

CONTRASTING APPROACHES TO WAR: SOME THOUGHTS ON THE VIEWS OF FLETCHER, SEGEV, SHANY, AND ZOHAR

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I am greatly honored that these four distinguished moral and legal theorists, who have all made substantial and important contributions to our understanding of the problems with which I am concerned in my book, have been willing to engage themselves so constructively with my arguments. The published book will be significantly better, or less bad, as a result of my having had to address their challenges. I find myself in substantial agreement with much of what each commentator has to say and concede that on some points they have proven me wrong. But I am obstinate by nature, and perhaps a little obtuse, and thus am prepared to resist some of their suggestions, however sensible they may seem.

I. Self-Defense, War, and Justice

Of the four commentators, the one whose objections reach most deeply into the foundations of my view about war is George Fletcher. According to Fletcher, my entire approach is misguided because I assume both that the justification for war has its foundations in the morality of self-defense and that that the justification for killing in war must be a matter of justice. He claims that self-defense is not a matter of justice, either in domestic or international law, and neither is war. He canvasses two possible ways in which self-defense and war might be matters of justice. One is that their purpose might be “to rectify a wrong”—a claim that he identifies as “the classic position in ‘just war theory.’” The other is that their purpose might be “to punish a wrongdoer.” If self-defense and war were to aim at the rectification of wrongs, they would be matters of corrective justice, whereas if they were to aim at the punishment of wrongdoers, they would be matters of retributive justice. But, he argues, they are neither.

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I will consider both these possibilities, beginning with corrective justice. Since we are considering both individual self-defense and war, there are two questions. Is self-defense a matter of corrective justice? And is war a matter of corrective justice? The answer to the first is obvious. Since the aim of defense is to prevent a future harm or wrong, there is as yet no wrong that defensive force could be correcting. It is, of course, often the case that defensive force aims to prevent the continuation of an attack in progress, and that one result of successful defense is to render the aggressor vulnerable to a demand for restitution or for compensation for any harms or wrongs caused by the attack. But to the extent that the use of force is intended to compel the aggressor to submit to a demand for restitution or compensation, it is to that extent coercive rather than defensive. And in any case the correction of the wrong comes only after the successful defense is completed. So defense is clearly not corrective.

But this leaves it open that war might rightly be fought for both defensive and corrective purposes or for the sake of corrective justice only. As Fletcher observes, the classical just war theorists held that the rectification or correction of wrongs already committed is a just cause of war. He thinks they were mistaken; I think they were right. It is true, of course, that in domestic society neither restitution nor correction is an aim of the criminal law. But we have a different body of law devoted to corrective justice: the law of torts. In relations among states, however, there is no comparably developed body of law. If one state unjustly attacks another and forcibly annexes a piece of territory along with its inhabitants, the victim cannot initiate litigation for the recovery of the territory or the compensation of the victims. Corrective justice remains largely a matter of self-help. Suppose that a state has recently suffered a loss of territory to unjust aggression. Its only recourse to recapture the lost territory may be renewed war against the aggressor. This war would not be defensive, for the wrong has already been committed, the harm already done. But if it can be permissible to resort to war of self-defense to prevent a wrongful capture of territory, it should also be permissible to resort to war to recover the territory if the initial defense fails. There is, of course, a statute of limitations: Stolen territory that remains in the possession of the aggressor for generations and whose inhabitants are eventually wholly assimilated into the population of the aggressor state can no longer be recaptured without injustice. But that is compatible with the idea that the recapture of unjustly taken territory can be a morally just cause for war within a certain period after the initial aggression. And the forcible recovery of stolen territory is a form of corrective justice—indeed, a better form of corrective justice than that delivered by the law of torts, assuming that restitution is preferable to compensation.

Consider now the second way in which self-defense and war might be matters of justice—namely, that their purpose might be “to punish a wrongdoer.” Here there are several questions that must be addressed. Is individual self-defense a matter of retributive justice? Can individual self-defense be punitive? Is punishment of wrongdoing a just cause for war? Is retribution a just cause for war?

Fletcher explicitly addresses the first of these questions, claiming that “the proof that self-defense is not a form of retributive¹ justice is that a successful act of defense has no bearing whatsoever on the deserved punishment of the aggressor.”² I agree that self-defense ought not to be pursued with the intention of inflicting deserved retribution on the aggressor—that is, with the thought that the aggressor deserves to be harmed and that whatever harms are inflicted on him count as just retribution. That would arrogate to the individual certain rights that we have properly invested only in the legal system. And in any case it would be incompatible with the constraints of proportionality and minimal force as they apply to self-defensive action. Yet I also think that it would not betray “a deep misunderstanding of self-defense” if a judge were to mitigate a convicted aggressor’s sentence on the ground that the latter had already suffered some grievous and permanent injury from the defensive action of his intended victim.

My view here may seem rather curious. It is that while agents acting in self-defense should not take themselves to be meting out retributive justice, it can nevertheless be appropriate, in determining how much suffering to inflict on guilty persons *ex post*, to count at least some of what they may have suffered from prior defensive action toward what they deserve to suffer as a matter of retribution. This is not incoherent. It derives from the idea that what a guilty person deserves to suffer as a matter of retribution is not necessarily a function only of what he did and the mental states in which he acted, but may also be affected by how much he has also suffered or will suffer, either in absolute or comparative terms. So the suggestion is not that the only suffering that a person has experienced that can affect how much more he deserves to suffer for some wrongful act is that which has resulted from prior defensive action. Natural misfortunes might be relevant in the same way. My view is thus that while retribution cannot be among the legitimate *intended* aims of defense, harms inflicted

¹ Please note that there is a serious typographical error in Fletcher’s article. In the sentence I have quoted, he writes “corrective” where he has meant “retributive.”

² George P. Fletcher, *Is Justice Relevant to the Law of War?*, 40(3) *ISR. L. REV.* ## (2007).

on a wrongdoer during the process of defense may, along with other harms he may have suffered, affect how much *more* he deserves to suffer in retribution.

This seems intuitively plausible. Suppose that two equivalently motivated people are both attempting to murder the same victim. By sheer luck, the intended victim is able to defend himself against one simply by knocking him unconscious. Yet the minimum necessary defensive action against the other requires causing him to be permanently paralyzed. It does not seem incompatible with justice to suppose that the one who has already been paralyzed now deserves a less harsh punishment for the criminal attempt than the one who was merely knocked unconscious. I acknowledge that this is controversial; but nothing relevant to the morality of war seems to depend on it.

Let us move on to the second question, whether individual self-defense can be punitive. Defense and punishment are not mutually exclusive. In the criminal law, for example, one of the purposes of punishment is preventive defense. Suppose a person is engaged in the commission of a harmful criminal offense and the police intervene to stop the ongoing offense. Matters are not concluded with the completion of their successful defensive action. Rather, they send the offender to court and the court sends him to jail. The purpose of confining him might be retributive but it need not be. Philosophers might persuade us that free will and responsibility are illusions, that no one can deserve anything, and that retribution is therefore not an acceptable aim of punishment. But this would not prevent us from having a recognizable practice of punishment. If we had rejected retribution as a purpose of punishment, our justification for confining the offender might be to prevent him from committing further offenses, to deter him from committing further offenses after he has been released, to deter others from committing similar offenses, or some combination of these aims, which are all widely recognized as legitimate aims of punishment. It would be absurd to suppose that if we did not believe in retribution, our confining the offender could not count as punishment. There can be punishment without retribution.

In criminal law, an individual may engage in necessary self-defense, but he may not go further to take preventive action against his assailant. Preventive defense to which a person has become liable through the commission of an actual offense is considered punishment and is solely the prerogative of the state. In a state of nature, however, the right of individual self-defense would include a right of preventive defense. If a person wrongfully and culpably attacks you and you are outside the rule of law, you may not only defend yourself against the attack but may also, if necessary, take further, proportionate action to prevent the attacker from being able to attack

you again. The initial wrongful attack both provides evidence that the attacker is dangerous and also constitutes the basis of his liability to preventive action.

States are at present in a situation in which there is no higher authority capable of enforcing compliance with international law. Suppose that one state wrongfully attacks another. Except for pacifists, everyone agrees that the state that has been attacked is entitled to engage in defense to stop the attack. But suppose the attack has revealed a settled determination on the part of the aggressor to renew the attack if its first efforts are defeated. There are no police, and no criminal justice system, to which the task of restraining the aggressor can be delegated. In relations among states, the prevention of future aggression is, like corrective justice, largely a matter of self-help. It is generally accepted, therefore, that the state that has been the victim of aggression is permitted not only to stop the initial aggression but also to take further action to disarm the aggressor as a means of preventing a renewed attack. The forcible disarmament of the aggressor may occur after the completion of successful defensive action, in which case it cannot be purely defensive, in that its purpose cannot be to stop an attack in progress. It is, rather, analogous to the imprisoning of the attacker in the domestic case. It is punishment, though not retribution. It is punishment that may have preventive defense as its sole aim.

It is in this sense that punishment can be a just cause for war—that is, a goal that may permissibly be pursued by means of war. And if the punishment of those who are guilty of wrongful aggression for the purpose of preventive defense is a matter of justice, then war that is fought not only to stop wrongful aggression but also to prevent further aggression through the disarmament of the aggressor may also be a matter of justice. It is, of course, neither retributive justice nor corrective justice, but what we might call *preventive justice*. Because the prosecution of a war that involves preventive defense is not a matter of retributive justice, it does not require that the aggressors *deserve* to be attacked; but it does require that they be *liable* to be attacked by virtue of their responsibility for a wrong, or a wrongful harm—in particular, for a threat of further wrongful aggression. When those who are already guilty of wrongful aggression continue to be responsible for a threat of further aggression, those who may be able to avert the threat through preventive action face a choice involving the ex ante distribution of harm or risk. If they do not take preventive action, they allow the potential innocent victims of unjust aggression to remain at grave risk, and may end up having allowed them to be attacked. If they take preventive action, they instead impose risks and inflict harms on those who are responsible for the unjust threat and

thus for the necessity of making a choice about the distribution of risk and potential harm. I claim that those who are responsible for the threat of wrongful aggression have thereby made themselves liable to have the risks imposed, and harms inflicted, on them. It would be unjust to allow the risks to lie with the innocent rather than redistributing them to those who are liable. It is in this sense that preventive defense can be a matter of justice in the ex ante distribution of risk and harm. It can be a matter of justice both in war and in individual action, though as I noted, preventive action is rightly denied to private individuals in domestic society under the rule of law.

Parallel claims apply to what I have referred to as “pure defense”—that is, defense intended only to stop an attack in progress. Pure defense, both in war and individual action, is also a matter of preventive justice. Self-defense is not justified as the lesser evil. It can be justified, and for the same reasons as in other cases, even when it is the greater evil, impartially considered—for example, when it is necessary for an innocent potential victim to kill a number of culpable attackers. Neither is self-defense justified by reference to permissible self-preference, or personal partiality. If self-defense were justified by the permissibility of giving priority to oneself in conflicts among lives, the same justification would permit the intentional killing of an innocent bystander if that were a necessary means of self-preservation. There are, of course, other accounts of the justification for self-defense, including Fletcher’s own, but I cannot review them all here.³ I will simply assert my view that even pure defense is justified as the prevention of harm to the innocent through the infliction of harm on those who have made themselves morally liable to be harmed. This is a matter of justice in the ex ante distribution of inevitable risks and harms. It applies both to individual self-and other-defense and to defensive war. Indeed, on the view I defend, just war is in most cases nothing more than the large-scale exercise of individual rights of self-and other-defense against coordinated wrongdoing by others.⁴

I have thus far argued that preventive defense can be a form of punishment, that preventive defense can be a just cause for war, and that just war can therefore be

³ For a succinct statement of Fletcher’s view, see his *Punishment and Self-Defense*, 8 L. & PHIL. 201-15 (1989).

⁴ Fletcher writes that “McMahan also appeals to the analogy between cases of self-defense between individuals and self-defense as a rationale for killing in international armed conflict.” Fletcher, *supra* note 2, at ##. As I noted in the Précis: The Morality and Law of War, 40(3) ISR. L. REV. ## (2007). I reject this analogical mode of reasoning about war. Even though for economy of expression I often write as if we can intelligibly make the same moral judgments about states that we make about individuals, my considered view is that such statements are always reducible without remainder to claims about individual responsibility, liability, wrongdoing, and so on.

punitive in nature. I have also suggested that in relations among individuals, in criminal law, and in war, both preventive defense and pure defense are matters of preventive justice. Yet I have conceded that neither pure defense nor preventive defense is properly understood as retributive. But just as it is true that corrective justice may be a legitimate aim of war even though neither pure defense nor preventive defense has the rectification of a wrong as its purpose, so it might be true that retributive justice is a legitimate aim of war even though no form of defense is retributive. We should therefore turn now to the final question I noted earlier—namely, whether retribution can be a just cause for war.

Fletcher cites a “definitive” objection by Kant to the idea that war can properly be understood as punitive, and therefore as retributive.⁵ The objection is that all states are legally each other’s equals, yet punishment cannot be between equals but must be *by a superior of a subject*. Hence no state can legitimately punish another state.

There are, however, several reasons why this objection is unsuccessful. First, it is unclear why only a superior may punish and only a subject be punished. The only elucidation Fletcher offers is that justice in punishment requires “a neutral judge, hierarchically superior to” those who are punished.⁶ Certainly procedural justice requires impartiality, and that is usually best achieved by having a neutral judge, but impartiality can be achieved without official neutrality, and neutrality can be achieved in the absence of any formal hierarchy of authority.

Second, Kant’s argument, as presented by Fletcher, proceeds by an analogical mode of reasoning. It takes a claim about legal punishment within domestic society and applies it at the international level on the assumption that states are relevantly like individuals. It presupposes that if war is to be understood as punishment, the agents who administer it and the victims who deserve and suffer it must be states. This is the collectivist view of war, advanced via the domestic analogy, against which I argue in my second chapter. I think it is wholly misguided. For reasons that I will give below, I think that there can be no just retributive punishment *of states*. If war is to serve a retributive function, those who are its targets must deserve punishment as individual persons.

Perhaps we should restate the challenge that Fletcher derives from Kant. Whence do those who would administer punishment via war derive their authority to do so? Legitimate punishment may issue only from legitimate legal structures that assign

⁵ Fletcher, *supra* note 2, at ##.

⁶ *Id.* at

the authority to punish only to some. What gives one state the authority to punish another?

Such authority is in fact unnecessary for punishment to be legitimate. Recall that what is at issue is retributive punishment—that is, the infliction on the guilty of whatever harm they deserve by virtue of their action. Desert is a moral rather than a legal notion— or, rather, to the extent that it is a legal notion, it is a borrowing, a notion imported directly and unaltered from morality into law. If it is objectively true that a person deserves to suffer a certain harm, his suffering is an intrinsic good whether or not it is inflicted by the proper authority. In domestic society we of course insist that punishment be inflicted only if it is properly authorized. But the case for this restriction is pragmatic. The practice of punishment must be constrained. The pursuit of retribution offers limitless opportunities for mistakes and abuse unless it is subject to rigorous procedural constraints, among which is that only those properly authorized to administer punishment may do so. But imagine a situation in which the following conditions obtain. People can deserve to suffer certain harms as retribution for wrongs they have committed. It is objectively true that a certain individual deserves to suffer a certain harm. Appropriately designed procedural constraints on the practice of retributive punishment do not exist. But it is possible for an individual, acting without authorization, to inflict on the wrongdoer exactly the harm he deserves. Retributivists should concede that in these conditions it would not be unjust, and would be presumptively permissible (in the absence of contingent conditions that would make it impermissible) for the individual, if motivated solely by retributive concerns, to inflict on the wrongdoer the suffering he deserves.

Prevailing conditions in international relations resemble those just described. There are fledgling institutions, such as the ICC, that offer some procedural constraints on the punishment of those guilty of international rather than merely domestic crimes. But often war is necessary in order for individual offenders to be surrendered to the jurisdiction of the court. As I noted earlier, punishment in international relations is still largely a matter of self-help, whether the aim of punishment is preventive defense, deterrence, or retribution. This is profoundly undesirable but it does not rule out the possibility of just retribution via war.

What *does* rule out the pursuit of retribution via war is a series of insuperable practical problems.⁷ These problems would not arise if the proper object of punishment

⁷ I discuss these problems at slightly greater length in *Aggression and Punishment*, in *WAR: PHILOSOPHICAL PERSPECTIVES* (Larry May ed., forthcoming 2007).

were the state. But states are compound entities composed of individuals, territory, institutions, and so on. A state can suffer only through the suffering of its individual citizens; it is therefore not possible to inflict retribution on a state without harming at least some of its citizens, many or all of whom may bear no personal responsibility for the wrongs that were committed in the name of the state and constitute the basis of the demand for retribution. These people cannot deserve to be punished for anything that they have done as individuals. And no one can deserve to suffer punishment merely by virtue of being a citizen of a certain state. Yet for retribution to be just, those punished must deserve to suffer, or to be harmed. It is therefore not possible to inflict just retribution on the state *per se*.

If war is to be justly retributive, it must be directed only against those individuals who are themselves responsible for, or guilty of, wrongs or wrongful harms that are derivatively attributable to the state (perhaps because the relevant individuals acted in their capacity as authorized agents of the state). Yet war is altogether too blunt an instrument for the administration of retributive punishment. In war we cannot possibly determine who is guilty of what, determine exactly how much punishment each guilty person deserves, and inflict on each only a form of punishment that is proportionate to his desert, while avoiding causing significant harm to innocent people as a side effect. There are some goals, such as preventing the killing of a large number of innocent people, that can justify the foreseeable killing of a smaller number of innocent people as a side effect, but the infliction of deserved suffering on the guilty is not such a goal.

One might argue that once war is in progress, it can be permissible to continue to fight after the defensive aims have all been achieved in order to capture individuals believed to be personally guilty of the wrongs that the war has prevented or corrected, in order to bring these individuals to trial and, if they are convicted, to expose them to just retribution. I believe this is true. But it does not show that the continuation of the war would be justified as a means of facilitating retribution. In itself, the aim of exacting retribution cannot justify the risks to which combatants fighting on the just side, as well as other innocent people, would be exposed by the continued prosecution of the war. What could justify those risks, however, is the enhancement of deterrence that might be achieved by punishing war criminals, especially those charged with *ad bellum* offenses. The punishment itself could serve retributive as well as deterrent purposes, but without the prospect of increased deterrence, the continuation of the war solely for the sake of retribution would be disproportionate.

II. *Morality and Law*

Yuval Shany summarizes the thrust of his paper by concluding that my book “fails to establish a case for a legal reform.”⁸ He concedes that I have advanced some interesting moral arguments, and that morality in general and justice in particular have a role in the normative regulation of war, but argues that we ought not to remake the law of war in their image. I entirely agree, at least while the only international legal and political institutions are the ones we have at present. In fact I agree with virtually everything that Shany writes in his paper and have learned from his examples of the ways in which the law diverges from my conception of the morality of war and am grateful, in particular, for the examples he cites (the evolving jurisprudence concerning “collateral damage” from targeted killing and decisions concerning “civil liability” for damages in aggressive war) in which the law departs somewhat from its own standards in apparent recognition of the relevance and cogency of some of the moral considerations to which I have tried to draw attention.

As I mentioned in the *Précis*, the manuscript that the commentators read was a rough draft, composed for presentation as a series of six one-hour lectures. It was incomplete, and the most important material that I had not yet included concerns my understanding of the relation between the law of war and what I believe that morality implies about war. As it turns out, my view is quite close to Shany’s. The main point I have emphasized in my writings is this.⁹ I have argued that morality discriminates quite radically between those who fight in a just war (“just combatants”) and those who fight for an unjust cause, or without a just cause (“unjust combatants”). While it imposes stringent constraints on just combatants, it is vastly more restrictive with respect to unjust combatants. It asserts that unjust combatants are not permitted to use force *at all*, except perhaps as a means of preventing just combatants from pursuing their just aims by wrongful means.¹⁰ Yet for a variety of reasons, both psychological and political, most people who fight in wars that are objectively unjust or illegal believe

⁸ Yuval Shany, *A Pragmatic Objection to Moral Distinctions: A Comment on “The Morality and Law of War*, 40(3) ISR. L. REV. ## (2007).

⁹ See Jeff McMahan, *The Sources and Status of Just War Principles*, J. MILITARY ETHICS (forthcoming 2007); and Jeff McMahan, *The Morality of War and the Law of War*, in *Just and Unjust Warriors: The Legal and Moral Status of Soldiers* (David Rodin & Henry Shue eds., forthcoming 2007).

¹⁰ See Jeff McMahan, *The Ethics of Killing in War*, 114(4) ETHICS 693-733 (July 2004). A condensed version of this article appears in 34 PHILOSOPHIA 23-41 (2006) together with a short reply by Michael Walzer.

that they are fighting in a war that is both just and legal. That is, unjust combatants typically believe that they are just combatants. As a consequence, whatever is legally permitted to just combatants will tend to be done by unjust combatants as well. For this reason, we need, at present, laws of war that are neutral between just and unjust combatants. This is a pragmatic reason for refraining from introducing asymmetries of moral judgment into the law. It coincides rather closely with the reasons that Shany gives in support of the same conclusion (in particular his claim that “states cannot be trusted to identify ‘unjust’ situations nor to choose a sanction commensurate with the unjustness of the situation”).¹¹

There are, however, two further points that are worth making here. The first is critical. Shany draws a broad overall contrast between the categories of morality, justice, culpability, liability, desert, punishment, and retribution, on the one hand, and the categories of law, defense, prevention, necessity, lesser evil, and pragmatic considerations, on the other. He rightly attributes to me a defense of a “liability-based justification” of war and of killing in war, but tends also to identify my view with “retributive justifications” and “retributive rationales,” and to assume in places that culpability is a necessary condition of liability. He also contrasts my view variously with views that focus not on liability but on defense and prevention. But it is important to draw clear distinctions here and to avoid the conflation of distinct conceptual categories. I do not, for example, think that there is any contrast between a liability-based justification for acts of war and the aims of defense and prevention. On the contrary, I think that self-defense and preventive defense both have liability-based justifications. I also think that preventive defense often counts as punishment, but that retribution is in general not a goal that can permissibly be pursued by means of war.

The importance of maintaining sharp distinctions emerges in several places in Shany’s commentary. I will cite only one example. When he discusses the issue of punishing combatants, he observes that “a liability-based rationale” cannot explain why it is impermissible to kill POWs or wounded soldiers, since they may “be no less guilty from a moral perspective than persons still taking an active part in hostilities.”¹² The suggestion is that if they are *guilty*, they may be liable to be killed even though they “no longer constitute a military threat.”¹³ There is a valid point here though it may be obscured by the reference to guilt in the context of an article that uses the

¹¹ Shany, *supra* note 8, at ##.

¹² *Id.* at ##.

¹³ *Id.* at ##.

phrases “retributive rationale” and “liability rationale” as if they were equivalent. The idea that captured soldiers are morally guilty may, in this context, suggest that on my view it might be permissible to harm or kill them for retributive reasons—a suggestion that I would emphatically repudiate. I do accept, however, that combatants may be responsible for a wrong without being morally guilty and that their responsibility may make them liable to be harmed even if they do not deserve to be harmed. As I noted in the *Précis*, however, it is a condition of liability to harm that the infliction of the harm should serve some instrumental purpose. If POWs or wounded soldiers pose no further threat, it is unlikely that they could be liable to be harmed, since harming them would serve no defensive purpose. But it is not always true that prisoners pose no further threat. It is, on the contrary, a familiar problem that in certain conditions prisoners may impede the mobility of their captors, consume their captors’ supplies, seek to alert their own forces of the presence of their captors, or try to escape to rejoin their own forces, perhaps killing or injuring some of their captors in the process. When these conditions obtain, morality may imply that prisoners are liable to be harmed for essentially defensive reasons. Even so, I believe—and here I think Shany and I are in agreement—that there is a compelling moral reason to have and to respect a *convention* that accords to POWs and the injured a special protected status—namely, that such a convention works to everyone’s advantage by reducing the amount of killing and injuring that occurs in war. So even when prisoners are morally liable to be harmed, there can be a further moral reason, based on considerations of consequences, to respect the conventions we have devised that demand that they not be harmed.

The second point that I think is worth making is that even though I concede that it would be ill-advised *at present* to try to reform the law of war to coincide more closely with the liability-based understanding of the morality of war that I have tried to develop, this account of the morality of war nevertheless offers an ideal that can guide the formation of international legal and political institutions that can eventually facilitate a closer convergence between law and morality. My knowledge of the history of the development of domestic law is worse than rudimentary but I would assume that there have been periods when the moral understanding of a society has exceeded the capacity of the institutions in the society to allow for the codification of that understanding in the domestic criminal law. When that has been true, there have been pragmatic reasons why the laws have had to exempt from punishment certain forms of action that have been widely recognized in the society as morally wrong. But as institutional structures in a society evolve, it gradually becomes possible to bring the law into closer harmony with the prevailing conception of morality, so that

in most western democracies today the statutory elements of the criminal law are reasonably closely congruent with the prevailing moral understanding.

Perhaps the most significant obstacle to achieving closer congruence between the international law of war and morality is that while it is morally wrong to fight in an unjust war, there are no reliable methods by which combatants can determine whether a war in which they are commanded to fight is unjust. If it were made illegal to fight in an unjust war, those whose conduct the law was intended to guide would have no reliable way of knowing what exactly the law required of them. This is a compelling reason not to make it illegal *now* to fight in an unjust or illegal war. But this is not a problem that must forever resist intelligent efforts to overcome it. We can, through more careful and rigorous philosophical inquiry, improve our capacity for identifying unjust wars and, through the creation of international legal and political institutions that are more impartial and effective than those we have now, better enable combatants in all countries to know what they need to know to be able to avoid violating an international law of war that has been brought into closer harmony with morality. In the meantime, if the liability-based account of the morality of war that I have been trying to elucidate is at least closer to the truth than the regnant theory of the just war, it can even now, in advance of any institutional reform, provide guidance for the conscience of the individual combatant in cases in which the law must, for the time being, remain more permissive than morality.

I doubt that Shany would disagree with any of this, for he notes at the opening of his commentary that one reason for focusing as he does on the pragmatic objections to translating my moral views directly into law is that “a better understanding of the reasons underlying the rejection of ‘pure morality’ in the context of the regulation of war would contribute to a critical assessment of the desirability of McMahan’s ideas and to [the] identification of the institutional conditions that could facilitate their application.”¹⁴ Shany has succeeded admirably in providing that better understanding, and he is also right that if my ideas have merit, the next step is to consider how the design of new institutions can help us to overcome the practical obstacles to bringing the law into closer conformity to morality, a project that certain theorists—most prominently, Allen Buchanan—have already begun.¹⁵

¹⁴ *Id.* at ##.

¹⁵ *See, e.g.*, Allen Buchanan, *Institutionalizing the Just War*, 34 *PHI. & PUB. AFFAIRS* 2-38 (2006):.

III. *Liability, Lesser Evil, and Proportionality*

Re'em Segev offers his comments as a series of friendly suggestions for improvement and as a consequence I find much in his paper to be grateful for but little to disagree with. I should concede right away that I think he is right that my account of the conditions of application of the lesser evil justification is inadequate. Segev quotes me as saying that the “aim of killing the innocent”—where killing the innocent is the lesser evil—“must be to prevent harm rather than to provide a benefit.”¹⁶ What I meant here was to emphasize that the greater evil must really be an *evil* and not just a failure to make an already acceptable situation better. But Segev is right to insist that the concepts of harm and benefit presuppose some baseline against which declines and improvements are to be measured. It is also true that the phrase “providing a benefit” can refer to the elimination of a harm or harmful state, which can be just as important as preventing the occurrence of that same harm. So at least in some cases there is no interesting contrast between providing a benefit and preventing a harm. Clearly I have to rethink the conditions of application of the lesser evil justification for killing in war.

My second claim about the application of the lesser evil justification—that the “harms prevented must be substantially greater than those inflicted”¹⁷ (or, alternatively, that the goods realized, including harms prevented or eliminated, must substantially outweigh the harms inflicted)—is accepted by virtually everyone other than consequentialists.¹⁸ Segev raises a question about the justification of this condition and offers one himself—namely, that equality demands that each innocent person be given an equal chance of avoiding harm and that this demand can be overridden only when the difference between the magnitudes of the harms among which we are choosing exceeds a certain threshold. He suggests, however, that there is an alternative justification implicit in a passage he cites from an earlier paper of mine on self-defense, and he is indeed right to surmise that I think the suggestion in that passage offers a more promising justification.

¹⁶ Re'em Segev, *Lesser Evil and Responsibility: Comments on Jeff McMahan's Analysis of the Morality of War*, 40(3) ISR. L. REV. ## (2007).

¹⁷ *Id.*

¹⁸ I omit here any discussion of whether the relevant goods and evils are to be understood objectively or as expected utilities.

Segev quotes my claim in that earlier paper that there is a “presumption against shifting harms.”¹⁹ That presumption derives from the moral significance of the distinctions between doing harm and allowing harm and between causing harm intentionally and causing harm foreseeably but unintentionally. If a harm is going to befall you, you can allow it to befall you or you may be able to shift it to someone else. I include in the category of shifting a harm to someone else both (1) literally deflecting a threat so that the same harm that would have befallen you befalls someone else instead, and (2) evading one harm by inflicting a different harm on someone else. Self-defense typically takes this second form. Notice that shifting a harm in either of these ways involves doing harm rather than allowing harm to occur. Notice too that if you allow the harm to befall you, you do not intend that it befall you, but if you shift it to someone else, you may, depending on the case, intend to harm the other person. Again, this is true in typical cases of self-defense: The potential victim intends to harm the attacker (or intends to affect the attacker in a way that she knows will be harmful) as a means of averting the harm that she will otherwise suffer from the attack. So, if doing harm is generally more objectionable, or more difficult to justify, than allowing harm to occur, and if harming that is intentional is generally more objectionable than harming that is merely foreseen but unintended, it is clear why it is a necessary condition of shifting a harm from one innocent person to another that the magnitude of the harm should be significantly reduced. For the burden of justification is to show that it can be permissible intentionally to harm an innocent person rather than foreseeably to allow oneself to be harmed. (If, of course, as consequentialists contend, these distinctions are devoid of moral significance, then the justification for harming or killing as the lesser evil will extend to cases in which the lesser evil is only slightly less evil.)

Throughout his commentary, Segev treats the “liability justification” and the “lesser evil justification” as roughly on a par. They may coincide or they may conflict. He sees the proportionality restriction on defensive violence as a function of the trade-off between the two forms of justification in cases in which they conflict. I will return to that point shortly. For the moment it is important to note that I regard the liability justification as the stronger and less contentious of the two forms of justification. This in itself provides a reason for insisting that the lesser evil justification applies only in cases in which the greater evil is significantly greater. For otherwise the significance of

¹⁹ Segev, *supra* note 16, at ##.

liability as a justification would be diminished. Liability would have no more weight as a justification for harming or killing than a slight advantage in consequences. A person could justifiably be killed either because he had made himself liable to be killed by virtue of being responsible for a wrong, or because the harm he would suffer by being killed would be slightly less than the harm to someone else that could be averted by killing him. Yet it is hard to see these two justifications as having equal plausibility, or equal force.

As I just noted, Segev analyzes the proportionality restriction on harming those who are liable as arising from trade-offs between liability and lesser evil in cases of conflict. Here we disagree. I think that a proportionality restriction is inherent in the notion of liability itself. It is a limit on what a person is liable *to*, given the magnitude of the wrongful harm that the person has caused or will cause and the degree to which the person is responsible for that harm. If Segev's analysis of proportionality were correct, it would presumably be disproportionate to kill a significant number of culpable attackers if that were necessary to prevent them from killing a single innocent person. For this would be a case in which considerations of liability would of course favor the innocent over the noninnocent, but in which the lesser evil justification would strongly oppose the killing of the many. Yet intuitively no innocent person is required to forgo the option of self-defense once the number of villains who are trying to kill her passes a certain threshold.

Elsewhere in his commentary, Segev also challenges the claim to which I appeal here by suggesting that the idea that it could be permissible for an innocent person to kill 50 culpable attackers in self-defense must presuppose that the attackers *deserve* to be killed. For unless they deserve to be killed, each one's being killed must count as a bad effect, and eventually enough such bad effects must outweigh the good of preventing the innocent person from being killed. The proper response to this challenge, I think, is simply that harms to which individuals are fully liable are not additive. If person P1 makes himself liable to be killed by wrongfully threatening an innocent person's life, the harm he suffers in being killed is bad rather than good, but it is justified because he is liable to suffer it. Exactly the same is true if P2 also threatens this same person's life. And if P3, P4, and so on all join the attack. In each case the harm is bad but is justified because of what *that person* has done. The person is harmed but not wronged. Harms that are individually justified in this way cannot be added to yield an unjustified sum of harm. Each harm is, as Thomas Scanlon would say, justified *to* the person who suffers it.

IV. *Intention and According Due Weight to the Rights of Noncombatants*

Noam Zohar's commentary is ostensibly concerned with the Doctrine of Double Effect (DDE), which he and I both seek to defend against a formidable, determined, and numerically strong opposition. The deep disagreement between us concerns the role that collectivist considerations have in the morality of war. Whereas I defend an extreme and reductivist form of individualism, and Fletcher, in his various writings about the law of war, defends an equally extreme form of collectivism, Zohar seeks, here and elsewhere, to defend a sensible, moderate position that, while conceding that some aspects of war are governed by the same moral principles that govern relations among individuals outside the context of war, claims that there is also an ineliminable collectivist dimension to the morality of war that cannot be reductively assimilated into any individualist moral framework. In his commentary, he tries to show that our intuitions about the relevance of intention to the morality of war are best captured, not by the fundamental presupposition of the DDE that the intention with which an act is done is relevant to its permissibility, but by a "collectivist (corrected) version of DDE."²⁰

For the most part, I do not disagree with the substance of Zohar's view. I do think, however, that he mischaracterizes the view for which he argues. His aim is to give determinate content to a suggestion in Michael Walzer's *Just and Unjust Wars* that Walzer himself represented as an extension, or more demanding version, of the DDE.²¹ According to Walzer and Zohar, it is not enough that noncombatants should not be the intended target of attack; efforts must also be made to reduce any incidental harm they may suffer from military action. On Zohar's collectivist reading of this positive requirement, what really matters is whether the collective decision-making procedures that guide the conduct of war are designed so that they always accord "due weight...to the rights and lives of noncombatants."²² Individual mental states such as intentions are relevant only to the extent that they provide evidence that noncombatants have actually been accorded the respect that is their due.

What does it mean to give due weight to the rights and lives of noncombatants? Zohar's phrase "giving real weight to noncombatant immunity"²³ could refer to an act

²⁰ Noam J. Zohar, *Double Effect and Double Intention: A Collectivist Perspective*, 40(3) ISR. L. REV. ## (2007).

²¹ MICHAEL WALZER, *JUST AND UNJUST WARS* 155 (1977).

²² Zohar, *supra* note 20, at ##.

²³ *Id.* at ##.

of war itself. An act of war might give due weight to noncombatants if and only if it meets the objective standards of proportionality and minimal force with respect to incidental harms to noncombatants. On this interpretation, if an act of war causes harm to noncombatants that is proportionate to the contribution it makes to the achievement of the just cause, and there is no other act that would be comparably effective but would cause less harm, then the act gives to the rights and interests of noncombatants their correct objective weight.

This is not, however, what I think Zohar has in mind. Suppose that military planners are wholly indifferent to casualties among noncombatants but that the military action they take nevertheless turns out to cause only minimal and proportionate harm to noncombatants. I do not think that Zohar would consider that due weight had been given to the rights and interests of noncombatants. As he understands it, "giving due weight" is not so much a property of action as it is something that happens in the process of deliberation. The rights and interests of noncombatants are given due weight if those involved in deciding whether and how to pursue a certain military objective have actually taken proper account of those rights and interests in their deliberations. But there is more to it than this. Zohar insists that what is required in order for a collective to give due weight to the rights and interests of noncombatants in its planning for and conduct of war is that the collective's institutional decision-making procedures should be structured to ensure respect for the rights and interests of noncombatants in a way that is maximally independent of the vagaries of individual decision-making.

In locating respect for the rights and interests of noncombatants in the deliberative process rather than in the act itself, Zohar may be delivering himself into the hands of the enemies of the DDE. Thomas Scanlon, for example, has argued that those who believe that intention is relevant to the permissibility of action are making the mistake of confusing the evaluation of the permissibility of action with the evaluation of the way in which agents conduct their deliberations about the permissibility of action. Zohar's paper might be invoked as evidence in support of Scanlon's hypothesis.

But in fact the view that Zohar defends has nothing to do with intention or double effect. It is instead about institutionalizing a proper concern for proportionality and minimal force in the conduct of war, specifically with respect to unintended or side effect harms to noncombatants.²⁴ To see this, note that the positive requirement that

²⁴ It is important to note that Zohar's proposal is concerned not just with proportionality but also with the requirement of minimal force. Suppose there is an act of war that would cause a proportionate

Zohar elucidates and defends can apply equally to incidental or “collateral” harms to noncombatants and to intentional harms to noncombatants. It can, in other words, be a component in an account of the morality of war that makes no distinction between killing noncombatants as an intended means and killing noncombatants as a side effect of action directed at military targets. Suppose that there is a political collective whose moral code attributes no significance to the distinction between intended effects and effects that are foreseen but unintended. But these people nevertheless accept that noncombatants must be protected to the maximum possible extent from the effects of war. Their military planners regularly adopt strategies of fighting that reduce the expected harm to noncombatants, even at the cost of increasing the risks their own forces face, and the collective decision-making procedures are also set up to yield policies that give priority to the avoidance of harm to noncombatants. Their concern, however, is with the rights and lives of noncombatants, not with whether noncombatants are killed or injured intentionally or merely foreseeably. So suppose they are confronted with two options, both of which would make the same expected contribution to the achievement of their just cause. One option involves attacking a military facility but is reasonably expected to cause a certain number of unintended deaths among noncombatants. Assume that the killing of the noncombatants would be proportionate to the importance of the destruction of the facility. The other option involves intentionally killing noncombatants as a means of coercing their government to surrender. This second option would actually require killing *fewer* noncombatants (who would also be different people from those who would be killed by the destruction of the military facility) but would be more dangerous, or riskier, for their own forces. When confronted with this choice between these two proportionate options, the planners, who are committed to giving due weight to the rights and interests of noncombatants, choose the terrorist option, despite the fact that it involves greater risks for their forces.

I doubt that Zohar would approve of their choice. Yet it seems to satisfy the demand that his commentary is devoted to defending. I suspect that Zohar assumes that the terrorist option is ruled out; but it is not ruled out by the requirement to give due weight to the rights and interests of noncombatants, but by the DDE’s

number of civilian deaths but that there is an alternative act that would be equally effective militarily, cause fewer deaths among noncombatants, but be somewhat riskier for the combatants who would do it. Provided that these additional risks would not be unreasonably high, Zohar’s proposal implies that the combatants ought to choose the second act. But this is not demanded by proportionality, since the act that would cause more civilian deaths would also be within the limits of proportionality.

prohibition of intentional attacks on noncombatants, which is *presupposed* by Zohar's discussion but neither elucidated nor defended in that discussion. Because of this, I think that Zohar's proposal actually offers no help in accounting for whatever moral difference there might be between the tactical bomber and the terror bomber. At least in principle, a terror bomber might be highly scrupulous in determining exactly how many noncombatants need to be killed in order to achieve his aim and accept additional risks to himself in order to avoid killing any more than that.

So, while I agree with Zohar that it is highly important for collectives to set up their war-making institutions in ways that seek to ensure that individual intentions and choices end up giving due weight to the rights and lives of noncombatants when they are transmuted into policy, I nevertheless think that we are still waiting for a satisfactory defense of the intuition that there is a fundamental moral difference between attacking and killing innocent people deliberately and intentionally and attacking and killing them foreseeably but inadvertently. Until we have that defense, the distinction between just war and terrorism remains precarious.