reciprocal,” but why should reciprocal obligations be limited to “the obligation to *refrain* from behaving in certain... ways”? The common defense paradigm augments the

³⁶ See David Rodin, *War and Self-Defense*, pp. 72-6.

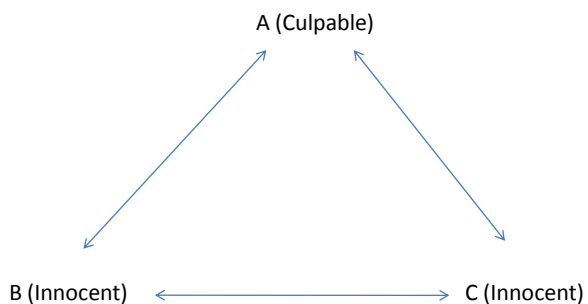
³⁷ Rodin, D., *War and Self Defense* (Oxford: Oxford University Press, 2002), p. 78. REDUNDANT

duty to refrain with the duty to act, treating restraint and action as two aspects of the same reciprocal principle. If an agent either fails to refrain when she should or if she fails to act when she should, then she may forfeit her some of her rights.

This point is overlooked by current individualists because they emphasize self-defense and fail to appreciate the relationship between self- and other-defense in evidence-relative justifications. Although common defense treats individuals as the fundamental unit of moral analysis, it is not reducible to personal self-defense. The right to personal self-defense is a relational claim that is fundamentally dependent on the evidence an agent has about the actions (including consequences) and intentions of others. Pace individualists like Rodin, it is not a ‘stand alone claim’.³⁸ Every agent’s act of personal self-defense is justified in terms of the risk it imposes on others and the risks that others impose on the agent. The agent can often enhance her self-defense by relaxing the triggering conditions for self-defense and imposing greater risks on others. Thus, any restraint in self-defense is also an act of other-defense. Since all justified acts of self-defense satisfy certain restraining principles, all justified acts of self-defense are simultaneously justified acts of other defense. Any act of self-defense that demonstrates too little restraint imposes too much risk on others and is unjustified because it is a failure of other-defense. Any act of restraint that imposes risk to the self in excess of that which distributive justice requires is a form of supererogatory other-defense. Additionally, if others impose greater risks on an agent, then that agent is justified in imposing greater risks on them. In other words, the agent’s triggering conditions for justifiable self-defense are more relaxed when others show less restraint. Therefore, the distinction between posing a direct threat and failing to defend others can become blurry in evidence-relative justifications. They are really two ways of describing the same moral fact about triggering conditions.

³⁸ Ibid, pp. 31-2. Rodin writes, “First, the right of self-defense may contain claims against others to assist in the act of self-defense. Secondly, it may contain claims against others not to interfere. My (Rodin’s) view is that, though it may be tempting to see claims against others as part of the right of self-defense, it is more appropriate and less misleading to analyse the right of self-defense as a simple liberty without any attendant claims.”

Minimal Relational Claims for an Act of Common Defense



To illustrate this, imagine a relationship between three agents: A, B, and C. So long as all three respect each others' right not to be killed, their rights and claims with respect to each other are relatively straightforward. Each possesses a right against being harmed by the others and a correlative duty not to harm the others. But, imagine that A threatens to kill B, and B can only defend her own life by killing A. According to dyadic reciprocity, A forfeits her right to life and B can kill A. But, the problems of uncertainty and collective aggression make the dyadic model overly simplistic. Any time that B uses violence to secure her rights, because of inherent uncertainty, she risks inflicting harms on C, who has done nothing to merit harms. This can happen as a result of misidentification or 'collateral damage.' Furthermore, aggressors often organize into collectives that cannot be overcome by individual defenders (that is the reason aggressors form collectives). Assuming that A is an aggressive collective threatening B and/or C, B and C have claims against each other to deter, thwart, and defeat A. That is, B and C have positive correlative duties to defend each other. If, for example, B has such a duty to C, allowing A to harm C is a morally serious rights violation that can be as serious, or almost as serious, as actually

harming C directly. In actuality this model is still simplistic, but I will use it as a baseline paradigm to try to demonstrate the contractarian principles for common defense.

In common defense, every justified act of violence to secure rights must have the objective of maximally securing everyone's rights fairly by establishing evidence-relative action-guiding triggering conditions. To achieve this end, the right to self-defense will be fundamentally related to the expectation that others will carry out other-defense. Specifically, the right to personal self-defense does not exist in situations where the agent has evidence that other agents will execute common defense better than the agent can herself. B's right to personal self-defense is usually triggered if and only if she has a net balance of evidence that others (C) will not do a better job of carrying out other-defense on B's behalf in a manner that maximally secures everyone's rights fairly. Because of this, the morally valid claim of self-defense does not entail the morally valid claim of other-defense, nor does the morally valid claim of other-defense entail the morally valid claim of self-defense. This point is often overlooked because necessity and imminence are usually built in to the definition of justified self-defense, and the necessity and imminence requirements are exactly where the difference in other-defense and self-defense is likely to manifest itself in the real world. Society normally requires persons who feel threatened to call the police rather than handle the problem themselves. The better the expectation of other-defense, the more imminence/necessity considerations restrict the right to self-defense. Furthermore, since restraint in self-defense is fundamentally related to the expectation that others will carry out other-defense, the distinction between doing and allowing becomes more suspect in common defense. Imagine that A's restraint in carrying out an act of self-defense is predicated, at least in part, on the reasonable expectation that B will carry out an act of other-defense on A's behalf. If B fails to carry out the expected act (i.e. fails in his responsibility to protect A), then B, through an act of omission, is unjust towards A.

Furthermore, if agent A has evidence that agent B will not carry out other-defense on A's behalf, then A is justified in imposing commensurately greater risks on B during self-defense. This is simply a matter of reciprocity; A is justified in treating B the same way that evidence indicates B will treat A.

Justice demands that A carry out self-defense in a manner that distributes risks evenly. If the evidence indicates B will not carry out other-defense, then the evidence indicates that B is imposing greater risks on A. Therefore, A can justifiably relax his triggering conditions for self-defense and impose greater risks on B. Essentially, I am asserting that distributive justice always demands other-defense as a matter of reciprocity, up to the point where risk of harms to cooperators are distributed as evenly as possible. Non-cooperation is defined in terms of a failure to provide other-defense.

The common defense paradigm helps us reconsider Nozick's well-known thought experiment of the fat man falling down the well. The case goes like this. There is an innocent fat man sitting on the edge of a well. There is also an innocent man at the bottom of the well with a ray gun that can disintegrate the fat man. An unknown aggressor walks by and pushes the fat man down the well. If bottom man shoots fat man with the ray gun, fat man will be disintegrated and killed and bottom man will survive. If bottom man does not shoot, then fat man will survive but bottom man will be crushed and killed. Some argue that fat man is violating bottom man's right to life, therefore bottom man is justified in killing fat man.³⁹ Others argue that bottom man and fat man are both innocent and there is no moral asymmetry between them. Therefore, bottom man is not justified in shooting fat man.⁴⁰

I disagree with both claims. Setting aside the fact-relative nature of the case (guilt, innocent, and consequences are all known), there is a critical moral fact that is omitted. Namely, what would fat man do if he was in bottom man's position? If fat man would shoot, bottom man is justified in shooting. If fat man would not shoot the ray gun, things get more complicated. The most justice can demand of bottom man is an equal distribution of the risk of harms, therefore fat man's supererogatory willingness to accept

³⁹ Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 34-5. Other who hold this view include Judith Jarvis Thomson and Suzanne Uniacke. See J.J. Thomson, "Self-Defense," *Philosophy and Public Affairs* Vol. 16 (1987), pp. 283-310; and Suzanne Uniacke, *Permissible Killing* (Cambridge: Cambridge University Press, 1994).

⁴⁰ Jeff McMahan, "Self-Defense and the Problem of the Innocent Attacker," *Ethics* Vol. 104 (1994), pp. 252-90; Michael Otsuka, "Killing the Innocent in Self-Defense," *Philosophy and Public Affairs* Vol. 23 (1994), pp. 74-94; for an excellent overview of theories of self-defense see Tyler Doggett, "Recent Work on the Ethics of Self-Defense," *Philosophical Compass* Vol. 6, No. 4 (2011), pp. 220-33.

certain death cannot bind bottom man to accept certain death. Bottom man cannot justifiably open fire though. Justice demands that he distribute risk as evenly as possible, perhaps by flipping a fair coin to determine who dies.

If we leave the fantastic fact-relative world of the thought experiment, and move an evidence-relative version, reciprocity becomes even more important. Imagine that culpability and consequences are unknown. Is fat man guilty? Can both parties survive if bottom man does not shoot? Now bottom man's choice to shoot is a matter of distribution of risk. In a context of uncertainty, how much risk can he take that fat man is innocent or that they could both survive if he does not shoot? The answer is that he can shoot if and only if the evidence available to bottom man indicates that fat man would shoot if their role were reversed or shooting is an even or supererogatory distribution of risk.

This point is why I strongly disagree with McMahan's use of moral responsibility as a criterion for liability to harm. McMahan claims that moral responsibility, not culpability, is grounds for a forfeiture of the right not to be killed. Jeff McMahan, for example, uses the example of the conscientious driver to illustrate the differences between moral responsibility-based and culpability-based notions of rights forfeitures.

(3) *The Conscientious Driver* A person who always keeps her car well maintained and always drives carefully and alertly decides to drive to the cinema. On the way, a freak event that she could not have anticipated occurs that causes her car to veer out of control in the direction of a pedestrian.¹

The Conscientious Driver is not culpable for the threat that she poses to the pedestrian. She does not foresee that the act of driving to the cinema will harm the pedestrian, and, because the risk that driving to the cinema will hurt anyone is so small, the act is morally permissible. But, she is morally responsible for undertaking an act that carries a risk (albeit a tiny one) of harming innocents. Therefore, according to the moral responsibility-based accounts of rights forfeiture, if either the Conscientious Driver or the pedestrian must die, and if the pedestrian can save herself by killing the Conscientious Driver, then the pedestrian is justified in killing Conscientious Driver. In effect, the Conscientious Driver forfeits her right to life in that circumstance.

McMahan wants to argue that this illuminates something about deep morality. I deny this. The Conscientious Driver, by McMahan's own account, did nothing wrong. I agree that she does nothing wrong, so long as she acts in accord with ex-ante practical moral principles that reasonable agents would accept. Those principles almost certainly allow agents to act in ways that impose risks on others in order to live flourishing lives. Driving is arguably an activity that reasonable agents would permit. If it is, then it is justifiable to drive in accordance with the principles reasonable agents would agree to. It is not necessary to identify these principles with precision in order to prove that they exist. Rather, they are like a limit in math; we can identify principles that are grossly unjust, but it is harder to differentiate between principles that are almost just. Thus, there is a zone of reasonableness within which principles are reasonably just. So long as an agent acts in accord with these ex-ante principles and it would be unjust to treat her differently because of ex-post results. She played within the rules of the game. The outcome is not her responsibility; it is everyone's 'responsibility,' including the person who suffers the harm. It was a risk that everyone ought to accept; therefore it is everyone's risk. In common defense terms, singling Conscientious Driver out for undeserved harms would be unjustified.

Rights waiver is a second way that a person can single herself out for undeserved harms. When an agent waives her rights, she freely volunteers to give up rights that otherwise would have been hers.⁴¹ Rights waivers are not always in effect; they are conditional or limited in scope. They are usually from specific persons or classes of persons with respect to specific persons in specific types of situations. Thus, a police officer waives some of her claim against non-culpable persons that they share risk of harms

⁴¹ Unlike rights forfeiture, a rights waiver is, in at least some respects, voluntary. When an agent waives her rights she agrees to give up rights that otherwise would have been hers. An agent chooses to expose herself to more than her fair share of risk, usually for the sake of someone else. Sometimes individuals accept increased risk for money or prestige though. To the degree that such forfeitures are motivated by moral reasons (i.e. concern for society, others) and not prudential ones (e.g. in exchange for a salary), they are supererogatory acts, and ought to be the object of moral respect. A person can forfeit her right to proportionate harms for a combination of reasons. Institutions are deliberately designed to satisfy and develop a variety of these reasons in individuals selected for the security professions, but supererogatory service is almost always deliberately recruited and cultivated.

according to proportionality, but she does not waive any of her claims against culpable threats. Furthermore, she typically waives these rights while she is on duty, but not when she is off-duty. One who offers himself up as a substitute hostage for a friend waives his claim for proportionate harms to his friend, but he makes no forfeiture to the hostage takers or the rest of society.

One important subset of this type of rights waiver are security profession rights waivers, including those of police officers and military personnel. Members of the security professions voluntarily accept the responsibility to protect others and obligate themselves to accept increased risk in the line of duty. Security professionals also waive their right to certain forms of political activity. In the just war tradition literature, theorists have focused on rights waivers between opposing combatants.⁴² This focus is misguided though, because security profession rights waivers are not primarily about moral relationships between opposing belligerents. When a security professional agrees to accept more than her fair share of risk inherent in dealing with culpable threats, she voluntarily gives up her right (vis. a vis. some other members of the common defense) against being subjected to disproportionate risk. The most common example of this type of rights waiver is the security professional's rights waiver vis a vis the agents that she voluntarily protects. The police officer agrees to accept more than her proportionate share of the risk of dealing with criminal threats and the combatant voluntarily (to some degree) accepts more than her fair share of the risk of dealing with wartime threats. When these rights waivers are in effect, some additional degree of risk of harms ought to be directed towards the persons who waived rights (i.e. security officers) and away from other non-culpable persons. For example, consider a police officer who must choose between two courses of action. In the first, she may engage a target and place other police officers at risk of collateral damage. In a second, she may engage a target and place ordinary citizens at risk of collateral damage. Discrimination may prescribe that she choose the course of action that places

⁴² Walzer's principle of MEC arguably fits into this category. McMahan focuses on this conception of rights waiver as well. McMahan, J., *Killing in War* (Oxford: Oxford University Press, 2009), 58-60. Benbaji also focuses on this form of rights waiver. Benbaji, Y., "The Moral Power of Soldiers to Undertake the Duty of Obedience," *Ethics* Vol. 122, No. 1 (October 2011), 43-73.

police officers at risk instead of ordinary citizens, because police officers waive their right to proportionate harms in some circumstances.

Society also loses much of its individual right to use force and security professionals gain the right to use such force. This is not a rights waiver, though, because it is involuntary. It simply reflects the consistent application of evidence to common defense principles. Individuals are notoriously bad at using violence. They are often incompetent in the use of weaponry and fighting techniques. Most members of society are not used to the stressful situation most likely to require the use of force; therefore they are more likely to make poor decisions. Furthermore, even professionals find it impossible to develop the broad array of skills necessary to employ force in accord with the principles of discrimination and proportionality. This leads society to develop a division of labor and field professionals who are better at violent action than dilettante citizens. For the better protection of the rights of all, some members of society give up most of their claim to use violence in exchange for protection from professional security forces. The result is a greater prospect that one will be protected from culpable threats and a lower chance that one will be the unfortunate victim of an incompetent or overzealous defender.

Rights waivers and professionalization result in new relational dynamics between non-culpable persons, with professionals assuming increased risk from culpable threats and enhanced claims to use force. Conversely, non-security professionals involuntarily lose much of their claim to use defensive violence. The moral right to use force within this organizational/institutional structure can be thought of as the morally legitimate authority to carry out violence, but this should not be considered a stand-alone principle. It merely reflects evidence applied to common defense principles. Agents can defer to a legitimate authority because they have evidence to believe the legitimate authority can satisfy common

defense principles better than the agents could themselves.⁴³ The agent or agents granted the authority must be more competent at carrying out violence. They should be more effective at defeating threats, more proportionate, and more discriminate than the average person. Different professionals will stress different types of competence. As a general rule, police will show more restraint than soldiers, reflecting the types of problems that they are selected, trained, and equipped to deal with. This professionalization will include internalizing different norms of restraint in police work and war, but these norms should not be confused with the uniform moral principles underlying justified common defense. Rather, these professional norms are designed to help security professionals act in accord with common defense principles in different contexts. The principles prescribe different actions in domestic law enforcement than they do in war. Additionally, ordinary citizens in a relatively just domestic society internalize norms of extreme restraint that emphasize assuming the risk of allowing instead of the risk of doing. This is because, according to the principles of common defense, they should almost always defer to law enforcement to handle the situation. It is a distinct possibility that the current individualist approaches are conflating this role-specific norm of restraint in personal self-defense within well ordered liberal society with the underlying moral principles of common defense. Because of this, they mistakenly assume that morality draws a sharp distinction between doing and allowing, and that moral individuals should accept more risk of allowing in order to avoid additional risk of doing.

Rights waivers can also apply to other aspects of common defense. One of the problems inherent in common defense is the threat that security professionals pose to the rights of the citizens the security professionals are obligated to protect. Therefore, security professionals often waive rights in addition to their right to proportionality or have their right to use violence limited in scope in ways designed to

⁴³ Raz's normal justification thesis is often considered an example of epistemically based legitimate authority. Raz's justification thesis is, "The normal and primary way to establish that a person should be acknowledged to have authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly." Raz, J., "Authority and Justification," pp. 115-139, in Raz, J. ed., *Authority* (New York: New York University Press, 1990), p. 129

protect those they serve. Importantly, military professionals often waive the right to get involved in political decision making. When this is the case they grant civilian appointed politicians the legitimate authority to decide when war is necessary. It will be argued that this is not actually a rights waiver; instead it is a responsibility waiver, therefore it is morally impermissible. Unfortunately, there is no way out of the fact that military professionals pose a threat to the rights of those they protect, and the best way to secure those rights is to take away their right and responsibility for certain types of political decisions.⁴⁴

3 – The Moral Importance of Institutions

Most individualists explicitly agree that justifications for police action are distinct from justifications for acts of war because police actions rely on an ‘institutional justification’ that does not obtain in wartime environments.⁴⁵ Thus, most individualists agree that police actions can have a distinct, stand-alone ‘institutional’ justification.⁴⁶ This point, then, seems to undermine at least part of McMahan’s argument in the epigraph to this paper. There, he argues that, if killing in war is governed by different moral rules than killing in other contexts, then there must be a precise criterion that distinguishes between war and other situations.⁴⁷ However, by claiming that police action relies on an institutional justification that does not obtain in war, individualists provide the distinguishing characteristic in question: the presence or absence of just policing institutions.

This raises the question of how institutions make a moral difference. Most individualists argue that stand-alone ‘institutional justifications’ make certain police actions easier to justify than acts of war. McMahan is inconsistent in this regard though. In *Killing in War*, he echoes the same ‘institutional justification’ claim as other individualists. However, in “War as Self-Defense,” he implies that a lack of institutions makes acts of self-defense and, by analogy, acts of war easier to justify. There, McMahan

⁴⁴ Dan Zupan hints at this point in “A Presumption of the Moral Equality of Combatants,” pp. 214-225, in Rodin, D. and Shue, H. ed, *Just and Unjust Warriors* (Oxford: Oxford University Press, 2008), pp. 224-5.

⁴⁵ Rodin, *War and Self-Defense*, 173-179; McMahan, *Killing in War*, 66-79.

⁴⁶ Ibid.

⁴⁷ McMahan, *Killing in War*, 36.

points out that the requirement to retreat in domestic society is contingent on the expectation that the police will protect the retreating defender. There are no police to call in war, so the requirement to retreat is relaxed. McMahan correctly points out that “conditions of war are different from... situations in domestic society”⁴⁸ because, in war, unlike domestic society, threats are “organized in phases over extended periods of time”⁴⁹ and, in domestic society, unlike war, defender can (and is morally required to) call upon the police.⁵⁰ McMahan also argues that defender’s requirement of retreat is not a corollary of the principle of necessity, but, in fact, it is a corollary of the principle of proportionality. The act of defense must be proportionate to the rights that will be violated if defender retreats, but if those rights are valuable enough, then defender is not morally required to retreat.⁵¹ Additionally, according to McMahan, one of the factors that must be accounted for in the proportionality calculation is deterrence.⁵²

McMahan also argues that conditional threats may be an important factor in self-defense justifications. A conditional threat is a background threat that will only be carried out if defender resists a lesser rights violation. An example of a conditional threat is when a mugger threatens to shoot a defender unless defender gives his wallet to mugger. The problem of conditional threat is related to proportionality and the escalation of force. In the mugger case, a lethal defensive act to recover the wallet may be disproportionate, but, if defender attempts a proportionate act, then mugger may kill defender. Therefore,

⁴⁸ McMahan, “War as Self-Defense,” 76.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid, pp. 76-7. I am not convinced by McMahan that the requirement to retreat is not a necessity requirement. Necessity and proportionality have significant overlap, and the requirement to retreat seems to be a function of both principles. McMahan is quite right that Rodin was wrong to claim that the duty to retreat obtains in war, but this is because of proportionality and necessity. Proportionality demands that the rights to be secured must outweigh the harm inflicted. A lack of police institutions can increase the likelihood that more significant rights that are at stake. However, necessity demands that the least harmful of the available methods should be employed. Even if the exact same rights are at stake, police institutions reduce the harms that are necessary to inflict in order to secure the exact same rights. Therefore, the duty to retreat is a function of necessity and proportionality.

⁵² “Capitulation to lesser aggression may embolden other potential aggressors, thereby impericlling collective self-determination elsewhere. The fact that defensive war may help to deter other instances of lesser aggression cannot be ignored in the proportionality calculation.” McMahan, “War as Self-Defense,” 79.

defender may be justified in resorting to lethal force against the mugger. McMahan is unsure about this case,⁵³ but it seems at least plausible that defender can justifiably kill mugger in self-defense.

As persuasive as it is, McMahan's argument is irrelevant in fact-relative morality. If agents know all the morally relevant facts (e.g. the guilt of the threat, the consequences of actions or inactions, and the amount of collateral damage that will result from various actions, etc.) then justifications for violence are the same in all contexts. The presence of a police force is likely to affect moral facts, but it does not necessarily affect moral facts. It is conceivable that a defender with an available police force will be killed unjustly if she attempts to run away. In a fact-relative sense, she would be justified in killing the threat, even though there is a police force. It is also possible that a defender without a police force could flee a threat without suffering any serious harm or undermining deterrence of similar threats. In a fact-relative sense, she would not be justified in killing the threat. If a deliberating agent had access to those morally relevant facts, then institutions would not be good reasons for her to decide to act one way or another. But, McMahan convincingly argued that "conditions of war are different from these situations in domestic society"⁵⁴ because the presence of a police force can morally require defenders to retreat and its absence can morally justify killing threats in self- and other-defense. How is that the case?

The answer is that the moral difference between war and domestic society only makes sense in evidence relative morality. Institutions are morally important because they provide evidence that is germane to evidence-relative moral principles. I, however, deny that this distinguishing criterion must be 'precise.'⁵⁵ The justice of institutions is always a matter of degree; creating an 'institutional justification' for institutions that are on one side of an artificially binary point and claiming institutions do not otherwise affect moral prescriptions is false. All institutions that provide evidence relevant to common defense principles affect moral prescriptions. Even though the justice of institutions is a matter of degree,

⁵³ Ibid, p. 78. Also see Jeff McMahan, "Innocence, Self-Defense, and Killing in War," *Journal of Political Philosophy* Vol. 2, No. 3 (September 1994), pp. 195-6.

⁵⁴ McMahan, "War as Self-Defense," p. 76.

⁵⁵ Ibid.

not precision, war is obviously characterized by an extreme lack of institutions for arbitrating conflict and securing rights. So, individualists are wrong that we cannot identify a morally relevant distinction between killing in war and killing in other contexts. The presence or absence of certain types of institutions makes a moral difference between killing in war in Afghanistan and killing in personal self-defense on the streets of Florida, and all institutions that provide evidence relevant to common defense principles affect moral prescriptions. Institutions are very important to deliberating agents, because they provide strong evidence about rights forfeitures and the consequences of action or inaction. Institutions provide at least three types of evidence that are important to common defense principles: 1) evidence about the consequences of action or inaction, 2) evidence about rights of the perceived threat, and 3) evidence about rights of persons in the same political community.

With respect to consequences, institutions often generate robust evidence about the likely cost of acting or not acting. Institutions provide evidence about what rights are at stake in a particular practical decision. They provide evidence that others will secure individual rights in the long term. If the defender retreats, the police will probably pursue, detain, and arrest the threat. Then the criminal justice system will probably correctly identify the threat, any excusing conditions, and apply a sentence that corresponds to the principle of discrimination. The police and criminal justice system will also deter like threats, so individuals do not have to act in personal self-defense to achieve deterrence. Therefore, proportionality and necessity are also harder to satisfy in self-defense when there is a police force. However, without police and a criminal justice system, there is evidence that individuals have to act in order to secure their rights and deter similar threats. Without institutions, evidence indicates that the likely costs of inaction rise significantly and evidence-relative principles justify relaxed triggering conditions. Relative to ‘domestic society’, in ‘war’, the lack of institutions gives the defender evidence that she is not required to show as much restraint in self-defense by necessity, discrimination, or proportionality. This is partially because the available evidence indicates that the perceived threat is probably a grave threat to defender’s and others’ rights. The gravity of the risk justifies defender’s imposition of increased risks on the

perceived threat and innocent bystanders.⁵⁶ Conversely, in the ‘domestic society’ case, the presence of institutions gives the defender evidence that she should show more restraint. The security institutions will probably protect defender’s rights directly via security forces and compensation. Additionally, they will probably satisfy deterrence better than the individual can herself. Finally, they will probably do a better job of minimizing harms to the threat and bystanders. The presence of institutions affects risk, the most important form of evidence for evidence-relative common defense justifications.

This type of evidence also communicates how a person can expect to be treated by society. If what the person can expect would be egregiously unjust, then a person or class of people may have a justification to resort to violence in order to improve the existing political institutions. But, it is important to note that necessity restricts violence to a last resort. Therefore, if the available evidence indicates that non-violent means have sufficient prospects for success, then violence cannot be justified. In addition to generating evidence about how others behave now, legal institutions generate evidence about how to change the institutions and, thus, change how people will behave in the future. In a liberal democracy, for example, there are robust laws (e.g. free speech, political participation, etc.) that provide citizens with nonviolent means to change the law. Autocratic systems, on the other hand, are generally more closed and harder for some classes of citizens to change. Therefore, *ceteris paribus*, violent uprising is easier to justify against autocratic regimes than against liberal democracies, because the available evidence indicates that non-violence has greater prospects for success in liberal democracies.

⁵⁶ This explains a question recently raised by David Rodin. He notes that, “But the conditions for permissibly infringing noncompensable rights (such as killing) remain extraordinarily restrictive. Consider comparably situations in domestic society. In a case of domestic self-defense or protective police action, it would not be permissible to unintentionally shoot one nonliable person as a side effect of saving another. Persons whose rights are infringed are owed compensation: if compensation is not possible, this provides compelling additional reasons against transgressing the right. Why, then are commonly accepted standards for the permissibility of collateral damage in war so much more lenient?” Rodin explores the possibility that war planners discount the rights of enemy noncombatants because war planners believe the noncombatants are partially culpable or because the noncombatants are foreigners. He does not explore the possibility that such harms are justified because more is at stake in war than domestic contexts. See David Rodin, “Justified Harm,” *Ethics* Vol. 122, No. 1 (October 2011), p. 109.

Additionally, institutions generate evidence about how others will act. This in turn affects the triggering conditions that the common defense principle of discrimination prescribes. Institutions generate evidence about how some classes of people will employ force on behalf of other classes of people in certain situations. Derivatively, the institutions generate evidence about how most people under an institution will behave. In this way, institutions can clearly lay out how far others will go to protect a person. That person can then deduce, via the principle of discrimination, what she is morally obligated to do to others. With respect to acts of violence, it lets her know what risks she is morally justified in imposing on others through common defense triggering conditions. One of the critical pieces of evidence germane to common defense is evidence that others will come to the aid of an individual and distribute the risks of common defense fairly. When evidence indicates that others will carry out other-defense, the triggering conditions for carrying out acts of self-defense become more restrictive. When evidence indicates that others will culpably refrain from other-defense, the triggering conditions for acts of self-defense become more permissive. Institutions provide one of the best forms of evidence about whether others will carry out other-defense. Therefore, institutions are morally important because they affect the prescriptions that the common defense principle of discrimination generates. When individuals have evidence that others will culpably fail to provide other-defense, those individuals can be evidence-relative justified in acting as if the others forfeit some of their common defense claims against the individuals. The individuals are thus evidence-relative justified in imposing on the others the risks involved in acting on less restrictive self-defense triggering conditions.

When the available evidence indicates that enough individuals forfeit their rights of other-defense to each other, society can become something akin to the contractualist conception of the 'state of nature,' because evidence generates a general expectation that others forfeit their rights of other-defense. 'State of nature' thought experiments common to contractualist moral theories provide various ways of describing socio-political contexts where individuals have evidence that others will not carry out other-defense. Then social relations suffer from an extreme version of the security dilemma and become akin to a state

of war with every man against every man. According to these theories, individuals give up some of their rights in order to escape the state of nature and the security dilemma.

The common defense paradigm acknowledges the security dilemma and the potential for a 'state of nature,' where evidence indicates a general state of rights forfeiture of other-defense. The common defense paradigm also acknowledges a trade-off, where individuals give up liberty in order to gain security. However, the common defense 'state of nature' differs from the traditional contractualist conceptions of 'state of nature' because the former has a different start point as a reference. Traditional contractualist conceptions use the 'state of nature' as a start point, and individuals consent to give up their 'natural rights' from that point. According to common defense, individuals do not start out possessing executive power or natural rights. Rather, common defense principles start from a state of justice where individuals are expected to carry out other-defense and self-defense in a way that distributes the risk of harms inherent in the culpable threat problem as fairly as possible. Persons do not start in the 'state of nature,' and, in the 'state of nature,' they are not exercising liberties that they are morally 'entitled' to under ordinary conditions. Rather, in the 'state of nature,' individuals only have enhanced rights of self-defense because other persons have forfeited their rights against each other in order to devolve into a 'state of nature'. This means that individuals do not have to consent to lose their moral right to liberty in order to gain security. When the evidence available to an individual indicates that others will carry out non-supererogatory other-defense, the individual simply loses the liberty right to less restrictive self-defense triggering conditions. Neither consent nor rights forfeiture is required for this to be the case. Individuals do not have a stand-alone right to self-defense that imposes more risk on others than it imposes on the self. Rather, individuals only gain that right when they have evidence that others forfeit others' right to other-defense. Therefore, it is a moral fact that others can impose more restrictive self-defense triggering conditions on individuals by merely providing evidence that they will carry out other defense. Consent is not necessary to impose more restrictive self-defense triggering conditions.

This point illuminates why George Zimmerman was not justified when he recently confronted and shot Trayvon Martin.⁵⁷ He only possessed a stand-alone right to self-defense where the risk of harms was distributed fairly. Because law enforcement institutions provided ample evidence that they could protect everyone's rights better than Zimmerman, he was morally obligated to let law enforcement handle the situation instead of pursuing Martin on his own. I suspect that most individualists would agree with me on this point, however they might disagree on the following points.

A) If Zimmerman had evidence that others would culpably refrain from carrying out other-defense on Zimmerman's behalf, he would be justified in relaxing his triggering conditions for using violence against Martin.

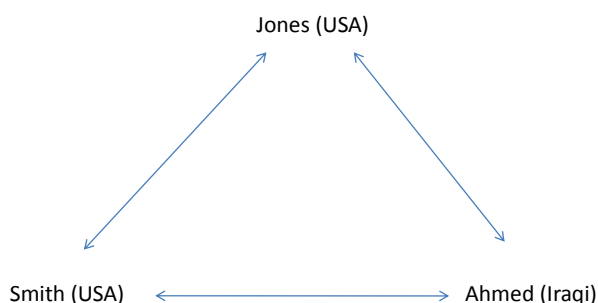
B) Additionally, if Martin had evidence that others would culpably refrain from carrying out other-defense on Martin's behalf, then Martin would be justified in lowering his triggering conditions for inflicting violence on Zimmerman.

C) If A and B hold simultaneously (e.g. in the 'state of nature'), Martin and Zimmerman can both be evidence-relative justified in lowering their triggering conditions for inflicting violence on each other.

One can plausibly argue that C) describes aspects of the majority of wars. Consider the following analogy.

⁵⁷ Transcript of George Zimmerman's Call to the Police, <http://www.motherjones.com/documents/326700-full-transcript-zimmerman>, City of Sanford, Florida, online in *Mother Jones* magazine, accessed 24 May 2012.

Common Defense in War



A) Jones has evidence that Ahmed will culpably refrain from carrying out other-defense on Jones's and Smith's behalf, therefore he is justified in relaxing his triggering conditions for going to war with Ahmed.

B) Ahmed has evidence that Jones and Smith will culpably refrain from carrying out other-defense on Ahmed's behalf, therefore he is justified in relaxing his triggering conditions for going to war with Jones and Smith.

C) A and B hold simultaneously, Jones and Smith are both evidence-relative justified in lowering their triggering conditions for inflicting violence (i.e. going to war) on Ahmed. Simultaneously, Ahmed is evidence relative justified in lowering his triggering conditions for inflicting violence (i.e. going to war) on Jones and Smith.

This is an entirely plausible description of war. As individualists are quick to point out, the available evidence indicates that individuals act on triggering conditions for war that impose risks on foreigners in order to protect their own political communities. However, individualists use this to argue that

individuals should suspect their own government's motives and compensate for it by adhering to more restrictive triggering conditions for participation in war.⁵⁸ Unfortunately, individualists overlook the moral significance of the fact that the same evidence indicates that foreigners in other political communities will not fulfill their duties of other-defense to the individual. That is, the evidence also indicates that foreigners will utilize less restrictive triggering conditions for going to war against the individual. For example, McMahan's mistake is that he chooses to emphasize different aspects of the same characteristic in the different cases. In "War as Self-Defense", he emphasizes the fact that a lack of institutions provides evidence that defender is more vulnerable. In *Killing in War*, he emphasizes the fact that a lack of institutions provides evidence that the perceived threat is more vulnerable. But, in actuality, the lack of just institutions *simultaneously* makes defender and perceived threat more vulnerable in 'war.' This is why the security dilemma in 'war' is tragic. Everyone ends up worse off and everyone's human security suffers for it; they share a condition of victimhood.

There is, however, a way that war is not analogous to personal self-defense in a 'state of nature'. In war, individuals in USA usually have strong evidence that other individuals in USA will bear the costs of war, therefore Smith and Jones have strong evidence that they will carry out other-defense on each others' behalf. Therefore, they have evidence that affects their triggering conditions to fight on each others' behalf in war. Because of reciprocity, they have a more demanding moral duty to fight. As I already explained, Smith and Jones also have evidence that affects their triggering conditions for going to war against Ahmed. That evidence indicates that Smith and Jones have a less restrictive triggering condition to fight against Ahmed. Therefore, it is plausible to argue that, in war, there is a distinction between doing and allowing that favors participation in war. Because of the available evidence, individuals have more a demanding moral duty not to allow other members of their political community to be harmed than they do to avoid doing harms to foreigners. Pace other individualists, the lack of just

⁵⁸ McMahan, *Killing in War*, pp. 60-6.

institutions over belligerent countries provides a moral reason for individuals to presume in favor of participating in war. Individuals are justified in acting on triggering conditions that impose disproportionate risks on foreigners.

This is not only an interactional principle for individuals deliberating whether or not to participate in a particular war. It is also an institutional principle for designing just institutions. Recall that, because of the collective nature of the culpable threat problem, when society creates professional security forces (especially militaries) those security forces are a mixed blessing. Superior equipment and training make professional security forces more effective at dealing with collective aggression, but the same factors make professional security forces dangerous to the people they are designed to protect. Furthermore, professional security forces carry an increased risk that individuals intending to carry out collective defense will be manipulated by political elites to conduct collective aggression. If the available evidence indicates that foreigners will fail to provide adequate other-defense, then foreigners forfeit their right to an equal distribution of the risk of common defense. Therefore, co-citizens are justified in lowering their risks to each other by imposing greater risks on foreigners. Most security institutions in liberal democracies are designed to do just that. For example the US military has strong legal and professional ethic norms of civilian control of the military. These norms require service members to give up their right to many forms of political participation and questions of *jus ad bellum*, but service members retain their right to refuse orders that violate *jus en bello*. The reason for these norms is twofold. First, they help maintain a well-functioning military. Second, and perhaps more importantly, these norms help protect US citizens from their own military. Individualists criticize these norms and recommend that they be reformed to encourage soldiers to engage in politics more directly by refusing to participate in certain wars. However, individualists underestimate the effect that changing these norms will have on the threat that militaries pose to their own citizenry. According to discrimination, countries are justified in accepting an increased risk of unjust war with foreigners in order to decrease the risk of a military coup or civil war within their own borders. Derivatively, individual combatants are justified in waiving some of

their rights to political participation, including jus ad bellum questions, in order to distribute the risks of harms disproportionately on foreigners. This would have limits; if a war is obviously unjust, then individual combatants would be morally required to refrain from combat. But, individual combatants are justified in acting on triggering conditions that presume in favor of participating in their countries wars within a context of epistemic uncertainty.

There is a weighty objection that contemporary individualists can urge against my argument though. Discrimination stipulates that rights forfeiture only occurs if others *culpably* refrain from carrying out other-defense. Usually, individual foreigners have extremely limited input into the triggering conditions that their country utilizes to go to war with each other and they have no way of actually participating in each other's wars. 'Ought implies can', and their failure to provide other-defense for each other may not be a culpable failure. If it is a culpable failure, then culpability is arguably mitigated by some powerful excuses (e.g. epistemic limitation, coercion, etc.). To the degree that evidence indicates that the failure to provide other-defense is not a culpable failure, there is no rights forfeiture. If there is no rights forfeiture then foreigners are not justified in relaxing their triggering conditions for war against each other based on the principle of discrimination. They should still distribute the risk of harms more or less equally.

My first response to this objection is that individualists consistently argue that most combatants are not fully excused for participating in war. Underlying this argument is the convincing claim that, even if most combatants do not know they are imposing disproportionate risks on foreigners, most combatants ought to know that they are imposing disproportionate risks on foreigners.⁵⁹ Therefore, at a minimum, other individualists consistently claim that most combatants are culpable for posing an unjust threat through negligence. Furthermore, most individualists claim that foreigners (including combatants) impose this reciprocal risk on each other consistently enough that whether a combatant ends up fighting

⁵⁹ McMahan, *Killing in War*, pp. 60-66. McMahan does not frame his argument as a disproportionate distribution from risk, but the claim follows from his argument.

for a fact-relative just or unjust cause is usually a matter of moral luck.⁶⁰ There is no moral luck in evidence-relative justifications. Risk is built into the concept of an evidence-relative justification, so that it is evaluated *ex ante* according to the risks that the deliberating agent accepts by acting. The realization of the risk is not subject to moral criticism. If opposing belligerents accept the same risks *ex ante*, then they must either be simultaneously excused or simultaneously justified. Either way, to the degree that they accept the same risks, they are moral equals. Moral luck is irrelevant to their evidence-relative moral status.

This will lead some to criticize the concept of an evidence-relative justification, because justifications are supposed to provide an all things considered reason to do something. If additional evidence comes to light that undermines an act that was previously thought to be justified, then that act is now supposed to be excused. Alex kills Billy because he has evidence that Billy was going to shoot Alex, so everyone agrees that Alex was justified in killing Billy. Then, upon inspection, it is determined that Billy's gun was not loaded. Therefore, Alex is no longer considered justified in killing Billy, but he is considered excused. In this way, it seems that justifications hinge on fact-relative morality. However, I am skeptical of this claim. If it is true, then we can never claim that an act is justified, it can only be considered presumed to be justified by the available evidence. After all, more additional evidence can be discovered that indicates that Alex is justified in killing Billy after all. Thus, any evaluation of Alex's action will be based on evidence. The concept of an evidence-relative justified action is supposed to categorize acts where an agent takes the appropriate action in her circumstances. It is supposed to prescribe what any other agent ought to do in that situation, and we should not feel moral disapprobation towards her. We think that she and we are morally required to behave exactly the same in similar situations. I do not think that such actions are appropriately labeled 'excuses', but I understand that others will disagree. In any event, even if it is an excuse, it is different than other forms of excuses. I

⁶⁰ McMahan, *Killing in War*, 185-6.

especially want to differentiate from the form of excuse that claims an agent is excused because others would have morally acted a certain way, even if they know it is immoral (e.g. coercion or duress).

Most individuals decide to participate in war based on similar triggering conditions and whether they fight for a fact-relative just cause or not is a matter of moral luck. Therefore, even if most combatants are not simultaneously evidence-relative justified, they are simultaneously evidence-relative excused. They act in a way that most others would act in similar circumstances, even if it is not action that morality prescribes. This, I suspect, is the sentiment underlying the most persuasive forms of pacifism.⁶¹ Importantly, this, more modest argument, still undermines individualist claims that most combatants are not moral equals. If most combatants are acting on the same triggering conditions, then those conditions must either be justified or excused to the same degree. It is not the case that there is usually a significant moral asymmetry between combatants in an evidence-relative sense. As I have already stated, moral luck has no relevance in evidence-relative morality. Of course, additional evidence is available in each particular case, but, if most individuals favor participating in war, then combatants are usually closer to moral equals than most individualists imply.

The claim that most combatants are at least evidence-relative excused is not simply an appeal to the pervasive effects of jingoism (although, that is, sadly, an important factor). Rather, it is primarily an appeal to the expected consequences of failing to participate in war. The concept of a ‘just’ and ‘unjust’ side in most wars is misleading. As individualists maintain, there is not an overarching institutional mechanism in war for generating and enforcing reasonably fair judgments. Therefore, war is plagued by ‘victor’s justice,’ where the more powerful side imposes its will on the other, independent of justice. A belligerent that started with a just cause was more likely than not to exceed the limits of justice if it gained the upper hand. For most of human history, the evidence indicated that the loser of a particular war or

⁶¹ See Cheyney Ryan, “Self-Defense, Pacifism, and the Possibility of Killing,” *Ethics*, 93.3 (April 1983), 508-524.

series of wars would be treated unjustly and harshly. For example, genocide against the losing side was a fairly common result in ancient warfare. Even if we assume that Rome was initially justified in fighting Carthage, the eventual destruction of an entire city-state seems unjust. Almost all of human history provides examples of 'victor's justice' of one form or another. Consider a Carthaginian who considers his current war against the Romans to be unjust, but has evidence that, if Carthage loses, Carthage and everyone in it will be destroyed. It will be unjust to inflict victor's justice on the Romans; it will be unjust to suffer victor's justice at the hands of the Romans. Given the state of human affairs, the evidence indicates that no intermediate options are realistically available. It seems to me that, if we can count self-preservation as a powerful excuse in some cases of self-defense, then communal self-preservation (preserving the self and much of what the self values) offers an even more powerful excuse for participating in war. One could try to split the difference by participating in war only up to the point where justice is restored. However, this is to misunderstand the nature of war. In war, advantages are often achieved suddenly and irrevocably. Once the advantage is achieved, the course of events and path towards victor's justice is extremely likely. Furthermore, the decisive point is usually much easier to determine in hindsight than in the heat of the moment. If the Carthaginian refuses to aid the war until Rome restores 'justice,' he is very likely to come to Carthage's aid too late. This risk is significant enough that the communal-self preservation excuse obtains for the Carthaginian at the outset of war. Importantly, it also obtains for the Roman towards the end of the war. It probably does not obtain at the point where Romans raze Carthage though, because Carthaginians are too vulnerable at that point. Interestingly, the razing of Carthage is also a *jus in bello* violation. So, even according to traditional just war theory it is proscribed. Individualists would not be novel if all they proscribe is the razing of cities or attacks on the extremely vulnerable.

According to my argument, most combatants in history were either evidence-relative justified or evidence-relative excused for lowering their triggering conditions to participate in wars against each other. I am, however, disinclined to think that most combatants are only evidence-relative excused. I

claim that they are evidence-relative justified, because, even if one rejects my argument that they are justified by the principle of discrimination, they are often justified by the principles of proportionality and necessity. Proportionality only stipulates that risks be distributed as evenly as possible in order to achieve the morally important ends of the violent act (i.e. securing rights from culpable threats). If the available evidence indicates that the rights violations at stake are important enough, then the deliberating person is justified in accepting a greater risk of imposing harms that would otherwise be considered disproportionate on others. This is the basic principle underlying justifications for collateral damage. Persons who are otherwise entitled to a more or less equal distribution of risk are liable to more risk because a grave threat must be defeated and defeating the threat requires imposing an unequal distribution of risk on the aforementioned persons. If available evidence indicates that 1) the deterrent gains achieved through relaxed triggering conditions exceed the expected costs and 2) relaxed triggering conditions are the only way to achieve such deterrence, then those triggering conditions can be evidence-relative justified. I claim that 1) and 2) obtained in international relations for most of human history. This is an empirical claim and it is where I suspect that I will part ways with most individualists. Instead of laboring a point that is unlikely to change anyone's mind, I want to turn to a point that I think holds some hope of gaining traction and changing the way others think.

Regardless of where one stands with respect to the available evidence about proportionality for most of human history, I think that the available evidence germane to justifications of war changed considerably during the twentieth century. As a result of this evidence, it is increasingly evidence-relative justified to assume that it is permissible to participate in a war fought by a liberal democracy and to assume that it is impermissible to participate in a war fought by an autocracy. I articulated this argument to a well-known individualist pacifist and he recently rebutted its distant cousin in the journal *Ethics*.⁶² Unfortunately, based on his article, I fear that I failed to communicate my idea effectively. Here, I will

⁶² Cheyney Ryan, "Democratic Duty and the Moral Dilemmas of Soldiers," *Ethics* Vol. 122, No. 1 (October, 2011), 10-42.

make a better attempt. My main point was not that individuals in liberal democracies, particularly the USA, ought to participate in wars that they know to be unjust. Rather, my point was that individuals in post-WWII liberal democracies ought to adopt triggering conditions that favor participating in their country's wars from a position of epistemic uncertainty.

The first important piece of evidence is domestic in nature. Since 1900, evidence accumulated that liberal democracy can successfully protect individuals from threats that do not originate from their own state. Importantly, as late as 1900, it was an open question whether liberal democracy could succeed in the long run and whether it could work for most peoples. Various weak arguments against democracy were formulated, but one strong argument claimed that the 'rights' guaranteed under liberal democracy would undermine the state's ability to secure its citizens from civil and international war. This argument is fully compatible with the common defense paradigm, since, in common defense, human security from all culpable threats is important. It makes no moral difference if an individual is killed by the state, by a rebel group, or by a rogue individual; the point of rights is to optimally protect non-culpable persons from these risks.

Let me be clear; I do not consider common defense principles to be wholly liberal in nature, although they are certainly egalitarian. In principle, they could justify some forms of authoritarian norms, where the state has rights that exceed commonly accepted liberal norms.⁶³ At the founding of the United

⁶³ This is why I am not concerned with Thomas Pogge's non-compliance problem in contractualism. Pogge is worried that a contractualist "conception of justice may require social institutions that permit and even encourage government officials to invade citizens' basic freedoms or fundamental interests, if these institutions minimize such invasions overall." This means that contractors may agree to rules that enforce strict liability. I rebutted this point earlier when I addressed McMahan's use of moral responsibility as a criterion for permissible harm. Second, Pogge is concerned about criteria for judging suspects. He points out, "We are quite convinced that it is much more important, morally, to avoid convicting the innocent than to avoid acquitting the guilty." Yet, "prudent prospective participants would not impose this requirement for social worlds in which the additional crimes engendered by the higher standard of evidence do more to reduce the citizens' quality of life than the additional false convictions engendered by the lower standard." Pogge's problem here is that he is conflating norms internalized in liberal democratic society with universal morality. The common defense principles do prescribe acting in accord with liberal norms in a well-ordered democratic society; however, they can prescribe violating liberal norms and giving more power to the state in other social contexts. Pogge is also concerned that contractors might agree to principles that violate discrimination in order to achieve deterrence. This worry is accommodated by my concept of

States, for example, the authors of the US Constitution considered one of their primary problems to be maximally preserving individual liberty without sacrificing security from faction or foreign aggression. At the time, the most convincing critique of republicanism was that, by granting too much individual liberty, it exposed society to excessive risk of civil war and foreign domination.⁶⁴ At the beginning of the 1900s, fascists, like Carl Schmitt, leveled similar criticisms, claiming that liberal societies cannot identify and deal with their enemies.⁶⁵ If the empirical evidence supported the critics of liberal democracy, then liberal democracy would fail to satisfy principles of common defense and it would be morally unjustified. This point would likely be moot though, because I suspect that, if liberal democracies could not protect citizens from internal and foreign threats, then they would not be successful. Regardless, the empirical evidence clearly indicates that liberal democracies can protect their citizens from threats that originate outside the liberal democratic state and, even more importantly, liberal democracies protect human security better than any other regime type. Additionally, the second and third waves of democratization proved that liberal democracy is feasible for a broad array of societies, even if it is an open question whether it is a viable option for all societies. The upshot of this evidence is that it is harder for individuals to justify defending authoritarian institutions and it is easier for them to justify defending democratic institutions.

The second important evidence is that international institutions since 1945 dramatically reduce the likely costs of losing war. Since 1945, the rise of the international law and the United Nations coupled with the rise of the human rights regime to impose limits on victor's justice. These limits gained strength when the United States assumed hegemonic super-power status. Wars of conquest almost never

discrimination. See Thomas Pogge, "Three Problems with Contractarian-Consequentialist Ways of Assessing Social Institutions," in ed. Ellen Frankel Paul, Fred D. Miller, Jr., and Jeffrey Paul, *The Just Society* (Cambridge: University of Cambridge, 1995), 255-264.

⁶⁴ For example, see Alexander Hamilton, "Federalist No. 9: The Union as a Safeguard Against Domestic Faction and Insurrection For the Independent Journal," and James Madison, "Federalist No. 10: The Same Subject Continued (The Union as a Safeguard Against Domestic Faction and Insurrection)," in *The Federalist Papers* (McLean, Virginian, IndyPublish), pp. 40-52..

⁶⁵ Carl Schmitt, *The Concept of the Political* trans. George Schwab (Chicago: The University of Chicago Press, 2007).

happen and borders rarely shift significantly solely through military action. Genocide is outlawed and genocide is increasingly likely to be met by armed humanitarian intervention.⁶⁶ Prior to 1945, liberal democracies were just as likely (if not more likely) as autocracies to impose the most brutal forms of repression through colonialism. However, since 1945, the rise of international media and international non-government organizations has rendered the more brutal forms of colonialism impracticable for democracies and restricted the means that liberal democracies can effectively employ in war.⁶⁷ Therefore, evidence indicates that liberal victors will respect limits on victor's justice, and these limits affect proportionality calculations. As a result, it is harder to justify more permissive triggering conditions for going to war against liberal democracies. In addition, the feedback mechanism which allows for non-violent change within democracies has expanded (albeit in a much less perfect form) to the international arena. These mechanisms do not satisfy the individualist criteria for an 'institutional justification,' but they are a step in the right direction. Democracies are increasingly susceptible to feedback on injustice from the international arena. As I already mentioned, this has important implications for individuals considering violent resistance to injustices originating from democracies. Necessity restricts resorts to violence as a last resort. Therefore, if democracies are increasingly responsive to non-violent resistance and the world is increasingly democratic, then violence in general and, in particular, violence against democracies is increasingly difficult to justify by the evidence-relative principles of necessity. Additionally, recent empirical evidence indicates that non-violent resistance is more likely to yield liberal institutions after conflict than violent resistance is.⁶⁸ If the goal of common defense is to secure rights and if liberal institutions protect human security better than any other type of regime, then this piece of

⁶⁶ United Nations, "Convention on the Prevention and Punishment of the Crime of Genocide," 1948, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en, accessed 24 May 2012.

⁶⁷ See Gil Merom, *How Democracies Lose Small Wars* (Cambridge: Cambridge University Press, 2003).

⁶⁸ See Erica Chenoweth, "Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict," *International Security* Vol. 33, No. 1 (June 26, 2008), pp. 7-44.

evidence provides yet another reason to impose more restrictive triggering conditions for going to war on all regime types.

The combination of these points indicates that protecting and spreading democracy is a moral imperative. If one accepts these points, then it is justifiable to accept the risk of some unjust wars in order to preserve and promote democracy over the long run. After all, the self-imposed restraint originates in liberal norms and evidence does not indicate that autocracies will impose limits on victor's justice. Therefore, a single or series of catastrophic missteps can result in the end of democracy, which is a significant blow to the development of just institutions. However, one unjust war is not going to derail the ongoing process of democratization. This does not undermine the individualist claim that democratic citizens should deliberate before participating in their country's wars and it does not imply that democratic citizens should support a war that they know to be just. Instead, it provides evidence that their wars are more likely to be just and that the importance of preserving democracy has to enter the proportionality calculation. The importance of preserving democracy is a factor that gives citizens in democratic states reason to relax their triggering conditions for participating in war.

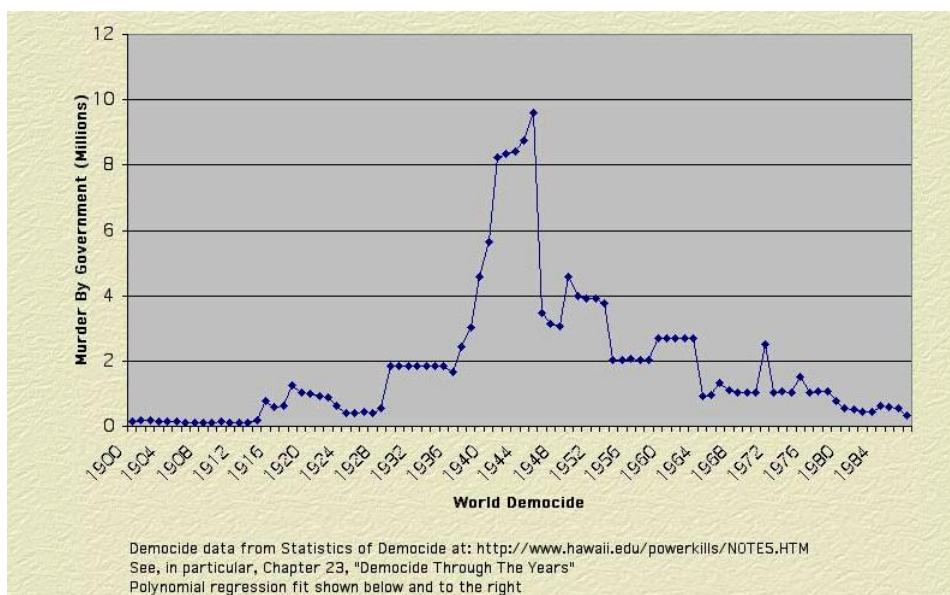
I am quite certain that these points rule out pacifism. First, the available evidence indicates that the costs of war are high, but they indicate that the costs of appeasement are higher. With respect to the former, the prominent pacifist recently cited the extraordinary costs of war in the twentieth century in order to motivate his argument.⁶⁹ This however, only provides the inputs for one side of the proportionality equation. In order to determine whether or not, war is proportionate, the costs of war must be compared to the costs of appeasement. If we use Rummel's statistics for democide (deaths caused by the victims' own government) in the twentieth century as evidence for the costs of

⁶⁹ The twentieth century was an era of unprecedented war-induced death. As historian Niall Ferguson has noted, the hundred years after 1900 were without question the bloodiest century in our history, far more deadly in relative as well as absolute terms than any previous era." Cheyney Ryan, "Democratic Duty and the Moral Dilemmas of Soldiers," *Ethics*, Vol. 122, No. 1 (October 2011), p. 10. Ryan is citing Niall Ferguson, *War of the World* (New York: Penguin, 2006), xxxiv.

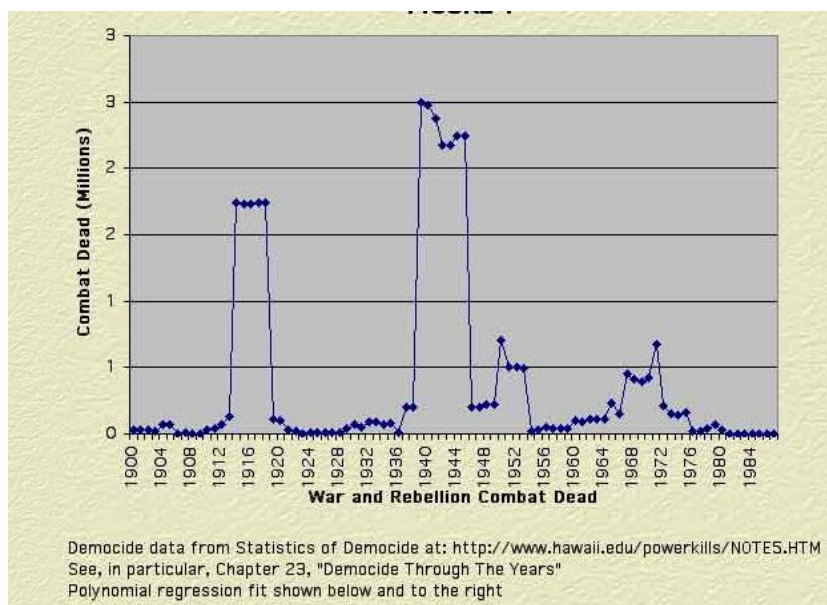
appeasement, the comparison is striking. The costs of democide in the twentieth century dwarf the costs of war in the twentieth century.⁷⁰ The costs of democide are largely born by individuals in totalitarian societies and empirical evidence indicates that liberal states are the best way to achieve human security. If one accepts the plausible claim that the Nazis and Soviets could only be defeated with war and the credible threat of war, then the evidence indicates that war is proportionate. Not everyone accepts this claim, and many assert that non-violent resistance is more effective than war. I think that this argument deserves more credit than it is usually given. However, it only obtains in liberal democracies or world orders where liberal democracies hold significant power. It is hard to imagine Hitler or Stalin responding to Ghandi in the same manner as the British did. Therefore, the preservation of a liberal world order, or at least a world order where liberal states hold considerable power, is a prerequisite to the effectiveness of non-violent resistance.

⁷⁰ See “Statistics of Democide” at www.hawaii.edu/powerkills/NOTES.HTM. See, in particular, chapter 23, “Democide Through the Years.” See also Rummel, *Power Kills: Democracy as a Method of Nonviolence*. New Brunswick, NJ: Transaction Publishers, 1997.

Human Costs of States Gone Bad



Human Costs of War



I am decidedly less certain that this line of reasoning rebuts the individualist argument that democratic citizens should presume in favor of abstaining from their country's wars in the current historical context. The wars against the Nazis or Stalinists are obviously justified wars that most current individualists would prescribe fighting in. However, there is a large set of wars that individualists argue were unjust (indeed, there is a consensus among all just war theorists that these wars were unjust), but that may have been necessary to defeat totalitarianism. Arguably, the more restrictive triggering conditions for war that manifested themselves in the policy of appeasement prior to WWII nearly led to the death of democracy and the ascendancy of totalitarianism. Additionally, it is arguable that the wars in Korea, Vietnam, the Middle East, and Latin America during the Cold War are examples of wars that may have contributed to the preservation of democracy through deterrence and credible threats. My point is not that these empirical arguments are all fact-relative correct; it is impossible to prove counterfactuals. Nor is it to suggest that citizens in liberal democratic states should support all wars. I actually think that some of these empirical arguments are flawed and some (but not all) of these wars were unjust. Furthermore, I think that Cheyney Ryan is correct that the current triggering conditions in the United States are too permissive and should be restricted more than they currently are. Rather, my point is that these arguments are not obviously wrong. If they are plausible, then it is justifiable for citizens in liberal democratic states to lower their triggering conditions *to some undefined degree (but less than the current degree)* for participating in war in order to preserve democracy for everyone's sake. These triggering conditions cannot be relaxed indefinitely, through a slippery slope argument, but they can be relaxed to some degree, especially for professional soldiers who have more demanding duties of other-defense to their fellow citizens and less-demanding duties of political participation. Furthermore, the evidence available to democratic citizen's contemplating participating in wars against authoritarian states has not changed since WWII. Necessity, proportionality, and discrimination still lead to less restrictive triggering conditions for liberal states contemplating war against authoritarian states and non-government actors.

My argument implies that, since WWII, it became increasingly difficult for citizens of authoritarian states and non-state actors to justify fighting for their political communities against democracies. A few qualifying remarks are in order though. Evidence-relative principles prescribe action based on the evidence available to the deliberating agent; they do not prescribe action based on all of the evidence available to everyone. As individualists already note, authoritarian states are notoriously isolated from the outside world (e.g. North Korea). Therefore, the evidence available to them may indicate that war against a democracy is justified, even if evidence available to the rest of the world indicates that this is not the case. Second, the legacy of colonialism is fresh in the international community's mind and provides evidence that liberal democracies are not sincere in their commitment to human rights on a global scale. Finally, the available evidence indicates that liberal democracies ability to carry out regime change and transition from autocracy to democracy is sketchy at best. The evidence does not indicate that this is a culpable failure, but it is a failure nonetheless. Iraqis, for example, still find themselves in a very real security dilemma ten years after the US-led 'liberation' in 2003. At a minimum, these factors provide evidence-relative excuses; they might even provide justification for fighting liberal democracies. Even if they do not, combatants fighting for authoritarian regimes are not liable to harms, because these harms cannot satisfy the principles of proportionality or discrimination. The surrender and post-conflict cooperation of opposing combatants is a prerequisite for the cessation of hostilities and the establishment of a just peace. This is commonly referred to as the 'spoiler problem.' Therefore, punishing combatants fighting for unjust authoritarian causes is likely to undermine the cause of securing rights. I am skeptical of claims that a punishment mechanism would actually deter participation in war, although I must admit that this is an open question. Thus, I am skeptical that a system of post-conflict punishment for combatants can satisfy proportionality or discrimination. These types of arguments are found in the literature on transitional justice and war crimes tribunals. Additionally, I think that the powerful excusing conditions that bear on most combatants would make punishment unjust. Even if some punishment is in order, the horror of war experience ought to count towards some degree of 'time already served.'

At this point, it is important to re-iterate what I am not claiming. Individualists provide numerous forms of evidence that they claim make it harder to justify acts of violence in war than personal self-defense. Those considerations may or may not be significant and maybe they ought to influence agents deliberating whether to participate in war. My point is that, setting those additional considerations aside, individualists mistreat the moral importance of institutions. Institutions do not provide a stand-alone ‘institutional justification’ and a lack of such institutions does not make acts of violence harder to justify. To the contrary, in an evidence-relative sense, a lack of institutions provides evidence that relaxes the triggering conditions for going to war and it does so to individuals on opposing sides simultaneously. This is especially true for combatants defending liberal democratic states, because the success of those states is important for the future prospects of liberal democracy, the single greatest system for protecting human security. This does not mean that combatants should fight for democracy when they ‘know’ the war is unjust, but it means that they should presume in favor of participating in war when they are unsure of the justness of its cause. This does not necessarily mean that combatants on opposing sides are necessarily moral equals, but it makes it more likely than individualists imply. I am also not advocating political realism, which maintains that there is no morality in the ‘state of nature’ that is war. I’ve clearly articulated moral principles that apply to violence intended to secure rights from culpable threats in all contexts, including war. The ‘state of nature’ is not devoid of morality; moral principles still constrain action. But, morality prescribes very different kinds of actions (i.e. more permissive) within it.

I would also make a few final comments on the relationship between existing international institutions and morality. Individualists consistently argue that international humanitarian law (IHL) does not constitute morality and that the traditional approach to just war theory conflates law and morality. This claim is probably correct, but I am dissatisfied with individualists inability to appreciate the moral significance that law has on evidence-relative moral prescriptions. By placing constraints on a conduct during war, and especially on victor’s conduct after war (e.g. releasing prisoners), IHL provides evidence that the consequences of losing war are less severe than they would be without IHL. Thus, IHL affects

prescriptions generated by necessity, proportionality, and discrimination by generating more restrictive triggering conditions for conducting war. The fact that IHL is not a ‘just or reasonably just institution’ does not undermine its moral importance. As an institution, IHL moves war one step away from the ‘state of nature’ and one step closer to fully or mostly just institutions. IHL is thus a morally good thing, not just a practically good thing.

Additionally, the rise of the Responsibility to Protect (R2P) doctrine generates evidence that the international community will protect individuals through other-defense. By assuming the R2P, the international community is taking steps, not just to protect human rights, but to eliminate moral justifications for war. In short, by protecting others, the international community is morally obligating others to refrain from violence. To the degree that the international community carries out R2P successfully, war will be increasingly hard to justify. War is less likely to be a necessary or proportionate response if the world achieves a universal basic level of human security. Furthermore, by fulfilling duties of other-defense the international community will restrict the triggering conditions for collective self-defense via the principle of discrimination. According to the Universal Declaration of Human Rights:

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,⁷¹

Whether one accepts that relaxed triggering conditions for war are justified or merely excused, the successful implementation of R2P would provide evidence that restricts those triggering conditions more than at any point in human history. The fact that international institutions are not ‘fully just’ yet (and maybe never will be) should not blind us to their moral significance for individuals deliberating participation in war.

It might be argued that, by giving institutions such an important role in moral justifications for violence, I am conflating law and morality. There are two variants of this argument. The first variant is

⁷¹ United Nation General Assembly, “United Nations Declaration of Human Rights,” 1948, <http://www.un.org/en/documents/udhr/index.shtml>, accessed 12 May 2012.

the argument that legal positivists might be inclined to make. Positivists like to draw a sharp distinction between law and morality in order to, among other things, leave space for moral arguments against the law. Perhaps positivists would point out that some legal institutions, such as some Nazi law, does not generate evidence. Such a point would be misplaced in the context of my argument. I am not arguing for a particular conception of law. Rather, I am arguing that, regardless of whether one accepts positivism or natural law theory, a large portion (at the least) of the law generates evidence relative to common defense. Furthermore, my argument explicitly rests on the premise that law and morality can come apart, a point that is important to a potential second line of criticism.

The second form of criticism is one that individualists make explicitly. According to McMahan, for example, the law represents de facto power, which does not necessarily coincide with morality. Any moral argument that rests on the law is thus akin to an objectionable Hobbesian realism variety of morality. This objection would also fundamentally misconstrue my argument. I am not claiming that law and morality are the same thing. I do, however, accept that the law reflects and constitutes de facto power relations. This is morally important, not because de facto power is moral, but because the application of de facto power affects morality by affecting reciprocal relations. By generating evidence about how others will use violent force, the law generates moral prohibitions and justifications for the use of force by different classes of people in certain types of situations. According to discrimination, the underlying principle of reciprocity which justifies the use of violence to secure rights is dependent upon evidence, and, in the real world, much, if not most, evidence about the use of violence is generated through legal institutions. The law provides evidence how far A will go to protect B, which is morally important in determining how far B is obligated to protect A.

Conclusion

Individualists neglect the relationship between self- and other-defense in evidence-relative justifications. As a result, they conflate the role-based norms of ordinary citizens in well-ordered liberal

society with the universal moral principles for security rights from culpable threats. These particular role-based norms favor the risk of allowing over the risk of doing that exceeds baseline morality. Additionally, individualists err when they treat the moral significance of institutions. Individualists treat the effect of institutions in an artificially binary manner by claiming the existence of a stand-alone institutional justification that only applies to fully or mostly just institutions. In actuality, there is no such thing as a stand-alone ‘institutional justification.’ Institutions are morally significant because they generate evidence that is relevant to evidence-relative moral principles and any institution that generates the appropriate type of evidence is morally important.

These problems in the current individualist approach can be corrected by utilizing a new approach, the common defense paradigm. By harnessing the tools available in contractualism, common defense highlights the relationship between self-and other-defense and shows the moral facts underlying complicated relational claims. When institutions are analyzed in light of common defense principles, it is apparent that common defense principles generate prescriptions that are closer to common sense morality than individualists maintain. Nonetheless, the rise of international institutions has the potential to restrict the triggering conditions for individuals considering participating in war. If we build those institutions, then the ‘right’ to collective self-defense will be restricted. But, until that happens, it is fallacious to claim combatants, especially combatants fighting for liberal democracy in contemporary times, should presume in favor of refraining from war for institutional reasons.

Bibliography

- Bellamy, Alex. "Realizing the Responsibility to Protect," *International Studies Perspectives*, Vol. 10, Issue 2 (May 2009), pp. 111-128.
- Benbaji, Yitzhak. "The Moral Power of Soldiers to Undertake the Duty of Obedience." 122.1 (October 2011): 43-72.
- City of Sanford, Florida. Transcript of George Zimmerman's Call to the Police. <http://www.motherjones.com/documents/326700-full-transcript-zimmerman>, online in *Mother Jones* magazine. Accessed 24 May 2012.
- Chenoweth, Erica. "Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict." *International Security* 33.1 (June 26, 2008): 7-44.
- Darby, Derrick. *Rights, Race, and Recognition*. Cambridge: Cambridge University Press, 2009.
- Doggett, Tyler. "Recent Work on the Ethics of Self-Defense." *Philosophical Compass* 6.4 (2011): 220-33.
- Doyle, Michael. "International Ethics and the Responsibility to Protect," *International Studies Review*, Vol. 13, Issue 1, (March 2011), pp. 72-84.
- Fabre, Cecile. "Interneecine War Killings," *Utilitas* 24.2 (June 2012): 214-36.
- Fabre, Cecile. "Mandatory Rescue Killings." *The Journal of Political Philosophy* 15.4 (December 2007); 363-384.
- Frowe, Helen, "A Practical Account of Self-Defence." *Law and Philosophy* 29.3 (May 2010); 245-72.
- Gardner, John and Francois Tanguay-Renaud. "Desert and Avoidability in Self-Defense." *Ethics* 122.1 (October 2011): 111-134.
- Green, T. H., in P. Harris and J. Morrow (eds.), *Lectures on the Principles of Political Obligation* Cambridge: Cambridge University Press, 1986.
- Hamilton, Alexander John Jay and James Madison, *The Federalist Papers*. McLean, Virginian, IndyPublish.
- Lazar, Seth. "Responsibility, Risk, and Killing in Self-Defense." *Ethics* 119.4 (July 2009): 699-728.
- Leveringhaus, Alexander. "The Moral Status of Combatants during Military Humanitarian Intervention," *Utilitas* 24.2 (June 2012): 237-58.
- McMahan, Jeff. "Duty, Obedience, Desert, and Proportionality in War: A Response." *Ethics* 122.1 (October 2011): 135-167.
- McMahan, Jeff. "Individual Liability in War." *Utilitas* 24.2 (June 2012):278-99.
- McMahan, Jeff. "Innocence, Self-Defense, and Killing in War." *Journal of Political Philosophy* 2. 3 (September 1994): 193-221.
- McMahan, Jeff. *Killing in War*. Oxford: Clarendon Press, 2009.

- McMahan, Jeff. "Self-Defense and the Problem of the Innocent Attacker," *Ethics* 104 (1994): 252-90.
- McMahan, Jeff. "War as Self-Defense." *Ethics and International Affairs* 18.1 (March 2004): 75-80.
- Merom, Gil. *How Democracies Lose Small Wars*. Cambridge: Cambridge University Press, 2009.
- Nozick, Robert. *Anarchy, State, and Utopia*. New York: Basic Books, 1974.
- Otsuka, Michael. "Killing the Innocent in Self-Defense." *Philosophy and Public Affairs* 23 (1994):74-94.
- Parfit, Derek. *On What Matters: Volume One*. Oxford: Oxford University Press, 2011.
- Pogge, Thomas. "Three Problems with Contractarian-Consequentialist Ways of Assessing Social Institutions." In ed. Ellen Frankel Paul, Fred D. Miller, Jr., and Jeffrey Paul. *The Just Society*. Cambridge: University of Cambridge, 1995: 241-266.
- Rawls, John. *A Theory of Justice*. Cambridge, MA: Belknap Press, 1999.
- Rawls, John. "Two Concepts of Rules." *The Philosophical Review*. 64.1 (Jan. 1955): 3-32.
- Rodin, David. "Beyond National Defense." *Ethics and International Affairs* 18.1 (March 2004): 93-8.
- Rodin, David, "Justifying Harm." *Ethics* 122.1 (October 2011): 74-110.
- Rodin, David. *War and Self-Defense*. Oxford: Oxford University Press, 2002.
- Rummel, R.J. *Power Kills: Democracy as a Method of Nonviolence*. New Brunswick, NJ: Transaction Publishers, 1997.
- Ryan, Cheyney. "Democratic Duty and the Moral Dilemmas of Soldiers." 122.1 (October 2011): 10-42.
- Ryan, Cheyney. "Self-Defense, Pacifism, and the Possibility of Killing." *Ethics* 93.3 (April 1983): 508-524.
- Schmitt, Carl. *The Concept of the Political* trans. George Schwab. Chicago: The University of Chicago Press, 2007.
- Tadros, Victor. "Duty and Liability." *Utilitas* 24.2 (June 2012):59-77.
- Thompson, J.J. "Self-Defense." *Philosophy and Public Affairs* 16 (1987): 283-310.
- Uniacke, Suzanne. *Permissible Killing*. Cambridge: Cambridge University Press, 1994.

- United Nations. "Convention on the Prevention and Punishment of the Crime of Genocide." 1948, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en, accessed 24 May 2012.
- United Nation General Assembly. "United Nations Declaration of Human Rights." 1948. <http://www.un.org/en/documents/udhr/index.shtml> , accessed 12 May 2012.
- Zupan, Dan. "A Presumption of the Moral Equality of Combatants" In Rodin, D. and Shue, H. ed. *Just and Unjust Warriors*. Oxford: Oxford University Press, 2008: 214-225