

# Necessity in Self-Defense and War

## I. Introduction

Philosophers generally agree that justified self-defense must meet four conditions. First, the defender must face an unjustified threat.<sup>1</sup> Second, there must be some grounds to prefer the defender's interests to those of his target ("Attacker," though in some cases that name is not apposite).<sup>2</sup> Third, the force used must be

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<sup>1</sup> There is some dispute over whether the threat must be all things considered unjustified, or merely unjust, insofar as it contravenes the victim's rights. For the former view, see Jeff McMahan, "Self-Defence against Justified Aggressors," in *How We Fight*, ed. Helen Frowe and Gerald Lang (Oxford: Oxford University Press, 2012). For the latter, David R. Mapel, "Moral Liability to Defensive Killing and Symmetrical Self-Defense," *Journal of Political Philosophy* 18 (2010): 198-217; David Rodin, "Justifying Harm," *Ethics* 122 (2011); Uwe Steinhoff, "Jeff McMahan on the Moral Inequality of Combatants," *Journal of Political Philosophy*, 16 (2008): 220-26.

<sup>2</sup> On some accounts, what matters is Attacker's liability, grounded in his particular connection to the unjustified threat: e.g., Jeff McMahan, "The Basis of Moral Liability to Defensive Killing,"

proportionate to the threat averted: the threat must be of sufficient magnitude to justify that much force.<sup>3</sup> And fourth, the force used must be necessary to avert the threat. Much has been written on the first three conditions, each of which is subject to widely varying interpretations. The necessity constraint, however, has been generally neglected.<sup>4</sup>

This neglect would be less troubling if necessity were either immediately perspicuous, or peripheral to the ethics of self-defense. Unfortunately, closer examination proves the simple, pretheoretical account of necessity to be inadequate. And if defensive harm can be justified only if it is necessary, this constraint could hardly be more important. Nor is this only a problem in self-defense: necessity plays a crucial role in both popular and philosophical thinking about the ethics of war. We standardly think that, regardless of whether the other criteria for permissible harm in war are met, unless force is necessary to avert an unjustified threat, we should

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*Philosophical Issues* 15 (2005): 386-405; Judith Jarvis Thomson, "Self-Defense," *Philosophy & Public Affairs* 20 (1991): 283-310. On other accounts, Defender has an agent-centred prerogative to prefer his own interests, even if Attacker is not liable: e.g., Nancy Davis, "Abortion and Self-Defense," *Philosophy & Public Affairs* 13 (1984): 175-207; Helen Frowe, "Threats, Bystanders and Obstructors," *Proceedings of the Aristotelian Society (Hardback)* 108 (2008): 365-72; Jonathan Quong, "Killing in Self-Defense," *Ethics* 119 (2009): 507-37.

<sup>3</sup> For illuminating discussion, see Thomas Hurka, "Proportionality in the Morality of War," *Philosophy & Public Affairs* 33 (2005): 34-66; Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009): 18-32; Rodin, "Justifying Harm."

<sup>4</sup> One recent exception is Daniel Statman, "Can Wars Be Fought Justly? The Necessity Condition Put to the Test," *Journal of Moral Philosophy* 8 (2011): 435-51. See also Daniel Statman "On the Success Condition for Legitimate Self-Defence," *Ethics* 118 (2008): 659-86. Statman, however, takes for granted the simple, pretheoretical account of necessity. Hurka also discusses necessity in Thomas Hurka, "Proportionality and Necessity," in *War: Essays in Political Philosophy*, ed. Larry May and Emily Crookston (Cambridge: Cambridge University Press, 2008), pp. 127-44.

refrain.<sup>5</sup> Indeed, for one prominent school of just war theorists, necessity underpins the principle of noncombatant immunity, perhaps the single most important moral constraint on the use of force in war. These philosophers think that permissible killing in war is identical to permissible killing in self- and other-defense, indeed, that justified wars reduce to justified acts of self- and other-defense. They argue that, even if the other conditions that would make noncombatants legitimate targets of lethal force were satisfied, since killing noncombatants will never satisfy the necessity constraint, they are immune from attack on those grounds alone.<sup>6</sup>

The necessity constraint, then, is at the heart of the ethics of both self-defense and war, and yet we know little about it. This article seeks to remedy that defect. It proceeds in two stages: first, an analysis of the concept of necessity in self-defense (Sections II and III); second, an application of this analysis to war, looking both at its implications for just war theory (Section IV) and its application in the laws of war (Section V).

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<sup>5</sup> This was strikingly illustrated in an early survey of Republican presidential candidates by the *New York Times*, on the topic of executive authority. Asked whether they would use their executive power, as president, to authorize targeted killings, the initiation of armed conflict, indefinite detention without trial, and torture, each of the candidates who responded affirmatively placed necessity at the heart of their answer. Charlie Savage, "In G.O.P. Field, Broad View of Presidential Power Prevails," *The New York Times*, December 30, 2011.

<sup>6</sup>Richard J. Arneson, "Just Warfare Theory and Noncombatant Immunity," *Cornell International Law Journal* 39 (2006): 663-88, esp. p. 682; Cecile Fabre, "Guns, Food, and Liability to Attack in War," *Ethics* 120 (2009): 63; Helen Frowe, "Self-Defence and the Principle of Non-Combatant Immunity," *Journal of Moral Philosophy* (2011): 19-20; McMahan, *Killing in War*, p. 225; Lionel McPherson, "Innocence and Responsibility in War," *Canadian Journal of Philosophy* 34 (2004): 485-506, esp. p. 505; Gerhard Øverland, "Killing Civilians," *European Journal of Philosophy* 13 (2005): 345-63, esp. pp. 352, 360.

## II. Analysing Necessity

Satisfying the necessity constraint is a necessary condition of justified self-defense. Necessity is satisfied if and only if the harm inflicted is necessary to avert the threat faced. In ordinary English, X is necessary to avert Y if and only if we cannot avert Y without X. This yields:

Defensive harm H is necessary to avert unjustified threat T if and only if Defender cannot avert T without inflicting H.

The pretheoretical view is that H is suffered by Defender's Attacker, and that harm is not discrete, but continuous:

Defensive harm H is necessary to avert unjustified threat T if and only if Defender cannot avert T by inflicting less than H harm on Attacker.<sup>7</sup>

To illustrate, if Defender can avert Attacker's unjustified threat to his life either by killing her, or by breaking her leg (and there are no other alternatives), he must break her leg, since it is unnecessary to inflict any greater harm to save himself.<sup>8</sup> The rest of this section seeks to improve on this analysis.

The first modification concerns the locus of the harm. In law and philosophy, the necessity constraint is typically predicated only on harms to Attacker. When formulating statutes, this makes sense: self-defense is a legal defense against prosecution for a particular crime, that is, the harm inflicted on the putative attacker.

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<sup>7</sup> See, e.g., David Rodin, *War and Self-Defense* (Oxford: Clarendon Press, 2002), p. 40; Statman, "Can Wars Be Fought Justly?" This is also the conventional view in law; see, e.g., Model Penal Code, Section 3.04.

<sup>8</sup> The example assumes that the other conditions for permissible harm in self-defense are satisfied.

In philosophical terms, however, the necessity constraint must pay attention to all harms inflicted by Defender, not only those to Attacker. Suppose that Defender could avert an unjustified threat to his life by shooting Attacker in either the arm or the leg, and each will harm her to the same degree, but shooting her leg might also harm a Bystander (someone causally unconnected to the unjustified threat). Clearly, shooting her leg would not satisfy necessity, because it risks unnecessary harm to Bystander.

One could respond that Defender should indeed aim at Attacker's arm, but that necessity does not explain this: instead, the additional harm to Bystander renders Defender's action disproportionate. Proportionality is also a necessary condition for justified defensive harm. Defensive harm is proportionate when (and only when) the harm inflicted is an appropriate fit for the threat thereby averted. How that fit is determined need not detain us here (though I have more to say on the topic below). What matters is that even if harming Bystander were proportionate, it would still be unnecessary: Suppose Defender were protecting not only himself, but nine others as well. Harming Bystander as a side effect of saving ten people from an unjustified threat might well be proportionate. But if the same result is possible with less harm, then the necessity constraint is not satisfied.

While the necessity constraint must attend to all relevant harms, it should not weigh them all equally. Suppose the net harm suffered by Attacker and Bystander when Defender aims at Attacker's leg is less than the harm Attacker will suffer if Defender aims at her arm. If harm *simpliciter* were all we cared about, then shooting Attacker's arm would involve unnecessary harm, so Defender would be required to aim at her leg. This is clearly wrong: as noted in the introduction, one of the conditions of justified self-defense is that Attacker's interests be discounted relative to Defender's. They should also be discounted relative to Bystander's

interests, since the latter has nothing to do with the unfolding situation. In general, bystanders enjoy profound moral protections against being intentionally used to avert an unjustified threat. The necessity constraint should enjoin avoiding all unnecessary morally weighted harm, whoever the victim. This leaves us with the following analysis:

Defensive harm H is necessary to avert unjustified threat T if and only if Defender could not avert T by inflicting less morally weighted harm.<sup>9</sup>

The second modification concerns the standpoint from which necessity is evaluated. Whether necessity is satisfied looks very different depending on whether we adopt the standpoint of a reasonable person in the defender's position, with access only to the evidence available to him, or the perspective of an omniscient observer who knows all the facts.<sup>10</sup> Three examples should help to illustrate the point.

First, suppose Defender has two options to avert Attacker's threat to his life. He can shoot her dead, or he can press a hidden button beneath his desk, raising an impenetrable barrier between them. Defender does not know the button exists (nor could he be expected to), and shoots Attacker dead.

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<sup>9</sup> Interestingly, the formulation of the necessity constraint in the Law of Armed Conflict contrasts with necessity in the domestic law of self-defense by drawing attention to precisely this point. Article 57(3) of the First Additional Protocol to the Geneva Conventions states that, when choosing between military objectives that offer the same degree of military advantage, combatants should select the option that causes least harm to civilians. The focus is therefore on morally weighted harms, and the weighting proposed is that civilians are the only victims who count.

<sup>10</sup> A full theory of necessity would have to specify just what the standards of reasonableness are, and when evidence counts as available, but for present purposes we can leave those questions open.

Second, Defender can shoot Attacker in the head or in the leg. He shoots her in the leg, severing an artery and causing her death from blood loss. Had he shot her in the head, he would not have killed her (the bullet would have lodged safely in her skull).

Third, Defender can either shoot Attacker in the head, killing her and not harming Bystander, who is standing next to Attacker, or throw a grenade at Attacker. Defender throws the grenade, and fortuitously its explosion is entirely blocked by Attacker's body, leaving Bystander unharmed. Attacker too miraculously survives.

If necessity is relative to all the facts of the case, then killing Attacker in the first two cases is unnecessary, while throwing the grenade is necessary in the third. However, if we evaluate Defender's actions based on what a reasonable person could be expected to believe in his situation, then necessity is satisfied in each of the first two cases, but not in the third. On the available evidence, killing Attacker is indeed the least harmful means to avert the threat she poses in the first two cases, while throwing the grenade is, on the evidence, very likely to involve unnecessary harms.

Without taking a position on whether our moral theories should be evidence-relative, fact-relative, or both, it is clear that our primary interest when exploring the ethics of self-defense and war is in this evidence-relative perspective, because the judgments it yields are much more in tune with our ordinary thinking about self-defense.<sup>11</sup> This is particularly clear given that, in almost every realistic case of

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<sup>11</sup> Constraints of space preclude any detailed discussion of the relative merits of fact-relative against evidence-relative theories of self-defense, the debate about which I therefore wish to bracket as much as possible. However, for the most prominent statement of the fact-relative approach and a compelling critique, see, respectively, Thomson, "Self-Defense"; and Russell Christopher's papers, "Self-Defense and Defense of Others," *Philosophy & Public Affairs* 27 (1998): 123-41; and "Self-Defence and Objectivity: A Reply to Judith Jarvis Thomson," *Buffalo Criminal Law Review* 1 (1998): 537-74.

defensive killing, there will in fact be some less lethal option that Defender could use, if he only knew how to do so. Unless Attacker is truly implacable, temporarily disabling her (and then retreating) should suffice to avert the threat she poses, and in almost all cases where a defender kills an attacker, it is in fact possible to disable her without killing her. For example, whenever it is possible to shoot an attacker dead, it is almost always also possible to shoot her in just the right place, and at just the right angle, so that she will be disabled without being killed.<sup>12</sup>

If necessity cannot be satisfied in such cases, and if necessity must be fact-relative, then lethal defense—whether in self-defense or in war—will almost never be necessary in practice, and so will almost never be permissible, though it might be excused. This would be a very short route to pacifism, and those of us who find that position untenable for other reasons must conclude that our interest is primarily in the evidence-relative sense of permissibility, at least as far as necessity is concerned. If an evidence-relative perspective on the permissibility of self-defense is also legitimate, then there remain interesting questions to answer about the permissibility of both self-defense and war. While the fact-relative necessity standard may in principle be equally valid, if we assume that our interest is in justifying self-defense and war, not excusing it, it is not equally apposite for our current purposes. Certainly those who apply the ethics of self-defense to the context of war are interested in justifying killing in war, not excusing it, so they must have the evidence-relative sense of necessity in mind.

Although focusing on the evidence-relative sense of necessity in no way impugns necessity's fact-relative aspect, perhaps we could achieve the same results

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<sup>12</sup> Does this mean lethal force is unnecessary on the evidence-relative standard as well, since we know in advance that attackers can be stopped without killing them? No: though we know this to be true in general, we do not know how, in this case, to forestall her attack without killing her.

with even thinner metaethical commitments. One possibility is that by shifting our attention to the risks imposed by Defender, we could remain wholly neutral between fact-relative and evidence-relative theories, since both objective (fact-relative) and subjective (evidence-relative) theories of probability are plausible. So, suppose we modify the analysis of necessity accordingly:

Defensive harm H is necessary to avert unjustified threat T if and only if Defender could not avert T by *risking* less morally weighted harm.

This reformulation works in the second and third cases. Tossing a grenade will generally be much riskier than taking one shot with a rifle; shooting someone's leg will normally risk less harm to her than shooting her in the head. However, it does not help with the button example.<sup>13</sup> Shooting Attacker is still not necessary, on this analysis, because pressing the button risks less harm. I think that the most interesting and useful analysis of necessity should explain why we think that Defender's conduct does satisfy necessity in the button case; so we are compelled to reintroduce the evidence-relative modification:

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<sup>13</sup> Additionally, there is a certain sleight of hand in the move to a risk-based fact-relative standard. Of course in general throwing grenades is riskier than shooting people in the head, which is riskier than shooting them in the leg. However, why describe the relevant actions at this level of generality? Presumably, if Defender threw the grenade in precisely the same way, in precisely the same environment, at an attacker identically positioned with respect to the blast and Bystander, then the same outcome would result. Throwing grenades in general is very risky, but in these particular circumstances not so. Similarly, in general shooting people in the leg is less risky than shooting their heads, but if you shoot them in precisely the place Defender shoots Attacker, severing an artery, then presumably the risks are at least as great. I am not sure how to delimit the relevant action-description in a nonarbitrary way.

Defensive harm H is necessary to avert unjustified threat T if and only if a reasonable agent with access to the evidence available to Defender could not avert T by risking less morally weighted harm.

In other words, while the shift to risks is salutary, our principal interest in the ethics of self-defense—insofar as we aim to vindicate the view that lethal defense can sometimes be justified—is still in the evidence-relative sense of necessity.

Thus far we have assumed that the simple analysis of necessity has essentially the correct structure, while proposing changes to its elements such as construing harm as risk of morally weighted harm, and assessing necessity relative to the evidence available to Defender. In particular, we have taken T and its prevention as a constant when comparing options at the bar of necessity. This assumption tends to go unquestioned. For instance, in the Law of Armed Conflict, the analogue to the necessity constraint (Article 57[3] of the First Additional Protocol to the Geneva Conventions) explicitly states that, when choosing among objectives *with a similar degree of military advantage*, belligerents should select the option that minimizes harm to civilians. Typical philosophical and legal discussions of necessity in self-defense have the same structure: they hold the options' prospects of success constant, while comparing them in terms of the harms inflicted. This is an important mistake. Suppose Defender can avert the unjustified threat to his life either by shooting Attacker dead or by disarming her, and so harming her considerably less—breaking a rib, say. Suppose, however, that his chances of success if he disarms her are 0.5, while if he shoots her, they are 0.9.<sup>14</sup> How can the necessity constraint decide between these options?

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<sup>14</sup> Obviously such precision is never available in practice; the numbers are being used only to illustrate a point.

On the last analysis given, necessity enjoins disarming Attacker, rather than shooting her. Both options can avert T, and disarming her risks less morally weighted harm. This seems wrong: how can the necessity constraint completely disregard the difference between a 0.5 chance of success and a 0.9 chance? Indeed, if we interpret “could not avert” loosely enough, we could stipulate that disarming her has a 0.1 chance of success, or less, and it would still be mandated by necessity. This amounts to saying that, at the bar of necessity, the interests of Defender—as well as other prospective victims of T—are irrelevant; we must simply minimize risks of morally weighted harms inflicted, consistent with still having some chance of averting T.

Clearly this is inadequate. We need to give “could not avert T” some interpretation that gives due weight to the interests of the prospective victims of T. We might start by setting a threshold for prospects of success, such that any options that exceed that threshold are equivalent and can be compared solely in terms of risks of morally weighted harm inflicted. This yields the following analysis:

Defensive harm H is necessary to avert unjustified threat T if and only if a reasonable agent with access to the evidence available to Defender *could not have a sufficiently high chance of averting T* by risking less morally weighted harm.

The question, of course, is where to set the threshold. Obviously we could choose an arbitrary statistical threshold, something equivalent to “reasonable prospects of success.”<sup>15</sup> However, while this might be a useful heuristic, we should aim for greater theoretical depth. One plausible approach is to outsource the task of determining a threshold for prospects of success to the proportionality constraint. Recall that defensive harm H satisfies proportionality if there is an appropriate fit

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<sup>15</sup> Statman, “Can Wars Be Fought Justly?”

between H and the averted threat T (in general, this means the averted threat T is of sufficient magnitude to justify that much harm). The proportionality constraint permits Defender to maximize his chances of averting T, subject to not inflicting harm that is disproportionate to the threat averted. One approach, then, is to apply the necessity constraint after first permitting Defender to maximize his chances of survival, subject to proportionality. So:

Defensive harm H is necessary to avert unjustified threat T if and only if a reasonable agent with access to the evidence available to Defender could not have an equal or better chance of averting T, consistent with proportionality, by risking less morally weighted harm.

In the case just discussed, we would first ask whether it is proportionate for Defender to kill Attacker to give himself a 0.9 chance of averting this threat. Since his life is at stake, this is likely to be proportionate. Since there is no other less harmful means to give him an equal or better, but still proportionate, chance of averting the threat, shooting Attacker satisfies necessity. This tracks how necessity is construed in the Law of Armed Conflict, with the proviso that, in international law, the only relevant morally weighted harms are those to civilians (and civilian objects). Article 57(2) specifies that belligerents must select only military objectives for which the harm to civilians is not excessive in relation to the military advantage achieved. Having thus identified which objectives satisfy proportionality, Article 57(3) then enjoins selecting the one that, for a similar degree of proportionate military advantage, involves the least harm to civilians.

This is definitely an improvement on merely holding “could not avert T” as an untheorized constant, but it still faces serious objections. First, suppose that disarming Attacker has only a slightly lower chance of success than shooting her—

0.85, say. Assuming that it is proportionate to kill Attacker for a 0.9 chance of averting the threat she poses, then since there is no less harmful way to have an equal or better chance of achieving that goal, killing her satisfies necessity as well as proportionality. In other words, for the sake of an increased 0.05 chance of averting the threat posed by Attacker, Defender is justified in killing her rather than breaking her rib. While justified self-defense presupposes some basis for discounting Attacker's interests relative to Defender's, such a uniformly absolute discount is implausible.

Second, suppose that T threatens the lives of both Defender and another potential victim. Defender can again either disarm Attacker or shoot her. But this time Attacker will use Bystander as a human shield if Defender shoots, thus exposing Bystander to a high risk of serious morally weighted harm. Shooting Attacker would be proportionate despite the risks to Bystander (given that he is saving another's life as well as his own). It follows that, provided shooting is more likely to succeed than disarming Attacker, it satisfies necessity whatever their relative prospects of success. And yet one might think that, to spare Bystander from an unnecessary risk of harm, Defender should accept some additional risk to himself.

Could we resolve these worries by making another move inspired by international law and change "equal or better" to "similar or better" to allow for these cases where the difference to Defender is slight? Again, this is an improvement, but on the one hand we would have to find a nonarbitrary way to delimit "similar"; and on the other hand once we do specify the boundaries of similarity, all we have done is create a new threshold around which just the same sort of counterexamples can be constructed.

The necessity constraint cannot plausibly be confined to comparing options for the risks of morally weighted harm that they involve. It must also compare their

relative costs to the prospective victims of T. And to compare along these two dimensions, we need some protocol for trading them off against each other. The foregoing attempts to structure those tradeoffs through thresholds are unsatisfactory. There is no clear and strict priority ordering that is not vulnerable to counterexamples. The necessity constraint must therefore effect an unstructured tradeoff between Defender's options, comparing the risks they avert and those they inflict. The key question that must be answered is: are the additional marginal risks inflicted in option A, when compared with option B, justified by some countervailing marginal increase in risk averted?

So, if disarming Attacker has 0.5 chance of success, but shooting her has 0.9 chance, then we must ask whether the additional 0.4 chance of averting the threat to his life is sufficient to justify killing Attacker rather than breaking her rib. Or suppose disarming her has the same prospects of success as killing her, but will involve incidental harms to Defender—he will, say, suffer a broken arm. Again, we must compare the marginal costs of the two options and ask whether avoiding a broken arm is sufficiently important to justify killing Attacker rather than breaking her rib.

On the simple, pretheoretical understanding of necessity, its purpose is to ensure that the minimum harm is done, consistent with averting the unjustified threat. However, if different defensive options in fact have different prospects of success, and involve different incidental harms, then this analysis proves fundamentally inadequate. We cannot isolate the marginal morally weighted harms inflicted from the marginal costs of the different options available to Defender. We must instead make pairwise comparisons between alternatives along both axes simultaneously, asking whether the marginal costs are justified by the marginal benefits. This suggests the following analysis of necessity:

*Necessity*: Defensive harm H is necessary to avert unjustified threat T if and only if a reasonable agent with access to the evidence available to Defender would judge that there is no less harmful alternative, such that the marginal risk of morally weighted harm in H compared with that in the alternative is not justified by a countervailing marginal reduction in risked harm to the prospective victims of T.

Looking back over some of the examples used thus far, we can see how this captures what is meant by necessity.

Where Defender can save herself either by shooting Attacker's arm or by shooting her leg, and risking harm to Bystander, the question is whether the marginal benefits of the first option justify the marginal increase in risked morally weighted harm in the second. Since the two options are equally likely to succeed, clearly necessity is not satisfied. Even if shooting Attacker's leg were considerably more likely to succeed, the importance of not harming Bystander would probably be determinative. Matters change slightly when Defender is protecting nine others, as well as himself. If the two options are equally likely to succeed, then there is no countervailing marginal reduction in risked harm that can justify the risk to Bystander. However, because more lives are at stake, any increase in prospects of success carries greater weight—it involves a greater marginal reduction in risked harm—so it is more likely that the increased risk of morally weighted harm will be outweighed.

In the hidden button case, killing Attacker satisfies necessity because, on the evidence available to a reasonable agent in Defender's position, there is no other option that will be equally likely to succeed, while inflicting less morally weighted harm. The same is true in the head/leg shooting case, since Defender chooses the option that risks the least morally weighted harm, even though it turns out to kill

Attacker. His actions fail to satisfy necessity in the grenade case because the additional marginal risk of morally weighted harm (of throwing a grenade rather than shooting Attacker) is not justified by a countervailing marginal reduction in risked harm to the prospective victims of the initial threat.

### **III. Implications for Self-Defense**

A number of implications follow from this analysis of necessity in self-defense. First, it is closer to the ordinary English meaning of necessity than one might otherwise think. Second, the harms involved in more than one option can satisfy *Necessity*. Third, there are deep connections between *Necessity* and proportionality. Fourth, if the other conditions of justified defense (beside proportionality) are not met, then harm will almost never satisfy *Necessity*. I elaborate on each implication in turn.

In ordinary English, for H to be necessary to avert T, it must be impossible to avert T without H. For example, it is necessary to score at least as many goals as the opposing team to avert defeat in a soccer match;<sup>16</sup> or it is necessary to keep pure water above zero degrees Celsius to prevent it from freezing. In each of these cases, there is no other way but the antecedent to avert the consequent. One might think that necessity in self-defense should be similarly constraining: unless there is no other way to avert the threat than by inflicting this much harm, it is not necessary.<sup>17</sup>

And yet, this looks quite far from the analysis of *Necessity* given in Section II.

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<sup>16</sup> Assuming the match is completed.

<sup>17</sup> This formulation raises the following thought: The claim that “A is necessary to avert B” must depend on some underlying system of reasoning, C, such that “A is necessary to avert B, in virtue of C.” Scoring at least as many goals as the opposing team is necessary to avoid defeat, in virtue of the laws of football. Keeping water above zero degrees is necessary to avert freezing, in virtue of the laws

The distinguishing feature of these examples is that they hold the outcome to be realized constant, and then assert that this outcome cannot be realized except through the antecedent. As Section II showed, this approach fails when applied to self-defense, because different options have different prospects of success and involve different incidental harms. It is therefore inevitable that *Necessity* should diverge from the usage of necessity in ordinary English. However, when we consider what makes harm *unnecessary*, we can see much closer links between the two concepts.

On an ordinary English interpretation, risked, morally weighted harm (hereafter, for economy: “harm”) is necessary to an end insofar as one cannot achieve that end without inflicting that much harm. It follows that harm is unnecessary when one could achieve the same result by inflicting less harm: the additional harm realizes no additional benefit. On *Necessity*, harm is unnecessary if there is another, less harmful option, which is sufficiently effective that the more harmful option realizes no sufficiently valuable additional benefit. These are very similar functions. Suppose Attacker poses an unjustified threat T, and Defender’s options for averting it can be reduced to two numbers:

[Morally Weighted Risk of Harm Inflicted, Morally Weighted Risk  
of Harm Averted]<sup>18</sup>

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of nature. Perhaps there is a further category, of practical necessity, that depends on an underlying system of practical reasoning, such that harm H is necessary to avert threat T, in virtue of the dictates of practical reason. *Necessity*, then, would be an attempt to interpret those dictates.

<sup>18</sup> Note that any incidental harms to Defender should be factored into the second total in this bracket. Also note that variations in the second total do not equate to variations in the threat (T) faced, but to variations in the prospects for averting T.

Suppose then that, holding T constant, we present two different scenarios, A and B in the table below, in which Defender can choose one from a pair of options that could avert T.

	1	2
A	[10, 10]	[11, 10]
B	[10, 10]	[15, 14]

When choosing between A1 and A2, clearly A2 is unnecessary, on either the simple theory or *Necessity*. This is because A2 involves more harm than A1, but is no more effective at averting the threat to the victims of T. The one unit of additional harm is therefore unnecessary in the linguistically commonplace sense that it serves no purpose. Now consider the choice between B1 and B2. B2 involves inflicting five more units of harm than B1, while succeeding in averting only four more units of harm to the victims of T. There is again one superfluous unit of harm, and B2 must be rejected, because that additional harm is unnecessary.

Options therefore fail to satisfy *Necessity* and simple necessity on just the same grounds: because they involve superfluous harms. Simple necessity is entailed by *Necessity* when the options are equally effective; *Necessity* applies the same reasoning (avoid superfluous harms) as simple necessity in cases where one option is more effective than another.

The analysis in Section II also shows that the harms involved in more than one option can satisfy *Necessity*, since more than one option might involve no additional unjustified harms, when compared with the alternatives.<sup>19</sup>

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<sup>19</sup> To say that an option satisfies *Necessity* is shorthand for saying that the harms brought about by that action satisfy *Necessity*.

For example, suppose Defender can avert Attacker's unjustified threat to his life either by shooting her dead or by beheading her with his samurai sword (there are no other effective options). Each option involves the same degree of harm (Attacker will die). Shooting her, however, is likelier to succeed. Defender's only alternative to killing Attacker is to do no harm and let Attacker kill him. When compared with this alternative—Inaction—the harms involved in both Shoot and Behead satisfy *Necessity*. The additional marginal harm inflicted is justified by the fact that it averts a threat to Defender's own life. Between Behead and Shoot, *Necessity* endorses each, because each is as harmful as the other.

*Necessity* is also indifferent between options that do not involve additional *unjustified* harms. Suppose that besides Behead, Shoot, and Inaction, Defender can also choose Disarm. Shoot and Behead harm Attacker to the same degree; Disarm inflicts a broken arm only; Inaction does not harm her at all. Shoot is most likely to succeed; Behead and Disarm are equally likely; Inaction of course cannot avert the threat. To establish whether the harms involved in Disarm, Behead, and Shoot satisfy *Necessity*, we must compare each option with those that involve less risk of morally weighted harm to see whether the harms are justified by a countervailing reduction in risk to Defender.

Shooting Attacker satisfies *Necessity*, because though it involves greater harm than Disarm and Inaction, these marginal costs are justified by the corresponding reductions in risk to Defender. The effectiveness gain justifies the additional harm inflicted. Similarly, Disarm satisfies *Necessity*, because though it involves more harm to Attacker than Inaction, this additional harm is also justified by a reduced harm to Defender. Inaction is harmless, so it does not have to satisfy *Necessity*. Given the availability of Disarm, Behead does not satisfy *Necessity*, because it involves greater

risk of morally weighted harm, without a countervailing reduction in risk to Defender.

*Necessity* does not, then, fully order the options for averting T. It is indifferent between those that, when compared with all the others, involve no additional unjustified risks of morally weighted harm. This means that Defender is entitled to maximize his chances of averting the threat, consistent with satisfying *Necessity*. If we assume ordinary motivation, then Defender will choose the most effective option, and this gives a full ordering. However, if Defender chooses not to maximize his prospects of averting T—perhaps because of some special reluctance to harm Attacker—he is entitled to choose a less harmful, less effective option, provided it does not involve additional unjustified harm when compared with the alternatives. However, even if Defender is not inflicting the optimal necessary defensive harm, as long as he is inflicting defensive harm, satisfying *Necessity* remains a necessary condition of its justification.

This analysis of *Necessity* also indicates that there is a deep connection between *Necessity* and proportionality. More precisely: satisfying proportionality is a necessary condition of satisfying *Necessity*. To see this, consider just what it means for a defensive harm to be proportionate, and for it to be necessary.

Defensive harm H aimed at averting threat T is proportionate if and only if the following is true:

- 1) The reduction in harm to the prospective victims of T realized by H is sufficient to justify inflicting that great a defensive harm.

Given the analysis of *Necessity* in Section II, H satisfies *Necessity* if and only if the following is true:<sup>20</sup>

- 2) There is no other less harmful course of action H\*, compared with which the marginal reduction in harm to the prospective victims of T achieved by H is insufficient to justify the marginal increase in defensive harm.

Satisfying proportionality is a necessary condition of satisfying *Necessity* when there is an option H\* that involves inflicting no harm. The threatened harm to the prospective victims of T just is what they will suffer if no harm is inflicted in their defense; and the marginal defensive harm inflicted when compared with not using force just is the whole defensive harm.<sup>21</sup> So, if Defender can inflict no harm, then any harm he inflicts can be necessary only if it is proportionate. Disproportionate harms cannot satisfy *Necessity* because, compared with doing no harm, the additional harm averted is inadequate to justify the additional harm inflicted. A defensive harm's satisfying *Necessity* is a sufficient but not a necessary condition for its being proportionate. There might be several proportionate options, only one of which satisfies *Necessity*.

A schematic example might help: Defender has four options when faced with a threat: A involves doing no harm, and B, C, and D involve inflicting different

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<sup>20</sup> For simplicity, the discussion will bracket the clause “a reasonable agent with access to the evidence available to Defender would judge that.” It should be assumed for both proportionality and *Necessity*, that is, in both (1) and (2). Recall also that “harm” is being used as shorthand for “morally weighted risks of harm.”

<sup>21</sup> This assumes that if it is possible to avoid the threat without incurring any incidental harm, and without inflicting any harm, then there is, for the purposes of the *Necessity* and proportionality calculations, no actual threat to avert. If you reject this assumption, then instead of the baseline being “doing no harm,” it should be “doing no harm and allowing the whole threat to eventuate.”

degrees of harm. To identify a proportionate harmful option, we must compare B, C, and D each with A. And to identify which options satisfy *Necessity*, we must make pairwise comparisons between them all:  $\{(A, B), (A, C), (A, D), (B, C), (B, D), (C, D)\}$ . This pairwise *Necessity* comparison includes the proportionality comparison of each option with A. It follows, then, that if B, C, or D satisfies *Necessity*, then it must also be proportionate. And if none of them satisfies proportionality, then none can satisfy *Necessity*. In that case, would A satisfy *Necessity*? No: *Necessity* is a constraint on permissible harm. A involves no harm, so it is not subject to *Necessity*. However, we might say that the *Necessity* judgment dictates that Defender must choose A, since none of the harmful options satisfies *Necessity*.

The *Necessity* and proportionality calculations differ, however, in one respect: *Necessity* compares only actually available options, whereas proportionality compares options against the baseline of doing no harm, even when that option is unavailable. To see this, consider the following case:

*Pressure-1*: Attacker is going to unjustifiably break Defender's wrist.

Defender's foot is on a pressure pad; if he keeps it there a lethal dart will be fired into Attacker. But if Defender removes his foot, that will trigger a second dart, which will hospitalize Attacker for a year.

Applying the *Necessity* calculation to Pressure-1 means looking at the actually available options to see if their marginal costs are justified by their marginal benefits. Raising his foot satisfies *Necessity* because leaving it there would inflict a greater harm on Attacker, but avert no more harm. We determine proportionality, by contrast, by comparing each option with the hypothetical alternative of inflicting no harm. If that option were available, then Defender would suffer a broken wrist, but would avoid hospitalizing Attacker for a year. The threat to Defender's wrist is too slight to render either hospitalizing or killing Attacker proportionate.

*Necessity* and proportionality can therefore diverge: the entailment from one to the other is conditional. Pressure-1 shows that it could be conditional on one of two things: the possibility of doing no harm, or the availability of a proportionate option (the second possibility includes the first, since inflicting no harm cannot be disproportionate). The second interpretation is correct. Even if Defender cannot but inflict some harm, provided he has one proportionate option, *Necessity* will entail proportionality.

To see this, suppose that Defender has a third option, of pushing his foot down harder, releasing a third, less potent dart, which will give Attacker a headache, but has a good chance of averting the threat. Call this Pressure-2. Assuming this option is proportionate, which of the three is necessary? Clearly killing Attacker cannot be necessary, since hospitalizing him is equally effective but less harmful. So, is the additional harm of hospitalizing Attacker instead of giving her a headache counterbalanced by the corresponding reduction in risked harm to Defender? No: since [Hospitalize Attacker, Certainly avoid broken wrist] is disproportionate and [Inflict severe headache, Good chance of avoiding broken wrist] is proportionate, the difference between [Hospitalize Attacker] and [Inflict severe headache] cannot be equal to or greater than the difference between [Certainly avoid broken wrist] and [Good chance of avoiding broken wrist].<sup>22</sup>

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<sup>22</sup> We can see this more clearly if we consider these options schematically, as pairs of disvalues:

[Harm Inflicted, Harm Averted]

Defender has only the following two options:

1: [HI1, HA1]

2: [HI2, HA2]

An option is disproportionate if and only if the risked morally weighted harm averted is too small to justify the risked morally weighted harm inflicted. Suppose that 1 is disproportionate, so  $HI1 > HA1$ .

An option is proportionate if and only if the morally weighted harm averted is equal to or greater

The entailment from *Necessity* to proportionality is conditional, then, on Defender having at least one proportionate option (including doing no harm). What should we make of the outlier cases, where he cannot act proportionately? Defender ought to raise his foot in Pressure-1, and so hospitalize Attacker rather than kill him, but how should we understand that judgment? There seem to be two reasonable interpretations.

On the first, we should deny that proportionality is a necessary condition of justified self-defense, and argue instead that only *Necessity* needs to be satisfied. Since raising his foot satisfies *Necessity*, it is permissible self-defense despite it's being disproportionate to inflict so much harm to avert a broken wrist.

On the second interpretation, proportionality is indeed a necessary condition for justified self-defense: in Pressure-1, Defender's actions cannot be justified as self-defense. Defender is nonetheless required to raise his foot, under the principle of the lesser evil: when one cannot avoid wrongdoing, one should choose the lesser wrong. We might speculate that *Necessity*, or something close to it, should be our guide in these unfortunate situations.

The second interpretation seems more apt. Hospitalizing Attacker for a year to avert a threat of a broken wrist is *pro tanto* wrongful, and our account of permissible harm should recognize that, even if the other options are more objectionable still. On this account, it follows that in the ethics of self-defense,

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than the morally weighted harm inflicted. Suppose that 2 is proportionate because  $HI_2 \leq HA_2$ . An option is necessary if and only if there is no other less harmful option where the difference in harm inflicted is not justified by an equal or greater reduction in the harm averted.

Between two options, the more harmful one can satisfy *Necessity* if and only if the additional morally weighted harm inflicted is less than or equal to the additional morally weighted harm averted—in this case, 1 satisfies necessity given the option of 2 if and only if  $(HI_1 - HI_2) \leq (HA_1 - HA_2)$ . However, if  $HI_1 > HA_1$ , and  $HI_2 \leq HA_2$ , then this is impossible.

*Necessity* entails proportionality. But this entailment is conditional on the presence of a proportionate option. In the unlikely event that there are no proportionate options, including simply doing no harm, then the entailment breaks down. But if Defender cannot satisfy proportionality, then whatever harm he inflicts cannot be justified under the principles of self-defense. For all cases where harm can be justified as self-defense, then, *Necessity* entails proportionality.

This subtle difference between proportionality and *Necessity* is sufficient to retain the independent significance of proportionality in the ethics of self-defense. It remains a necessary condition on permissible self-defense that the harm inflicted be proportionate to the threat averted. When the harm inflicted is disproportionate, it cannot be justified in the ethics of self-defense even if it satisfies *Necessity* (though it can be justified as a lesser evil). We can therefore see the proportionality calculation as a first stage in classifying the options available to Defender, setting out those that are admissible in the *Necessity* calculation, as potentially justified acts of self-defense. Proportionality identifies the set of possible options, each of which could be permissible in the absence of all of the others, and *Necessity* then selects among those. It follows that when purported defensive harm is disproportionate as well as unnecessary, it is more wrongful than if it is merely unnecessary. Unnecessary but proportionate defensive harms are at least better than doing nothing and in other circumstances could have been justified as self-defense (in the absence of the options that beat them with respect to *Necessity*). Unnecessary harms that are also disproportionate, by contrast, could not possibly have been justified as self-defense, and if *Necessity* is indeed at the heart of the lesser evil judgment, nor could they be justified as a lesser evil. In fact, a defender who inflicts unnecessary and disproportionate harm would have done better to simply suffer the unjustified threat.

The final implication to consider is how *Necessity* applies when the other conditions of justified self-defense are not satisfied. Besides proportionality, which we have already discussed, those conditions are:

*Unjustified Threat*: The defender must face an unjustified threat.

*Liability*: There must be some grounds to prefer the defender's interests to those of his target.<sup>23</sup>

So, suppose Defender faces a justified threat, from a justified attacker, which he can avert only by harming that attacker. Or suppose he faces an unjustified threat, which he can avert only by harming an innocent bystander, relative to whom there are no grounds to prefer his (Defender's) interests.

When proportionality cannot be satisfied, we move outside of the ethics of self-defense, into that of lesser evil. The same is true when either Unjustified Threat or Liability is contravened. Each of these is clearly a necessary condition on permissible self-defense. It is nonetheless interesting to ask whether *Necessity* can be satisfied if those conditions are not, whether in the ethics of the lesser evil, Defender can satisfy *Necessity* despite facing a justified threat or harming someone whose interests are in no way discounted.

In almost all likely cases, if Unjustified Threat and Liability are not satisfied, then *Necessity* cannot be satisfied either. *Necessity* judgments are reached by comparing options along two axes, harms inflicted and harms averted. On each axis, those harms are subject to moral weighting. When the threat Defender faces is justified, the harm that he averts becomes much less morally significant. Some might even think that it carries no moral weight at all. And when the target of his use of force is not liable (and there is no other basis for discounting her interests), then the

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<sup>23</sup> The standard reason is the liability of his target. However nonstandard accounts might focus on Defender's agent-centred prerogative to prefer his own interests.

harms done to her are given considerable additional moral weighting to reflect the prohibition on harming innocent bystanders. Assuming that Defender must compare any harmful option with the alternative of doing no harm, it is very unlikely that the marginal morally weighted harms averted will justify the marginal harm inflicted. This renders them disproportionate, as well as unnecessary.

However, assuming that the additional weight attached to his target's interests is finite, and that his own interests are not discounted to zero, it is possible for Defender to inflict proportionate and necessary harm, which might then be justified as a lesser evil, as long as the harm inflicted is very slight, and the harm averted very serious.<sup>24</sup> This, of course, raises the question of what other conditions must be met for harm to be justified as a lesser evil. Although I cannot answer that question here, it does seem likely that satisfying *Necessity* will be a necessary, and perhaps sufficient, condition of harm being justified as a lesser evil.<sup>25</sup>

## IV. Implications for War

### *A. Necessity and Stringency*

*Necessity* is the best available analysis of the necessity constraint on individual self-defense. Applied to the ethics of war, it can ground interesting insights about both the dominant philosophical framework for approaching war's morality, and the cognate principles of the Law of Armed Conflict, in Article 57 of the First Additional

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<sup>24</sup> This possibility has not been considered by those who argue that harm inflicted to avert justified threats can never be proportionate: see, e.g., Hurka "Proportionality in the Morality of War"; McMahan, *Killing in War*.

<sup>25</sup> This contra Rodin, who argues in "Justifying Harm" that lesser evil justifications have most in common with the proportionality constraint on individual self-defense.

Protocol, on “Precautions in Attack.” This section discusses *Necessity’s* philosophical implications in war, the next turns to law.

Contemporary philosophical discussion of the ethics of war is dominated by reductive individualism.<sup>26</sup> Reductive individualists believe that justified killing in war reduces to justified acts, by individuals, of self- and other-defense. To understand precisely what this means, it is worth quoting from their most prominent advocate’s canonical statement of how this view works:

First imagine a case in which a person uses violence in self-defense; then imagine a case in which two people engage in self-defense against a threat they jointly face. Continue to imagine further cases in which increasing numbers of people act with increasing coordination to defend both themselves and each other against a common threat, or a range of threats they face together. What you are imagining is a spectrum of cases that begins with acts of individual self-defense and, as the threats become more complex and extensive, the threatened

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<sup>26</sup> The term is coined in David Rodin, *War and Self-Defense* (Oxford: Clarendon Press, 2002), p. 124. Its principal advocate is Jeff McMahan in, for example, “Innocence, Self-Defense and Killing in War,” *Journal of Political Philosophy* 2 (1994): 193-221; “The Ethics of Killing in War,” *Ethics* 114 (2004): 693-732; *Killing in War*; “Who Is Morally Liable to Be Killed in War?,” *Analysis* 71 (2011): 544-59. Other adherents include Arneson, “Just Warfare Theory”; Tony Coady, “The Status of Combatants,” in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, ed. David Rodin and Henry Shue (Oxford: Oxford University Press, 2008), pp. 153-75; Cecile Fabre, *Cosmopolitan Wars* (Oxford: Oxford University Press, 2012); Helen Frowe, “Self-Defence”; McPherson, “Innocence and Responsibility in War”; Seumas Miller, “Civilian Immunity, Forcing the Choice, and Collective Responsibility,” in *Civilian Immunity in War*, ed. Igor Primoratz (Oxford: Oxford University Press, 2007), pp. 113-35; Gerhard Øverland, “Killing Civilians”; David Rodin, “The Moral Inequality of Soldiers: Why Jus in Bello Asymmetry Is Half Right,” in Rodin and Shue, *Just and Unjust Warriors*.

individuals more numerous, and their defensive action more integrated, eventually reaches cases involving a scale of violence that is constitutive of war. But if war, at least in some instances, lies on a continuum with individual self- and other-defence, and if acts of individual self- and other-defence can sometimes be morally justified, then war can in principle be morally justified as well.<sup>27</sup>

The central idea is that precisely the same principles that justify individual self- and other-defence justify killing in war, or, as McMahan puts it in *Killing in War*:

The difference between war and other forms of conflict is a difference only of degree and thus the moral principles that govern killing in lesser forms of conflict govern killing in war as well. A state of war makes no difference other than to make the application of the relevant principles more complicated and difficult.<sup>28</sup>

This view currently dominates philosophical discussion of war's morality. Its central thesis is that though warfare might make principles of self- and other-defence harder to apply, it does not alter their normative content: the four necessary conditions of justified self-defence have equal force and content in war as they do in self-defence, even if the fog of war makes it harder to know whether they have been satisfied.

I think that reductive individualism, consistently applied, leads to deeply problematic conclusions about the morality of war. I argue elsewhere that it threatens either to undermine the principle of noncombatant immunity, or to render justified wars impossible to fight.<sup>29</sup> In this article, however, I want to focus not on

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<sup>27</sup> Jeff McMahan, "War as Self-Defense," *Ethics & International Affairs* 18 (2004): 75-80.

<sup>28</sup> McMahan, *Killing in War*, p. 156.

<sup>29</sup> Seth Lazar, "The Responsibility Dilemma for Killing in War," *Philosophy & Public Affairs* 38 (2010): 180-213.

reductive individualism's substantive conclusions, but on its structural commitments: specifically, this thesis that the normative content of the necessary conditions of justified self-defense applies without alteration to the justification of acts of killing in war. Specifically, I think that the normative content of *Necessity* in war is different from its content in individual self- and other-defense, for two reasons: first, the uncertainty of war affects not only the application of the principle, but also its stringency; second, *Necessity* in war applies at the collective level. I discuss the first argument in this subsection, the second in Section IV.B.<sup>30</sup>

To determine whether defensive harm is necessary, we must know the risks of morally weighted harm involved, the prospects of averting the threat faced, and the importance of doing so. The weight of each variable is conditional on defense satisfying the other criteria for justification, in particular that it responds to an unjustified threat, and that there are grounds to discount the interests of the target. If the defender faces no threat, or if the threat he faces is justified, then there will be no grounds to discount his target's interests. Moreover, the additional weight given to bystanders' interests will be multiplied, since one cannot justify harming a bystander as a side effect of achieving an unjustified end. And as I argued above, *Necessity* will almost always enjoin an unjustified defender to simply do no harm.

So, when Defender has multiple options to avert a threat, how confident we are that the other conditions of justified self-defense are met affects how hard

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<sup>30</sup> Elsewhere I argue that the other necessary conditions of justified defense are also different in war from in individual self-defense—specifically that the nature of the unjustified threat is quite different in war, since, at least typically, it involves some irreducibly political component; and the proportionality constraint must be more permissive in war than in individual self-defense, at least if we think any actually likely wars can be justified. See Seth Lazar, “National Defence, Self-Defence, and the Problem of Lesser Aggression,” in *National Defence*, ed. Seth Lazar and Cécile Fabre.

*Necessity* is to satisfy. If there is a significant chance that the initial threat is unjustified, and that Attacker's interests are discounted, then this decreases the moral weight attached to risks inflicted by Defender, and increases the importance of averting the threat she faces. Conversely, if the threat might be justified, and Attacker's interests might not plausibly be discounted, then this increases the weight of the risks of harm inflicted by Defender, and decreases the importance of averting the threat. This in turn means that *Necessity* more tightly constrains Defender from maximizing her chances of survival, when there are less harmful alternatives, albeit ones with lesser prospects of success. In the extreme, our uncertainty might mean that *Necessity* prohibits any use of force to avert the threat, enjoining Defender to surrender or to use nonviolent means, even if they are highly unlikely to succeed.

In ordinary life, lethal self-defense against an unprovoked lethal attacker is very likely to satisfy the other conditions on justified self-defense besides *Necessity*. Outside of war, an unprovoked lethal attack will only very rarely be justified, so Defender most probably faces an unjustified threat. That her target is her attacker means there is very likely some grounds for discounting the latter's interests, whether in virtue of his responsibility for the threat, or simply because he is the threat's proximate cause. And that the threat is to her vital interests, while unintended harms to bystanders are unlikely, suggests that proportionality is very likely to be satisfied. Together, these facts decrease the moral weight attached to the harms an ordinary individual self-defender inflicts, and increase the importance of reducing risked harms to herself. Suppose she can shoot Attacker in the chest, or in the arm, such that the former seriously risks killing him, while the latter risks a much lesser harm. And suppose, further, that going for the kill increases her chances of survival. Our confidence that the other conditions of justified self-defense are met

makes it easier for a given marginal reduction in risk to herself to justify a given increase in risk of morally weighted harm inflicted on Attacker.

The epistemic situation of combatants in war is quite different from that of individual self-defenders in domestic society. Self-defenders respond to immediate threats to themselves or those around them. They have firsthand information about the provenance of those threats and the options for averting them. There is a direct causal link between their defensive action and the removal of the threat. By contrast, combatants do not respond to immediate threats, but to macro-threats posed by adversary states, as well as micro-threats to their fellow citizens' lives. They do not initially have firsthand information about these macro- and micro-threats, and what information they have is generally either unreliable or ambiguous. There is normally great uncertainty over whether there is a genuine unjustified macro-threat to their state (over both whether there is a threat, and whether the threat is unjustified), and since the justification of the micro-threats to their fellow citizens will likely depend on those broad macro-questions, there is considerable uncertainty over whether those threats are unjustified too.

The same fog shrouds whether they can discount the interests of their targets. I have argued this point elsewhere, and will not labor the point here.<sup>31</sup> But we can at least note that, on the one hand, combatants' degree of contribution to, and responsibility for, the micro- and macro-threats posed by their armed forces will vary very widely, and, on the other, that it is near-impossible for their adversaries to discriminate among them according to their individual contributions and responsibility. Added to this, combatants know that they will often risk serious

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<sup>31</sup> See Lazar, "The Responsibility Dilemma"; Seth Lazar, "Responsibility, Risk, and Killing in Self-Defense," *Ethics* 119 (2009): 699-728.

harms to noncombatants, as collateral damage, which is a rare occurrence in individual self-defense.

Finally, a crucial component of *Necessity* is effectiveness: one option that involves more risks of morally weighted harm than another can be considered necessary if it is sufficiently more likely to avert the unjustified threat. Individual self-defenders know that by killing their attacker, they avert the threat that he poses. This is often not true for combatants in war. Of course, they do sometimes kill adversaries who are engaged in posing micro-threats to their co-citizens. However, their aim is not only, or even primarily, to avert those micro-threats, but to avert the macro-threat posed by the adversary state. And while securing strategic success presupposes killing many enemy combatants, the death of any particular enemy combatant is likely to contribute little if anything to overall victory.

To sum up, then, combatants who kill take on far greater moral risks than do individual self-defenders. There is a much greater probability that the threat they seek to avert is either justified or indeed non-existent. It is much likelier that they will kill people whose interests are not plausibly discounted, whether bystanders or nonliable combatants. Killing any individual combatant is much less likely to be effective in averting the threat. Reductive individualists such as Jeff McMahan think that these uncertainties merely make it harder to apply *Necessity*, but do nothing to alter its moral content.<sup>32</sup> But if the foregoing analysis of *Necessity* is correct—in particular in its thesis that our principal interest is in the evidence-relative sense of necessity—then either this reductive individualist claim is false, or killing in war can be justified much less frequently than is plausible.<sup>33</sup> If we apply the necessity

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<sup>32</sup> McMahan, *Killing in War*, p. 156.

<sup>33</sup> Might reductive individualists therefore resist the evidence-relative construal of *Necessity*? At their own peril: a fact-relative necessity standard would be even harder to satisfy. As I noted above, on a

constraint appropriate to individual self-defense to combatants in war, it will standardly be too stringent for them to satisfy it.<sup>34</sup> Not only do they risk more harm than self-defenders, but the moral weight attached to the harm they risk is greater; not only are their actions less likely to succeed in averting the relevant threat, but uncertainty over their justification under the other conditions of self-defense means that reductions in risks to combatants and those they protect are less morally important.

This leaves reductive individualists forced to choose between three unpalatable alternatives. The first is to apply the necessity constraint appropriate to individual self- and other-defense to killing in war. This allows them to retain their commitment to reductive individualism, but will render killing in war implausibly difficult to justify. Second, they could apply the necessity constraint appropriate to killing in war to killing in individual self- and other-defense. This would provide scope for permissible killing in war, but would yield an excessively permissive account of individual self- and other-defense. Third, they can endorse a more permissive necessity standard in war than in individual self- and other-defense: this would mean conceding that the moral content of the principles governing killing in war differs from that governing self-defense, hence reductive individualism is false. In my view, the third option is the most plausible.

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fact-relative account lethal self-defense would almost never be justified, because there is almost always in fact some nonlethal way to protect yourself. Thus applying the fact-relative standard appropriate to individual self-defense to war would rule out even more of the killing in war as impermissible.

<sup>34</sup> Note that many of the same arguments could be used to show that the proportionality constraint is more stringent in war than in individual self-defense, which would be a very awkward result for reductive individualists. Thanks to an anonymous reviewer for pointing this out.

### *B. Collectivist Necessity*

*Necessity* can be applied to the actions of collectives, as well as to those of individuals. Four factors vary with the level of application: harm inflicted, harm averted, available alternatives, and the standpoint for evidence-relative assessment. To see this, consider the following example:

*Multiple Threats:* A, B, and C each face unjustified threats from, respectively, X, Y, and Z. Acting alone, A, B, and C can each avert the threat to his life only by killing X, Y, and Z, respectively. Acting together, however, they could avert all threats by subduing their attackers, inflicting serious but nonfatal harms.

Individualist *Necessity* says that A, B, and C each should consider only the harms he inflicts and averts. Acting alone, each kills his attacker to save his own life. Acting together, matters are more complicated: we must identify harms inflicted and averted that are attributable to each defender. Each defender must consider only his alternatives. Acting together to subdue the attackers is not in fact an alternative for any of them, since each can choose it only if the others do the same.<sup>35</sup> Each can, however, ask the others to coordinate their actions and, if they agree, carry out his role within the subsequent plan. Finally, *Necessity* should be applied relative to the evidence available to A, B, and C individually. For example, suppose the evidence available to A and B justifies the belief that they will all choose to act together, but the evidence available to C does not. C defending himself with lethal force might then satisfy *Necessity*, but A and B doing so might not.

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<sup>35</sup> Cf. Holly Lawford-Smith, "The Feasibility of Collectives' Actions," *Australasian Journal of Philosophy*, forthcoming; Philip Pettit and David Schweikard, "Joint Actions and Group Agents," *Philosophy of the Social Sciences* 36 (2006): 18-39, esp. p. 21.

The collectivist *Necessity* standard is the *Necessity* standard, as defined above, applied to the actions of collectives. It presupposes, therefore, that some individuals form a morally relevant collective, to which the demand to avoid inflicting unnecessary harm can be directed. I say more on what this means below; for now assume that {A, B, C} is the right type of collective. At the bar of collectivist *Necessity*, the harm inflicted and averted is then the aggregate harm inflicted by all three defenders. Each killing his attacker leads to three deaths inflicted, three unjustified deaths averted. Acting together also averts three unjustified deaths, but results only in nonfatal harms to the attackers. The relevant options are those available to the collective through its members acting independently or together. And we should assess *Necessity* from the epistemic standpoint of the collective, which might mean different things: Should we consider the evidence available to the most informed member of the collective? The aggregate evidence available to the collective as a whole? The evidence available to the averagely informed member? These are very complex questions, and I will not answer them here.<sup>36</sup> Simply stated, an individual conforms to collectivist *Necessity* when the harms he inflicts are part of a collective strategy that satisfies collectivist *Necessity*; he satisfies individualist *Necessity* when the harms he inflicts themselves satisfy individualist *Necessity*.

If individualist *Necessity* applies to individual self- or other-defense in ordinary life, and collectivist *Necessity* applies to some harms inflicted in war, then reductive individualism is inadequate: the justification of war requires satisfying a variant of the *Necessity* principle that is not engaged by individual self-defense. The reductionist might be tempted to endorse collectivist reductionism in response, but this would also fail, at least if collectivist *Necessity* applies to whole military

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<sup>36</sup> For an account of what it is for a collective to believe something, see Margaret Gilbert, "Modeling Collective Belief," *Synthese* 73 (1987): 185-204.

campaigns. If political and military leaders are required when choosing overall strategies to adhere to collectivist *Necessity*, then a justified war may not be *reducible* to a combination of justified acts of individual *or collective* self- and other-defense, such as might be justified outside of war. Collectivist *Necessity* would apply to the whole campaign, and principles governing warfare would be genuinely *sui generis*. This is because (1) satisfying collectivist *Necessity* may require disregarding *Necessity* at subordinate levels (whether individual or collective), and (2) acting as a collective can generate duties that do not apply to random aggregates of individuals.

To illustrate the first point, consider Multiple Threats. Call the two options Shoot and Subdue, and add a third, Kill X: A, B, and C can act together to avert the threat by killing X and inflicting serious, nonfatal harms on Y and Z. Suppose that Shoot, Subdue, and Kill X each have equal prospects of averting the unjustified threats.

If A, B, and C are the relevant sort of collective, and the collectivist *Necessity* standard applies to them, then they clearly ought to choose Subdue: each option is equally likely to succeed, and Subdue is the least harmful. At the bar of individualist *Necessity*, however, each agent should consider whether the marginal harms for which he is responsible, compared with the alternatives available to him, are justified by the marginal contribution they make to reducing an unjustified threat (whether to himself or to the others). Suppose that if they choose Subdue, A will personally harm both Y and Z. But if they choose Kill X, A will inflict similar harms only on Z. Suppose, though, that his actions in either case contribute equally to averting the threat. Individualist *Necessity*, then, requires A to choose Kill X, because his own contribution involves less harm than Subdue but is equally effective.<sup>37</sup> What satisfies

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<sup>37</sup> Compare Pettit and Schweikard: "Joint action can be sustained across the complexities of circumstances that confront pluralities only if the participants are willing to put aside their personal

*Necessity* overall does not satisfy *Necessity* for each individual whose action brings it about.<sup>38</sup> If A ought to choose Subdue over Kill X (which some might deny), then he does not breach individualist *Necessity*; rather, individualist *Necessity* no longer applies; collectivist *Necessity* stands in its place. The same argument applies, note, when A, B, and C each is a collective, for example, three platoons within an artillery company. In cases such as these, the overall collectivist *Necessity* standard replaces subordinate collectivist *Necessity* standards.

Perhaps one could respond by questioning my characterization of individualist *Necessity*. An individualist *Necessity* standard might hold that A ought to inflict only such harm as is consistent, given what he expects the others to do, with reducing harm overall, unless some overall more harmful option would be sufficiently more effective to counterbalance the additional harm. This gives us the right result in the Multiple Threats case, but does not, I think, save reductive individualism. On this putatively individualist *Necessity* standard, the harms inflicted by A satisfy *Necessity* in virtue of facts about the group strategy of which they are a part, just as with collectivist *Necessity*. Justified individual self-defense, by contrast, satisfies *Necessity* in virtue of facts about the harms inflicted by the defender, and about the effectiveness *of those harms* in averting the threat. This difference is all I need for my argument.

There is, however, a second way in which acknowledging the force of collectivist *Necessity* introduces moral reasons into the ethics of war, which do not bookkeeping and think as members of the collectivity—in particular, willing to think about which is the best way for the plurality to go, now in this context, now in that, without constantly checking back with their personal interests.” Pettit and Schweikard, “Joint Actions,” p. 26.

<sup>38</sup> Notice that this is a further difference between *Necessity* and proportionality. If every individual action of which a military campaign is composed satisfies proportionality, then the campaign as a whole must do so as well; the same is not true for *Necessity*.

apply in the same way in self-defense. If A, B, and C are a collective in a morally relevant sense (to be discussed below), then if they fail to choose Subdue they have acted wrongly as a group (in virtue of failing to satisfy collectivist *Necessity*), even if, as individuals, they each satisfied individualist *Necessity*.<sup>39</sup> This is true whichever we adopt of the two analyses of individualist *Necessity* in the preceding paragraphs. Suppose that it was reasonable for A, B, and C each to think that each of the others intended to choose Shoot: this would be sufficient for each to satisfy individualist *Necessity* on either of the above readings. And yet it still makes sense to say that, as a group, they acted wrongly: they should have chosen Subdue. Moreover, we can infer from the possibility of their acting wrongly as a group the presence of an additional duty on them to cooperate in order to bring about the outcome that satisfies collectivist *Necessity*. A random aggregate of individuals would not be under as stringent a duty to coordinate their actions.

Reductive individualism is in trouble, then, if collectivist *Necessity* applies to overall military campaigns. This means explaining both why adherence to collectivist *Necessity* matters, and why it applies to the armed forces of states at war.

The first is easy. Failing to satisfy *Necessity* means inflicting superfluous harm. There is nothing more obviously or paradigmatically bad than harm to no end. Moreover, inflicting harm carries a greater burden of justification than merely allowing it to happen. Insofar as an agent knowingly inflicts superfluous harm, when

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<sup>39</sup> On this sort of nondistributive group responsibility, see, e.g., Peter French, *Collective and Corporate Responsibility* (New York: Columbia University Press, 1984); Philip Pettit, "Responsibility Incorporated," *Ethics* 117 (2007): 171-201.

it could avoid doing so, that agent acts paradigmatically wrongly.<sup>40</sup> Moreover, since harm that fails *Necessity* is by definition pointless, one cannot claim that it is justified by other considerations.

However, not all superfluous harms are wrongdoings. If we hold that military campaigns must satisfy collectivist *Necessity*, we must argue that there is some entity that would act wrongly if it inflicted unnecessary harms. Without that argument, the reductive individualist could counter that if each individual involved in the campaign satisfies individualist *Necessity*, then that the campaign as a whole involves superfluous harms is an unfortunate externality, for which no agent is at fault. This counterargument can be addressed in two distinct ways, depending on which account one prefers of collective action.

There are two plausible models of collective action: joint action and group agency. I now defend two theses: first, that when a plurality of individuals acts together to inflict harm under either of these models, they ought to satisfy collectivist *Necessity*. Second, military campaigns are definitely joint actions, and probably actions by group agents. Either way, they must adhere to collectivist *Necessity*.

Take joint action first. Typical examples include our lifting a table together, or combining to sing in a choir, or playing for victory as a team.<sup>41</sup> While we each do something independently, there is a further outcome that we realize together. Each Ipswich town player makes his individual contribution through passes, tackles, shots, and saves, but each is also part of the joint action: beating Norwich City FC. Pettit and Schweikard direct us to the following account of conditions that are

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<sup>40</sup> Whether one's moral framework is consequentialist or deontological, or virtue-based, inflicting suffering for no reason is just obviously wrong.

<sup>41</sup> Pettit and Schweikard, "Joint Actions," p. 19.

typically sufficient and necessary for a performance to count as a joint action, implementing a strategy that is individually acceptable to each:<sup>42</sup>

- (1) the players each intend or desire that they together enact the performance by following that strategy;<sup>43</sup>
- (2) they each therefore intend to do their bit in this performance, playing their part in the strategy;
- (3) they each believe that others also intend to play their part and do their bit;
- (4) they each intend to do their bit because of believing or expecting this; and
- (5) they each believe in common that the other clauses hold.<sup>44</sup>

There are other good analyses of joint action, but space precludes considering them all, and this analysis is typical.<sup>45</sup> Moreover I am confident that,

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<sup>42</sup> The following analysis, which amends the presentation in “Joint Actions,” is owed to Philip Pettit, personal communication, on file with author.

<sup>43</sup> This is often considered the key element of joint action. See, e.g., Raimo Tuomela, *The Philosophy of Sociality: The Shared Point of View* (Oxford: Oxford University Press, 2007); Alexander Wendt, “The State as Person in International Theory,” *Review of International Studies* 30 (2004): 289-316, esp. pp. 296, 297.

<sup>44</sup> Pettit and Schweikard, “Joint Actions,” 23-24. For very similar views, see Michael Bratman, “Shared Cooperative Activity,” *The Philosophical Review* 101 (1992): 327-41: 338; Lawford-Smith, “The Feasibility of Collectives’ Actions,” p. 6; Raimo Tuomela, “We Will Do It: An Analysis of Group Intention,” *Philosophy and Phenomenological Research* 51 (1991): 249-77, esp. p. 263.

<sup>45</sup> The key theorists of joint action are Michael Bratman, Raimo Tuomela, Margaret Gilbert, and John Searle. See, e.g., Bratman, “Shared Cooperative Activity”; Michael Bratman, *Faces of Intention: Selected Essays on Intention and Agency* (New York: Cambridge University Press, 1999); Margaret Gilbert, *On Social Facts* (London: Routledge, 1989); John R. Searle, *The Construction of Social Reality* (New York: Free Press, 1995); Tuomela, “We Will Do It”; Tuomela, *Philosophy of Sociality*. There are

whatever analysis of joint action we settle upon, warfighting will prove to be the paradigm case. Our first question, then, is whether when a plurality that satisfies these five conditions jointly inflicts harm, its members ought to satisfy collectivist *Necessity*, or whether each individual ought instead to satisfy individualist *Necessity*, regardless of the overall outcome. Suppose that in Multiple Threats, A, B, and C satisfy these five conditions. They are ready to act jointly, and must now choose between Kill X, Subdue, and Shoot. As before, Subdue satisfies collectivist *Necessity*, as well as individualist *Necessity* for B and C, while Kill X satisfies individualist *Necessity* for A.

A, B, and C are together able to choose between the three options;<sup>46</sup> they know that superfluous harms are an unmitigated moral bad; and they know that Subdue involves less harm overall than Kill X. If A forces the others to choose Kill X, then they will together kill a person whose death was pointless. This is obviously wrong. People act together because they can thereby achieve outcomes that they could not achieve on their own. By acting together, A, B, and C can save their lives without killing anybody; insofar as they act together, therefore, they ought to set aside their “personal bookkeeping” and bring about the best overall outcome.<sup>47</sup> They ought to choose Subdue.

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of course substantive differences among their different accounts, but for my purposes Pettit and Schweikard’s is sufficiently representative.

<sup>46</sup> This is not a necessary condition of joint action: they might be able to jointly choose Kill X, but might not be able to jointly choose Subdue, in which case perhaps collectivist *Necessity* would not apply. I am assuming, then, that both options are available to them.

<sup>47</sup> Pettit and Schweikard, “Joint Actions,” p. 26. If they do not act together, then nothing here precludes them from satisfying individualist *Necessity*, though one might argue that they ought to act together in order to bring about the better overall outcome. For arguments that might support that

Some philosophers think that sometimes, when individuals act together, they create group agents. The key feature of group agency is typically that, through joint action, a plurality of individuals forms a collective decision procedure which in turn structures those actions that will count as actions of the group: actions that can be attributed to the group and for which the group may be held responsible. This allows the group to formulate its desires, and its beliefs about how to act on those desires, and to delegate the corresponding actions to its individual members with a presumption that they will take action.<sup>48</sup> Other common characteristics of group agents include persistence over time despite 100 percent turnover in membership,<sup>49</sup> and the presence of an explicit commitment by members to be part of the group agent. Typical examples of group agents include corporations, states, and indeed military units and the armed forces as a whole.

Although the arguments for the possibility of group agency are compelling, I will not present them here.<sup>50</sup> I need only show that, if there are group agents, when

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conclusion, see Stephanie Collins, "Collectives' Duties and Collectivisation Duties," unpublished manuscript.

<sup>48</sup> Pettit, "Responsibility Incorporated," pp. 172, 178-79. See also Peter A. French, "The Corporation as a Moral Person," *American Philosophical Quarterly* 16 (1979): 207-15; Lawford-Smith, "The Feasibility of Collectives' Actions," p. 3; Christian List and Philip Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford: Oxford University Press, 2011), part 2; Wendt, "The State as Person," p. 299.

<sup>49</sup> Pettit, "Responsibility Incorporated," p. 172; Wendt, "The State as Person," p. 299.

<sup>50</sup> For those arguments, see, e.g., French, "The Corporation as a Moral Person"; List and Pettit, *Group Agency*, p. 64ff; Pettit, "Responsibility Incorporated," p. 181; Pettit and Schweikard, "Joint Actions," p. 32ff. Note that the possibility of divergence between individualist *Necessity* and collectivist *Necessity*, and the overriding role of collectivist *Necessity*, might provide grounds for a version of the discursive dilemma, offered by Pettit and List as decisive proof of the possibility of group agency, that does not presuppose a majoritarian decision procedure.

they inflict harm, they ought to adhere to collectivist *Necessity*. Since group agents are effectively means whereby a plurality of individuals can achieve sustained, structured, and purposive joint action, if collectivist *Necessity* applies to joint action, then it applies *a fortiori* to group action as well. Pluralities of individuals acting jointly to inflict harm are able to choose whether to inflict superfluous harms, and clearly ought not to do so. Precisely the same is true of group agents; indeed their abilities to choose are even greater than those of joint actors, because their collective decision procedure brings with it greater capacities for amassing information to inform their beliefs about the harms inflicted and averted, as well as greater coordination of the individual actions that together make the group's strategy for achieving military victory. They can have more reliable beliefs about which harms are superfluous, and they are more capable of acting on those beliefs, than ad hoc joint actors. If A, B, and C are a group agent, then they clearly ought to choose Subdue over the alternatives.

When pluralities of individuals inflict harms through joint action or group agency, they ought to adhere to collectivist *Necessity*. The only remaining question, then, is whether military campaigns are examples of joint action, and whether armed forces are group agents. The answer in each case is emphatically yes. Indeed, warfare might be described as the paradigmatically collective activity, and states and their armies as the most sophisticated and capable group agents human beings have yet devised.<sup>51</sup>

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<sup>51</sup> I will focus on armed forces, but much the same could be said of states. Compare List and Pettit, *Group Agency*, p. 40; Wendt, "The State as Person." Levées en masse, where a civilian population rises up and takes arms against an opponent, are an interesting case: sometimes they will constitute group

Military campaigns are paradigmatic examples of joint action, where thousands, even millions, of individuals act together to bring about outcomes that they could not realize through acting on their own. Each member—from military and political leaders to infantry soldiers on the front line—intends that they achieve the military defeat of their adversary; each intends to do his or her bit in achieving that result;<sup>52</sup> indeed, each has explicitly committed, on oath, to carry out his or her lawful orders; in virtue of that commitment and the chain of command, each knows that the others intend to do their bit, and intend to make their contributions because they are part of this broader performance, and each believes in common that the other necessary conditions of joint action hold.<sup>53</sup> Military campaigns as a whole are therefore joint actions, subject to collectivist *Necessity*, and reductive individualism is false.

Moreover, if there are any group agents, then the armed forces of a state are the paradigm example, the ideal type, of how individuals can act together under an institutionalized decision procedure to achieve results far beyond their individual capacities.<sup>54</sup> Whatever plausible criteria we define group agency by will be satisfied by a state's armed forces. They have a clearly institutionalized decision procedure that enables them to formulate their objectives and their beliefs about which strategies will best achieve those objectives, and to delegate to their individual members the tasks constitutive of the best strategy. They are unmatched examples of the subtle division of labor that enables group agents to be more than the sum of

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agents, insofar as they develop a collective decision procedure, but sometimes they will not, and their actions will be joint actions, but not the product of group agency.

<sup>52</sup> Or at least a sufficient number do; there will inevitably be exceptions.

<sup>53</sup> Pettit and Schweikard, "Joint Actions," p. 23-24.

<sup>54</sup> Wendt, "The State as Person," p. 304.

their parts.<sup>55</sup> They persist as agents over time despite a 100 percent turnover in their membership.<sup>56</sup> Their members expressly commit to play their role in the group's actions through their oath to follow lawful orders. Their every endeavor, from training through combat, is self-consciously directed at being the most effective group agent they can be, to the point of effacing their individual members' capacity for independent judgment.<sup>57</sup> Typically their effectiveness is considered simply in terms of achieving military victory at least cost to themselves and their allies. I insist that the pursuit of victory must instead be constrained by collectivist *Necessity*.

The case against reductive individualism is strong. There are two good reasons why combatants in war should either disregard the individualist *Necessity* that applies to individual self- and other-defense, or at least acknowledge a further *Necessity* standard alongside it. First, as per Section IV.A, the individualist standard familiar from the ethics of self-defense is too restrictive to justify killing in war. Second, even if we endorse a modified, more permissive individualist *Necessity* standard for war, military campaigns are at least joint actions, and probably actions by group agents, that should at least also and perhaps only be constrained by collectivist *Necessity*. Reductive individualists' most likely reply to this objection is either to deny that military campaigns constitute either type of collective action or to deny that collective actions inflicting harm are constrained by collectivist *Necessity*. Neither denial is plausible.

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<sup>55</sup> Cf. *ibid.*, p. 303.

<sup>56</sup> Pettit, "Responsibility Incorporated," p. 172; Wendt, "The State as Person," p. 299.

<sup>57</sup> David Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society* (London: Back Bay Books, 1995).

The foregoing arguments should put reductive individualism in doubt. They are not, however, a full exposition or defense of the collectivist *Necessity* standard. All I have shown is that harmful joint and group actions are subject to a *Necessity* constraint distinct from that appropriate to individual self-defense, and that military campaigns constitute the relevant type of joint or group action. I have not explored the potential interplay between individual and collectivist *Necessity*, or the possibility that sometimes, in war, there will be genuine cases of justified individual self-defense (I think there are, just that these cannot be the whole story about justifying killing in war). I have also not considered the boundaries of collective action, whether everything done by members of the armed forces fighting a war counts as contributing to their group action, and, if not, how we should distinguish between group and individual actions. There remain many questions to answer, and indeed many possible further applications of the idea that the *jus in bello* should be viewed through the lens of collective agency, but I will not pursue them here.

## V. Necessity and the Laws of War

Thus far I have presented an analysis of the necessity constraint on individual self-defense, and considered its implications for a prominent theory of the ethics of killing in war. It remains to be asked whether *Necessity* can help in the interpretation and reform of the laws of war. It should go without saying that the laws of armed conflict are the product of many other concerns besides merely an attempt to implement the morality of war. As such, the following is merely an interpretation of how the laws measure up in this one regard, without considering their political or pragmatic failures and successes.

We must start by identifying the appropriate reference point for thinking about necessity in the laws of armed conflict.<sup>58</sup> In military discourse the term *necessity* is generally used to describe something quite different from necessity in individual self-defense. Military necessity is ordinarily taken to be synonymous with military advantage. In the canonical formulation, the judgment in the *Hostages* case at the Nuremberg trials of 1948, “Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money.”<sup>59</sup> Although it is deprecated by international lawyers, an even more permissive understanding of military necessity exists, according to which when there are no other means available to secure success, the constraints of law and morality can be overridden.<sup>60</sup> Clearly neither of these is directly relevant to our current inquiry.

In fact, the necessity requirement on the use of force is described in the laws of armed conflict as the principle of precautions in attack, and the requirement of constant care, in Article 57 of the first additional protocol to the Geneva conventions.<sup>61</sup> Article 57 divides military decisions into the selection of objectives and the selection of means and methods to secure those objectives. With respect to

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<sup>58</sup> In formulating the following analysis, I have benefited greatly from discussion with and reading the forthcoming work of Janina Dill, David Luban, and Henry Shue.

<sup>59</sup> USA v. List et al. (American Military Tribunal, Nuremberg, 1948), 11 NMT 1230, 1253.

<sup>60</sup> See, e.g., Isabel Hull, *Absolute Destruction: Military Culture and Practices of War in Imperial Germany* (Ithaca: Cornell University Press, 2005), pp. 122-26; Larry May, *War Crimes and Just War* (Cambridge: Cambridge University Press, 2007), p. 138.

<sup>61</sup> See Adam Roberts and Richard Guelff, *Documents on the Laws of War* (Oxford: Oxford University Press, 2000), p. 452ff.

means and methods, it imposes three requirements: distinction, proportionality, and necessity. Distinction is covered by 57(2.a.i): belligerents must

do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them.

Proportionality is addressed in 57(2.a.iii), which requires that belligerents

refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians and damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

Necessity in the choice among means and methods is then set out in 57(2.a.ii): belligerents must

take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimising, incidental loss of civilian life, injury to civilians and damage to civilian objects.

Each of these constraints applied to means and methods mirrors a similar constraint in the selection of objectives. For distinction and proportionality, the phrasing is identical, since Article 57 draws directly on the introduction and exposition of those principles in Articles 48, 51, and 52. Interestingly, however, the necessity constraint as applied to objective-selection (in Article 57[3]) is construed differently, as we saw in Section II:

When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.

How, then, do these principles of treaty-based and customary international law measure up against the analysis of necessity given in Section II? Although I think there are some interesting divergences from what I presented as the correct moral analysis of necessity, my first thought is that the formulation in the Additional Protocol is an elegant articulation of precisely the right set of problems. For instance, the article is formulated from the evidence-relative standpoint, and clearly presupposes a particular position on how harms should be morally weighted in war: effectively, the interests of enemy combatants are almost wholly discounted, and additional weight is given to the interests of civilians, regardless of their affiliation. Some would undoubtedly argue against applying such a heavy discount to the interests of enemy combatants, but the key point is that we are clearly focusing on minimizing risks of morally weighted harm, rather than harm simpliciter.

Moreover, I think distinguishing between the selection of objectives and the selection of means and methods to secure those objectives is a sensible implementation of the view, defended above, that warfare is in essence a group activity, such that the fact that a combatant's means and methods satisfy *Necessity* does not mean he has satisfied *Necessity* simpliciter, because that must depend on whether the objective he was tasked with securing itself satisfied *Necessity*. Of course there could plausibly be many more levels than the two identified in the protocol, but distinguishing between objectives and methods is enough to make the central point.

I think there is some room for moral critique, however, in the article's equivocation over the proper standard of necessity. Advocates of civilian protection might initially think the formulation in 57(3) preferable to that in 57(2.a.ii). After all, the latter includes the "feasibility" condition, which might be difficult to pin down and could be used by belligerents as a get-out clause when protecting civilians imposes significant costs on them. By contrast, 57(3) sets out an exceptionless requirement: between options with a similar military advantage, you must minimize civilian harm.

This evaluation, however, is wrong. Article 57(3) actually builds a priority ordering into the article that permits belligerents to inflict any quantum of additional harm to civilians (within the boundaries set by proportionality and distinction), provided doing so secures some additional quantum of military advantage. Only if the option that minimizes civilian harm is similarly advantageous to the most advantageous proportionate and discriminate option are they required to take it. This gives too much priority to military advantage; it means that, provided an objective satisfies proportionality and distinction, belligerents can never be required to select a less advantageous objective, simply because doing so avoids civilian harm.

Suppose, for example, that Commander is tasked with killing a group of twenty elite enemy combatants who are hiding in an apartment block, which also houses fifty innocent civilians. Commander can choose either to demolish the block with artillery fire, or to install sniper teams to take out the enemy combatants one by one. Artillery is much more likely to succeed, suppose, but will also likely kill many civilians. Sniper fire imposes no risks on civilians, suppose, but a few of the enemy combatants will probably escape, enough to say that the two options do not yield a "similar" military advantage. Suppose, further, that the enemy combatants are

of high-enough value that using artillery would be proportionate. On the current formulation of 57(3) using artillery is permissible in this case; no matter how great the difference in degree of civilian harm, and how slight the difference in military advantage achieved, any additional military advantage trumps any additional civilian harm (within the limits of proportionality and distinction). I think this is an artificial and implausible rule for trading off these values. I think that the availability of an alternative that yields a definite military advantage with considerably less risk to civilians should rule out the riskier option, even though it promises a greater military advantage.

Article 57(2.a.ii) is more open-ended than 57(3). It does not impose a strict priority ordering, but instead vaguely enjoins belligerents to minimize civilian suffering insofar as doing so is feasible. This could be interpreted in a number of different ways, but I think the best is to see this as capturing precisely the insight of *Necessity*, that when minimizing the risks of morally weighted harm inflicted in the course of averting a threat, we must trade off marginal increases in harm inflicted against marginal reductions in risk to the threat's prospective victims. In other words, we should choose the least harmful option feasible, where an option is unfeasible if there is an alternative, more harmful option where the additional harm is justified by a countervailing marginal reduction in risked harm to the victims of the averted threat.

Everything then depends on how we weigh the relevant risks: on the one hand harms to civilians, and on the other hand prospects of failure to avert the threat and harms to friendly combatants. One might worry, of course, that allowing unstructured tradeoffs into the picture will permit unscrupulous and self-serving evaluations to skew the application of *Necessity*. However, the best response is to present considered arguments to illustrate just how these different properties should

be weighed against each other, not to impose an artificial rule to structure the tradeoffs, which itself simply presupposes and forcibly legislates one perspective on their relative value.

In fact, I think in the interests of both consistency and adherence to the sound underlying principle, it would make sense to reformulate 57(3) to be consistent with 57(2.a.ii). It could instead read:

When a choice is possible between several otherwise legitimate military objectives, the objective to be selected shall be that the attack on which may be expected to cause the least feasible danger to civilian lives and to civilian objects.

Note that “otherwise legitimate” simply means that we are selecting among objectives that already satisfy distinction and proportionality.

This analysis should give us a useful handle on an important debate in international law over the relation between force protection and civilian protection. The problem is essentially that identified in 57(2.a.ii): minimizing risks to civilians often involves imposing additional risks on friendly combatants. How should we understand this tradeoff? *Necessity* shows that this is properly understood as a matter of necessity, contrary to Jeff McMahan’s view that just war theory needs a new principle to deal with this problem.<sup>62</sup> It also shows where our efforts must focus: on explaining why improved prospects of success and reduced incidental harms to the friendly combatants matter, and why harms to civilians matter, and how those values should be weighed against each other. When comparing options that involve different degrees of risk to civilians and to friendly combatants, we must ask

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<sup>62</sup> Jeff McMahan, “The Just Distribution of Harm between Combatants and Noncombatants,” *Philosophy & Public Affairs* 38 (2010): 342-79, esp. pp. 378-79.

whether the additional marginal risk imposed on civilians is justified by the marginal reduction in risk to combatants.

*Necessity* can also offer insights into other controversies around Article 57, for example, whether civilian harms in the pursuit of one objective can be offset by military advantage achieved in the pursuit of another objective within the same campaign. Military lawyers and representatives of states have argued that constant care must be viewed over a whole campaign; humanitarian lawyers, and representatives of the International Committee of the Red Cross, have argued that each objective must be viewed in isolation, that we should not aggregate up to the campaign as a whole.<sup>63</sup> Philosophical reflection on *Necessity* suggests that the military lawyers and state representatives have a case here: as I have argued, the operative *Necessity* standard in war is collectivist. Even if an action appears unnecessary when considered in isolation, as part of the overall strategy it may in fact prove necessary. However, this does not mean that lapses or excesses in one area can simply be traded off against care shown in another, which is, I think, the primary concern of the ICRC in this matter.

## VI. Conclusion

Most philosophers of self-defense regard necessity as a necessary condition on the justified use of defense force. Despite its centrality to the theory of self-defense, necessity has been too often overlooked or oversimplified. In this article, I have tried to remedy these defects, offering a sustained analysis of the concept of necessity in self-defense, showing how our pretheoretical understanding fails in important ways,

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<sup>63</sup> Judith Gail Gardam, "Proportionality and Force in International Law," *American Journal of International Law* 87 (1993): 391-413, esp. p. 409.

and proposing an alternative account. I concluded that a self-defensive harm H is necessary to avert threat T if and only if the expected reduction in risk to the prospective victims of T outweighs the expected marginal morally weighted harms that Defender inflicts on others. Whenever Defender considers an option that will inflict more morally weighted harm, the additional marginal harm must be justified by a commensurate reduction in risk to the prospective victims of T. I drew out some implications of this view for the ethics of self-defense, noting in particular that, on this account, *Necessity* entails proportionality. I then turned to the ethics and law of killing in war. I argued, in particular, that we should not expect individual soldiers in wartime to satisfy necessity standards appropriate to individual self-defenders, and that a reductive individualist approach, which reduces wars to aggregations of individual acts of self- and other-defense, fails as an attempt to offer a plausible account of the ethics of war. I then argued that the current formulation of necessity in international law—under the requirement of constant care—adeptly captures the central issues in *Necessity*, albeit with a troubling equivocation over how to rank options that differ in both military advantage and risks of harm to civilians.

### *Acknowledgments*