



BRILL

JOURNAL OF MORAL PHILOSOPHY 11 (2014) 428-453

JOURNAL OF  
MORAL  
PHILOSOPHY



brill.com/jmp

# Proportionality and Just Cause

*A Comment on Kamm*

*Jeff McMahan*

Professor of Philosophy, Rutgers University

*mcmahan@philosophy.rutgers.edu*

## Abstract

In the course of commenting on the third chapter of Frances Kamm's *Ethics for Enemies*, this article proposes an analysis of the notion of a just cause for war, according to which there is a just cause only when those whom it is necessary to attack as a means of achieving some aim are potentially morally liable to be attacked. The remainder of the article then discusses issues of proportionality, particularly in relation to several distinct forms of moral justification for harming or killing people. Among the central questions addressed is what the conditions are in which good effects of a war that are independent of the achievement of the just cause may count in determining whether the war would be proportionate.

## Keywords

proportionality – just cause – liability – Frances Kamm – liability justification – lesser-evil justification – combined justification

## 1 Introduction

The bulk of Chapter Three in Frances Kamm's brilliant Uehiro lectures, *Ethics for Enemies*, discusses which good effects of a state's resort to war can weigh against the bad effects in determining whether the war would be proportionate. It might seem obvious that all the good effects must count, but that initial impression is dispelled when one considers that the achievement of an unjust aggressor's wrongful ends may be good for the aggressor but clearly cannot weigh against or offset the harms inflicted on the victims of the aggression. And Thomas Hurka has cited other good effects of war that seem

incapable of offsetting harms inflicted on innocent people, even by the just side, such as the exhilaration that soldiers may experience in combat and the production of great art that may be inspired by the suffering and destruction caused by war.<sup>1</sup>

Kamm begins her discussion by examining and criticizing a claim that I made in 2004 and argued for at greater length in 2005, though she acknowledges in the note citing one source of the argument that I subsequently repudiated it.<sup>2</sup> The argument, which Kamm, following Hurka, calls the *No Sense Argument*, was badly mistaken. I will briefly summarize the argument and explain the ways in which it was mistaken. This will be of more than merely confessional value, for the explanation of my mistakes will help to illuminate both the notion of a just cause for war and the relation between just cause and proportionality. I will then discuss Kamm's objections to the argument and her constructive suggestions about the ways in which good effects other than the achievement of the just cause can be relevant to the assessment of proportionality in the resort to war. All things considered, it is perhaps fortunate that I made the mistakes I did, since they were instrumental in prompting Kamm's perceptive, subtle, and original contributions to our understanding of *ad bellum* proportionality.

## 2 Why the "No Sense Argument" Is Mistaken

The conclusion of the No Sense Argument was that good effects of a war that are neither instrumental to nor constitutive of the achievement of the war's just cause do not weigh against or offset the harms caused by the war in determining whether the war would be proportionate. The argument itself appealed to the traditional understanding of the requirement of just cause – namely, that only certain types of goal, or certain types of good effect, can justify the killing and wounding involved in warfare. Thus, as Hurka and others have argued, not all good effects that might be achieved by war constitute a just cause for war. But if only those good effects that are constitutive of a just cause for war can justify war, it follows that other good effects – which, following

1 Thomas Hurka, "Proportionality in the Morality of War," *Philosophy and Public Affairs* 33 (2005): 34–66.

2 The argument is in "The Ethics of Killing in War," *Ethics* 114 (2004), p. 709, and in "Just Cause for War," *Ethics and International Affairs* 19 (2005), pp. 17–19. The repudiation is in *Killing in War* (Oxford: Clarendon Press, 2009), p. 26 and more explicitly in note 23 on p. 237. But the explanation I give there of the mistake I had made is inadequate.

Kamm, I will call “non-just-cause goods” – cannot count in determining whether a war would be proportionate. For if they did, good effects that are not of a type that can justify war would have a role in justifying war. “And that,” I asserted, “makes no sense.”<sup>3</sup>

### 2.1 *The Concept of a Just Cause for War*

There is much that is wrong with this argument but I will focus on what I think are the two most important mistakes. The first concerns the conception of just cause that the argument presupposes. I assumed that a just cause for war must be a goal of a certain *type* – in particular, that it must be the prevention or rectification of a wrong that is itself of a sufficiently serious type that those responsible for it could be liable to military attack as a means of preventing or rectifying it. For war, I assumed, is an activity that consists mainly of military attacks. (In both law and common parlance, there could in principle be a war without any military attacks – for example, a war that is declared but terminated before the onset of active hostilities. But I was ignoring such rare and anomalous cases.) On this basis I claimed that a goal that is insufficiently serious for people to be liable to be *killed* as a means of achieving it could not be a just cause for war and thus could not weigh against or offset harms caused by war.

I now think this conception of a just cause for war is mistaken. Imagine a situation in which the government of a state is guilty of continuing violations of the rights of its citizens. It imposes certain restrictions on religious liberty, censors certain information as well as political dissent in the media, prohibits strikes and anti-government rallies, coerces certain people to work in jobs that are not of their choosing, rigs elections in ways that virtually guarantee its own perpetual reelection, deploys a large domestic “security” force to make mass arrests whenever citizens act together to try to change any of these conditions, and penalizes political dissenters with short-term prison sentences. Suppose that these are all distinct wrongs that together adversely affect most people in the society. But suppose that the members of the government who are responsible for these continuing wrongs and would have to be removed from power to eliminate them are not liable to be killed as a means of eliminating any one of them, considered on its own. Even though these people are responsible for the restrictions on religious liberty, for example, they are not liable to be *killed* just to eliminate those restrictions. And suppose that the same is true in the case of each of the other distinct wrongs. It does not follow that no one is liable to be killed in these circumstances. For each member of the government

---

<sup>3</sup> “Just Cause for War,” p. 18.

bears some responsibility for each of the many wrongs and thus is liable to a certain degree of harm as a means of eliminating each distinct wrong. Given a sufficient number of wrongs for which each member of the government is partly responsible, the harms to which each one might be liable could add up to a combined harm no less bad than the harm of death, thereby making each one liable to be killed as a means of eliminating *all* the wrongs. And if there is a liability justification for deposing or, if necessary, killing members of the government as a means of preventing or rectifying the many wrongs for which they are responsible, there is also likely to be a liability justification for attacking members of the security forces who seek by violent means to protect the members of the government and thus to enable them to continue to commit or cause those wrongs. In that case, various miscellaneous goals – the elimination of restrictions on religious liberty, the elimination of censorship, and so on – could together constitute a just cause for a war of revolution or of humanitarian intervention, even though no one of those goals could be a just cause on its own. Thus, even if only good effects that are constitutive of the achievement of the just cause can weigh against the harms that war would cause in determining whether war would be proportionate, those good effects can include ones for which, on their own, no one is liable to be attacked or killed. For such good effects can be *elements* of the just cause without being just causes for war on their own. The only constraint on the *type* of good effect that can be an element of a just cause is that the effect must involve the prevention or rectification of a wrong, or at least a contribution to the prevention of the rectification of a wrong.

The reason there could be a just cause for war in the kind of case just described is that it is sufficient for there to be a just cause that (1) those whom it is necessary to attack or kill as a means of preventing or rectifying certain wrongs are responsible for those wrongs to a degree sufficient to make them potentially liable to be attacked or killed for that reason, and (2) the attacks and killings would occur in a context that would make them acts of war rather than acts of violence in some other form of conflict. The important point is that a just cause is an element of a *liability justification* for attacking and killing people in war. That there is a liability justification for harming people in pursuit of a certain aim is what makes the infliction of harm not merely permissible or morally justified but *just*. For a liability justification is grounded in considerations of justice in the distribution of unavoidable harm. When a person is liable to be harmed, justice is served when he is harmed rather than others who are not liable to be harmed. And because harming someone in a way to which he is liable is just, he is not wronged by being harmed in that way and has no reasonable complaint about being harmed. This is why only a war

with a just cause can be just. It is possible for a war to be morally justified even though its aims cannot be achieved without attacking as a means people who are not liable to be attacked. But because such a war requires intentionally attacking people in ways that wrong them, it is not wholly just. Of course, even wars that have been thought to be paradigm instances of a just war wrong innocent bystanders by harming them as a side-effect of military operations. So there is a sense in which these wars are not wholly just either.<sup>4</sup> But the terms “just cause” and “just war” are in common use and it would be good to make their meanings as precise as possible while preserving conformity with the ways in which they are commonly used. As just war theory has traditionally distinguished morally between harming people who are not liable to be harmed as a means and harming them as a side-effect, there is a good case for reserving the notions of “just cause” and “just war” for wars in which those whom it is necessary to attack as a means of achieving the war’s ends are potentially liable to attack for that reason.

In stating the conditions of a just cause for war, I claimed that those whom it is necessary to attack or kill as a means must be *potentially* liable to be attacked or killed. This obviously requires explanation and elucidation. There are various conditions of liability to be harmed. For brevity, I will limit the discussion to conditions of liability to *defensive* harm. Of these, I will discuss four, though there may be others. The first is that for an individual to be liable to be defensively harmed, his action must be a potential cause of unjustified harm to others. There are various ways in which this claim requires qualification – for example, it can make a difference whether and to what extent the victim has *assumed* the risk, whether the individual acts with moral justification in imposing the risk, and so on.<sup>5</sup> Although such qualifications are highly important, I cannot discuss them here. A second condition of liability to defensive harm is that the individual be morally responsible for the risk he imposes. If an individual imposes a risk of wrongful harm but fails to meet the conditions of morally responsible agency, or if the risk he imposes is not reasonably foreseeable, he is not morally responsible for it and cannot be liable to defensive harm to prevent it. (This is compatible with its being permissible, all things considered,

4 See Michael Neu, “Why McMahan’s Just Wars Are Only Justified and Why That Matters,” *Ethical Perspectives* 19 (2012): 235–56.

5 It is also possible that an individual can be liable to be harmed by the self-preservative action of another even if the individual himself poses no threat. I ignore such harming here because it is not, in the strictest sense, defensive. For discussion, see Jeff McMahan, “Self-Defense and Culpability,” *Law and Philosophy* 24 (2005): 751–74; Richard J. Arneson, “Just War Theory and Noncombatant Immunity,” *Cornell International Law Journal* 39 (2006): 663–88; and Victor Tadros, *The Ends of Harm* (Oxford: Oxford University Press, 2011) chapter 8.

to harm him for defensive reasons. It is just that there must be a justification for harming him that is not a liability justification.)

These two conditions of liability to defensive harm – that an individual poses a threat of unjustified harm and is morally responsible for doing so – are concerned with the individual's action and its consequences, and with the individual's mental states in acting. I will therefore refer to them as *agent-based conditions*. They can be satisfied to varying degrees. The threatened harm may be trivial or serious and the individual may be only minimally responsible (for example, if his action is excused) or highly culpable. If a person is only minimally responsible for posing a threat of a comparatively minor wrongful harm, the harm to which he is liable as a matter of defense cannot normally be significantly greater than that which he will otherwise cause. But if, by contrast, he is highly culpable for posing a threat of enormous wrongful harm – perhaps a threat of death to many people – he may be liable to suffer a harm even greater than that of a painless death.

These two agent-based conditions arguably determine the upper limit to the harm to which a person may be liable. But they do not necessarily determine the precise degree of harm to which a threatener of wrongful harm is liable. For much may depend on the circumstances.<sup>6</sup> In particular, as I understand the concept of liability, a person cannot be liable to a certain defensive harm if there is an alternative means of achieving the defensive aim that would be better, all things considered. If, for example, a person will culpably kill me unless I defend myself and the only weapon I have will unavoidably kill him, he is liable to be killed. But if in addition to the unavoidably lethal weapon I have a pistol and can incapacitate him by shooting him in the leg, he is then not liable to be killed but is liable only to be shot in the leg. A necessity condition, one might say, is internal to liability. And so is a proportionality condition. If effective defense requires harming a threatener in excess of the harm to which he is liable on the basis of the harm he will otherwise cause and the degree of his responsibility for it, the threatener cannot be liable to suffer that excess harm. Necessity and proportionality are what we can call *circumstance-based conditions* of liability.

With these distinctions in mind, return now to my earlier claim that, for there to be a just cause for war, those whom it is necessary to attack as a means must be *potentially* liable to be attacked. What I mean by this is that these people must satisfy the two agent-based conditions of liability to be attacked or killed. That is, they must be morally responsible to a sufficient degree for a

---

6 For further discussion, see Jeff McMahan, "Proportionate Defense," *Journal of Transnational Law and Policy* (forthcoming).

threat of sufficiently serious harm to make them liable to be attacked or killed *if*, but only if, the circumstance-based conditions of liability are also satisfied. This stipulation secures the independence of the requirement of just cause from the *ad bellum* necessity and proportionality conditions, so that there can be a just cause for war even if war would be unnecessary or disproportionate.

This, of course, immediately raises the question why one should treat necessity and proportionality as internal to liability if they are external to just cause. If necessity and proportionality are best understood as constraints that are independent of the notion of just cause, why are they not also best understood as constraints that are independent of the notion of liability? I confess that I have no decisive response to this challenge. It may well be that it is best, all things considered, to understand liability in such a way that whether a person is liable to be harmed and, if so, the degree of harm to which he is liable are determined entirely by agent-based conditions. And it may also be that nothing of substance depends on whether necessity and proportionality are understood as internal or external to liability. My main reason for treating them as internal constraints on liability is that this makes liability essentially instrumental. In particular, if necessity is internal to liability, people can be liable to be harmed only if harming them is either a means or an unavoidable side-effect of achieving some good effect, such as the prevention of harm to another. This then helps to distinguish liability from desert, which is *not* essentially instrumental. If people can deserve to be harmed, they can do so even when harming them in accordance with their desert is not instrumental to the achievement of any good effects. The infliction of deserved harm is, as the notion of desert is commonly understood, an end in itself. It is therefore good to have a distinct concept of liability according to which the infliction of harm to which a person is liable is not in itself good (as the infliction of deserved harm is commonly thought to be) but bad, so that a person can be liable to be harmed only when harming him is a means or side-effect of achieving a distinct good effect, consisting in the prevention or rectification of a wrongful harm for which he is responsible.<sup>7</sup>

In summary, there is a just cause for war when those whom it is necessary to attack or kill as a means of achieving a war's aim or aims satisfy the agent-based conditions of liability to be attacked or killed, and thus will be actually and not merely potentially liable to be attacked or killed if the circumstance-based conditions of necessity of proportionality are satisfied as well. This

7 For a critique of both instrumental and wholly noninstrumental accounts of liability, and a defense of a pluralist account, see Joanna Mary Firth and Jonathan Quong, "Necessity, Moral Liability, and Defensive Harm," *Law and Philosophy* 31 (2012): 673–701.

conception of just cause allows for the possibility that the prevention or rectification of wrongs that are by themselves insufficient to justify killing those responsible for them can nevertheless be elements of a just cause, provided that these people's responsibility for these wrongs is part of the explanation for why they are potentially liable to be attacked or killed in the war.

## 2.2 *Narrow and Wide Proportionality*

The second major mistake in the No Sense Argument is that it takes no account of the fact that there are two distinct dimensions of proportionality, for I failed to recognize the distinction between these two forms of proportionality until after I had presented the No Sense Argument. The reason it is essential to distinguish between the two forms of proportionality is that there are two distinct forms of justification for harming and killing that, in my view, explain the permissibility of most instances of permissible harming and killing in war, and each of these forms of justification has its own distinct proportionality constraint.

There are various forms of justification for harming or killing people, several of which I have already mentioned. They include: (1) that a person deserves to be harmed, (2) that a person is liable to be harmed, (3) that a person has autonomously consented to be harmed or to risk being harmed, (4) that harming a person is the lesser evil in the circumstances, (5) that a person has an enforceable duty to what will harm him or to allow himself to be harmed, (6) that one has an agent-relative permission to harm a person, and (7) that one has a special duty to harm a person that derives from one's relations to others.

Of these types of justification, the two that are most relevant to the permissibility of harming and killing in war are the liability justification and the lesser-evil justification (2 and 4). As I mentioned, the agent-based conditions seem to determine a limit to the degree of harm to which a person is liable as a means of preventing a wrongful harm for which he is to some degree responsible. To harm the person for that reason either at or below that limit can be justified on grounds of liability. Such harm is proportionate in the *narrow* sense. Proportionality in this narrow sense – *narrow proportionality* – is thus a constraint on a liability justification for harming.

In war, the most common justification for the infliction of harms on people who are not liable to them is a lesser-evil justification. When an otherwise legitimate attack on a military target will foreseeably harm or kill innocent bystanders as a side-effect, the justification for harming those bystanders, if there is one, is likely to be a lesser-evil justification. This is a form of justification recognized by deontological moral theories that are not absolutist. The claim is that the deontological constraint against harming a person who has a right not to be



harmed, and even the constraint against intentionally harming such a person as a means, can be overridden when the consequences of obeying the constraint would be *substantially* worse than the consequences of infringing it, normally because infringing it would prevent far greater harms to others who also retain their rights not to be harmed. It is commonly accepted that the harm to be prevented must be even greater to justify intentionally harming a nonliable person as a means than to justify harming that same person to an equivalent extent but as a merely foreseen rather than an intended effect.

When there is a lesser-evil justification for the infliction of harms on people who are not liable to suffer them, the harms are proportionate in the *wide* sense. Thus, the commonly heard claim that the civilian casualties of an act of war are proportionate in relation to the goals of the action is a claim about *wide proportionality*, which is a constraint on a lesser-evil justification for harming people who are not liable to be harmed.

There is an element of truth to the No Sense Argument when it is applied exclusively to a liability justification, and thus to the assessment of narrow proportionality. For in a liability justification for defensive harming, the only good effects that weigh against the harms inflicted on the threatener are those that consist in the prevention of wrongful harms for which he is responsible. Other good effects, such as the prevention of harms for which the threatener is not responsible, cannot weigh against or offset harms to the threatener *if* those harms are justified on the ground that he is liable to suffer them. For he cannot be liable to be harmed to bring about good effects when he is not responsible for their absence. Such good effects cannot, therefore, weigh against harms defensively inflicted on the threatener in determining whether the infliction of those harms is proportionate *in the narrow sense*.

Because the requirement of just cause is an element of a liability justification for harming people in war, the No Sense Argument does have a limited application in a just war. The just cause for war specifies the good effects for the sake of which people are potentially liable to be attacked or killed. In determining whether the infliction of certain harms on these people is proportionate in the narrow sense, the only good effects that weigh against those harms are those that are either instrumental to or constitutive of the achievement of the just cause. To suppose that other good effects can weigh against and offset harms that are justified on the ground that those who suffer them are liable to suffer them is to suppose that there can be a liability justification for harming people as a means of achieving aims for which those people are not liable to be harmed. And *that* does make no sense. But this valid form of the No Sense Argument is also trivial, as it follows from the concepts of liability and just cause as I have explicated them.

There is no reason to suppose that only the good effects specified by the just cause can count in the assessment of wide proportionality – that is, in the assessment of whether harms inflicted on people who are not liable to suffer them are proportionate. Consider, for example, a type of good effect that Hurka says cannot be a just cause for war and thus cannot count in the assessment of *ad bellum* proportionality: the creation of economic benefits. That the entry of the United States into World War II stimulated domestic productivity, thereby eventually boosting the American economy, was a good effect but not, according to Hurka, one that could weigh against or offset the harms the U.S. war inflicted in the assessment of whether the U.S. war was proportionate. (Although he did not say so, Hurka was presumably referring to harms to innocent bystanders and thus to wide proportionality, for proportionality in war has traditionally been assumed to be concerned exclusively with harms to noncombatants, who have traditionally been assumed not to be liable to be harmed in war.<sup>8</sup>) Yet suppose that it was foreseeable that the American entry into World War II would be on balance economically disadvantageous or harmful to many American citizens. It seems that that would have been a relevant cost of the war that the government would have had to take into account in determining whether the war would have been proportionate in the wide sense. But it also seems that if the increased productivity required by the war effort would have provided very substantially greater economic benefits for other American citizens, those benefits could have weighed against and even outweighed the economic harms to some, so that there would have been a lesser-evil justification for the harms. The economic benefits to some Americans could have rendered the economic harms to others proportionate in the wide sense.

One might object that this is true only because the victims and beneficiaries would all have been members of the same group. They would all have been American citizens. But this is not a decisive difference if the victims of the harms would never have been compensated in any way by the benefits enjoyed by others. This is simply a case in which economic harms to some are outweighed and rendered proportionate by much greater economic benefits to others. In principle, the economic harms to certain Americans could also be outweighed by much greater economic benefits to non-Americans, though because of its relation to its own citizens, the U.S. government ought to give greater weight to economic benefits to its own citizens than it should give to equivalent benefits to foreigners.

---

8 Hurka, "Proportionality in the Morality of War," p. 40. When this article was written, the distinction between narrow and wide proportionality had not yet been formulated.

Some might think that harms that a government causes its own citizens to suffer can never be offset by benefits to people who are not among its citizens. This is an extreme view, as it rules out foreign aid, humanitarian intervention, and other apparently sacrificial action that cannot be justified on grounds of national self-interest. But even those who accept this view should agree that if the U.S.'s entry into World War II had unavoidably caused uncompensated economic hardship to some British civilians, that could have been outweighed in the assessment of wide proportionality if the same American action had produced substantially greater economic benefits for other British civilians, or even French civilians.

It nevertheless seems true, as Hurka, Kamm, and others have argued, that some good effects produced by war do not weigh at all against harms caused by war, or at least against certain types of harm caused by war. And it also seems that there are other types of good effect that count but have less weight in the assessment of proportionality than other types of equivalently good effect. Good effects of these types are not ones that are constitutive of the achievement of a just cause. All effects that are part of the achievement of the just cause count fully in the assessment of wide proportionality. So whether a good effect is part of the just cause is relevant to the role it can have in the assessment of wide proportionality. But whether other good effects count, and if so how much weight they have, seem to be primarily matters of justice in the distribution of harms and benefits among people who may neither deserve the benefits nor be liable to suffer the harms.

### 3 Forms of Justification: Liability, Lesser Evil, and Combined

Kamm discusses Hurka's objections to the No Sense Argument but concludes that they are unsuccessful. She then offers an objection of her own, which takes the form of a counterexample. Her example is one in which "it would not be unjust to deliberately harm a wrongdoer for the sake of a good for which he is not liable to be harmed, contrary to the No Sense Argument" (140–41).<sup>9</sup> In this example, which she calls *Help the Aggressor 1*, state A engages in wrongful aggression against state B. To stop the aggression, it is necessary for B to kill more of A's soldiers than is proportionate in relation to the goal of national self-defense. But if A's aggression is not stopped, deterrence will be weakened and A itself will immediately be unjustly attacked by C. In this subsequent war, all of A's soldiers who would now be killed if B were to defend itself against

---

9 Page references to Kamm's text will appear in parentheses rather than in endnotes.

A would instead be killed by C, along with many others. But if B now fights a defensive war against A, C will be deterred from attacking A. Kamm plausibly claims that in these conditions it is permissible for B to fight against A, even though B will kill more of A's soldiers than is proportionate in the narrow sense as a means of national self-defense.

I have two responses to this objection. One concedes that it is a counterexample to the No Sense Argument and proposes a way of understanding how B's disproportionate killing of A's soldiers can be justified. The other denies that Help the Aggressor 1 is actually a counterexample. I will state the first response first.

What Kamm says about the example is that "it seems to be morally permissible to harm the soldiers even if they are not liable to being killed by us in order to achieve the original just cause" (141). Given that she also refers to killing more "soldiers than would be justified by achieving the just cause alone," I interpret her as claiming that although a certain number of A's soldiers are liable to be killed, no others beyond that number are liable to be killed as a means of achieving the just cause. (This understanding of the relation between liability and numbers seems doubtfully consistent with her suggestion on pp. 133–34 that liability justifications work by means of pairwise comparisons, but I will not pursue this here.<sup>10</sup>) Yet she claims, as quoted, that it can be permissible to kill more than the proportionate number even though they are not liable to be killed. There must, therefore, be a different form of justification for killing them.

There are two possibilities. One is that those of A's soldiers who are not liable to be killed are not liable to be harmed in any way. Although this is implausible, suppose for the moment that it is true. It remains possible that there is a lesser-evil justification for killing them, even as an intended means of achieving the war's aim. This might be true if there were relatively few of them but a great many others who would not be killed in a defensive war by B but would be killed in an aggressive war by C – that is, if the number of A's nonliable soldiers who would be lethally harmed by B's defensive war would be far fewer than the number that would be saved by that war. In that case there would be what I have elsewhere called a *combined justification* for killing all the soldiers in A whom it would be necessary to kill to achieve B's aim of national self-defense.<sup>11</sup> There would be a liability justification for killing a certain number of them and a lesser-evil justification for killing the others.

10 For discussion, see Jeff McMahan, "Liability, Proportionality, and the Number of Aggressors," in Saba Bazargan and Samuel Rickless, eds., *The Ethics of War* (New York: Oxford University Press, forthcoming).

11 A description of the form of justification is in Jeff McMahan, "Targeted Killing: Murder, Combat, or Law Enforcement?," in Andrew Altman, Claire Finkelstein, and Jens David

A second possibility is more plausible. This is that those of A's soldiers who are not liable to be killed but would have to be killed by B as a means of successful defense are liable to some degree of *nonlethal* harm as a means of preventing their contribution to A's unjust aggression. In this case, a combined justification could apply at the individual level. Part of the harm they would suffer in being killed could be justified on the ground that they are liable to it, while the remainder – the difference between the harm to which they are liable and the greater harm of death – might have a lesser-evil justification. The role that the non-just-cause good of preventing others among A's soldiers from being killed by C would have in this form of justification is *not* that it would weigh against the portion of the harm to which those killed were liable. That is, the non-just-cause good has no role in the liability-based part of the combined justification and is thus irrelevant to narrow proportionality. It instead weighs against and, by hypothesis, outweighs the part of the harm to those killed that is beyond that to which they are liable. In the case of each soldier killed who was not liable to be killed, part of the overall harm he would suffer would have a liability justification and thus would be proportionate in the narrow sense. The other part of the harm he would suffer would exceed that to which he was liable and thus would be disproportionate in the narrow sense. But assuming that it would have a lesser-evil justification, it would be proportionate in the wide sense. When these two dimensions of proportionality are combined in this way, it can be proportionate overall to kill soldiers who are not liable to be killed.

We have now considered two variants of Help the Aggressor 1 in which some of the killing that is necessary as a means of defeating unjust aggression lacks a liability justification but can nevertheless be justified by a combined liability-lesser-evil justification. One might wonder whether the fact that some of the necessary harming has only a lesser-evil justification means that the defensive war fought by B against A's unjust aggression cannot, in these cases, be a *just* war. For in both cases, some of the people who have to be killed as a means of achieving the war's aims are not liable to be killed and thus are wronged by being killed.

The claim that in both cases B's war is a just war is compatible with what I said earlier about the notion of just cause. For in each case the reason why some of A's soldiers are not liable to be killed may be only that one of the

---

Ohlin, eds., *Targeted Killings: Law and Morality in an Asymmetrical World* (New York: Oxford University Press, 2012), p. 138. A more thorough description under the label "combined justification" is in Jeff McMahan, "What Rights May Be Defended by Means of War?," in Cécile Fabre and Seth Lazar, eds., *The Morality of Defensive War* (Oxford: Oxford University Press, 2014).

circumstance-based conditions of their being liable fails to obtain. Suppose, for example, that A's wrongful aggression against B is intended only to annex a small, sparsely inhabited section of B's territory to A and that, while it would be proportionate to kill a certain number of A's soldiers to preserve B's sovereignty over that territory, it would be disproportionate to kill as many of A's soldiers as it is in fact necessary to kill to achieve that aim. Unless we accept Kamm's suggestion that liability justifications always work by pairwise comparisons, it seems coherent to suppose that, while each of A's soldiers satisfies the agent-based conditions for liability, there are simply too many of them for it to be proportionate to kill them all. In that case, although only some of them are all-things-considered liable to be killed, all of them are *potentially* liable to be killed. Hence there is a just cause for B's war of defense against A.

One might next wonder how there could be a lesser-evil justification for killing those of A's soldiers who are not liable to be killed, given that the reason they are not liable is that there are too many of them for it to be proportionate to kill them all. How could killings that are disproportionate be the lesser evil?

This question ignores a vital feature of the case. The killing of A's soldiers beyond a certain limited number is disproportionate only *in relation to the importance of achieving the just cause* – that is, the preservation of B's sovereignty over a piece of territory that A seeks to annex. But the non-just-cause good of preventing some of A's soldiers from being killed by C counts in the lesser-evil justification for killing others among those who are not liable to be killed. (A parallel claim can be made about the killing of soldiers who are not liable to be killed in the second variant of the case, in which each of those soldiers is liable to some nonlethal harm.) Again, if the number of A's soldiers who are not liable to be killed and who would be saved by B's war of defense would substantially exceed the number of those who would be killed, there could be a lesser-evil justification for killing the smaller number. That lesser-evil justification would then combine with the liability justification for killing certain others among A's soldiers, so that the war as a whole would have a combined justification. Given that it would have a just cause and would be necessary and proportionate once all its relevant consequences were taken into account in the appropriate ways, B's defensive war against A could be a just war even though not every killing that would be necessary as a means of achieving the just cause would have a liability justification.

I have sought to give accounts of the concepts of a just cause and a just war that are consistent with the claim that a war in which some of the killing that is necessary as a means must have either a lesser-evil justification or a combined justification can nevertheless be a just war. It can, in other words, be a just war, with a just cause, even though not all the killing that is necessary as

ameans can be justified on grounds of liability. Yet the question whether such a war can be a just war may be an empty question in the sense identified by Derek Parfit.<sup>12</sup> If we know that the harming and killing in a war are morally justified, and if we also know what kinds of justification there are for the different acts of harming and killing, we know the important moral facts. What labels we give to wars that are justified in different ways is mainly a matter of clarity and convenience of classification.

#### 4 Compensated Harm

Thus far I have assumed that Help the Aggressor 1 is a counterexample to the No Sense Argument, in that it is an example in which harms inflicted on soldiers who are not liable to those harms are nevertheless rendered proportionate because they are outweighed by a non-just-cause good – namely, the prevention of the wrongful killing of a greater number of other soldiers. But the second response to this example denies that it is actually a counterexample.

As Kamm describes the case, when B kills some of A's soldiers who are not liable to be killed, this is “no worse” for them than if B were not to kill them, for they would otherwise soon be killed by C (141). Of course, if the life they would have between the time that B might kill them and the time that C would kill them would be worth living, then B's killing them *would* be worse for them. But I will follow Kamm in ignoring this detail, as a variant of the example could be constructed in which there would be no significant interval between the two overdetermining causes of their deaths, or in which their lives would be intrinsically neutral during a longer interval, or in which their deaths would be more agonizing if caused by C. So assuming that, for whatever reason, it is no worse for these soldiers to be killed by B than to be killed slightly later by C, it follows that B would not harm them, in the morally relevant sense, by killing them. This is because the sense of “harm” that is presupposed by proportionality judgments is what can be called the “counterfactual comparative” sense, according to which an act harms an individual if its being done is worse for her than its not being done.<sup>13</sup> For judgments of proportionality in defense are based on a comparison between what will happen if some particular defensive

<sup>12</sup> Derek Parfit, *Reasons and Persons* (Oxford: Oxford University Press, 1984), p. 213.

<sup>13</sup> See Jeff McMahan, “Causing People to Exist and Saving People's Lives,” *Journal of Ethics* 17 (2013): 5–35, pp. 7–9. To say that an act harms a person if it is worse for her is different from saying that it harms her if it makes her worse off. The latter implies a comparison between two states of the person and thus excludes the possibility that death can be a harm.

action is taken to avert a threat and what will happen if *no* action is taken to avert the threat. (Comparisons among different means of averting the threat are the bases of judgments of necessity.) There is thus a harm in the sense relevant to proportionality if it is worse for someone that the defensive act is done than it would have been if nothing had been done to avert the threat.

If this is right, and if B's killing certain of A's soldiers who are not liable to be killed is not worse for them than if B had done nothing to avert the threat from A (which it is because they would then have been killed by C), then B's killing these soldiers does not harm them in the relevant counterfactual comparative sense. But if B's killing them does not harm them, the killings are irrelevant to proportionality. They would be relevant to proportionality only if they constituted harms that would have to be offset by good effects to render them proportionate. Thus, in *Help the Aggressor 1*, the fact that B's defensive war will prevent some of A's soldiers from being killed by C counts in favor of the war, but not because the lives saved counterbalance some lesser number of lives taken. The saving of lives is instead a pure benefit. The action that saves the lives of some of A's soldiers causes no harm to people who are not liable to be harmed that would have to be offset by non-just-cause goods to establish that the action is proportionate.

Kamm recognizes that, in another of her cases, *Scare the Criminals*, there is a sense in which no one who is liable to be harmed is harmed, or suffers a bad effect. But she does not accept that this undermines the case as a counterexample. In *Scare the Criminals*, when just combatants bomb a munitions storage site, this causes a reduction in the local civilians' food supply as a side-effect. She describes this as a harm that is disproportionate in relation to the contribution that the bombing makes to the achievement of the just cause. But the bombing also scares off criminals who would otherwise have killed all those civilians. Kamm observes that:

When we consider what actually occurs when we bomb, we see only a very bad effect that itself (we are assuming) is out of proportion to the bombing. ... [Yet] if we compare what actually occurs with what would have occurred, the bombing turns out to have no bad side effects and even a beneficial one. And this effect is certainly proportional to bombing the munitions (145).

Yet she also says that "the fact that the alternative to our bombing would be worse for these people than our bombing does not seem to make what actually happens to them – the loss in their food supply – proportional to the bombing



of the munitions" (145). That is, she assumes that the harm involved in the reduction of the food supply is not outweighed by the good of destroying the munitions.

There are two ways to interpret the claim that what actually happens is a "very bad effect." As Kamm describes Scare the Criminals (and Relocation, on which it is based), the civilians' food supply is merely *reduced*. We are not told that the civilians go hungry or that some of them starve. So one interpretation is that the bad effect that "actually occurs" is in fact comparative – that is, the civilians are in one respect worse off after the bombing *than they were* before it. They have therefore been harmed in the "temporal comparative" sense. But that, as Kamm recognizes, is compatible with the bombing's having been better for them in the counterfactual comparative sense, because without it they would all have been killed. The other interpretation is that the bombing causes them to be hungry and malnourished, which is intrinsically bad and thus would be "a very bad effect" even if they had been even hungrier and more malnourished before. But we need not resolve this interpretive issue. For there is a more important question about how to interpret this case.

The question is whether the bombing, which reduces the civilians' food supply, *harms* them in a way that must be offset by counterbalancing good effects if the bombing is to be proportionate in the wide sense. One answer is implicit in the second response I gave to Help the Aggressor 1. This is that the bombing does not harm the civilians in the sense relevant to proportionality because it is not worse for them than not bombing would be, and is indeed better for them. On this view, what seems to be a harm is merely an apparent harm. Thus Kamm's comment that the beneficial effect "is certainly proportional to bombing the munitions" is misleading, since bombing the munitions causes no harm and produces two good effects: it contributes to the achievement of the just combatants' just cause and saves the lives of many civilians on the opposing side. Because there are no harms – that is, because the bombing is worse for no one – the issue of proportionality does not arise. For there is no harm that needs to be proportionate in relation to the two good effects.

Another answer is that the bombing does harm the civilians by reducing their food supply. But this harm is outweighed by the non-just-cause good of preventing them from being killed by the criminals, which is also an effect of the bombing. So the bombing both harms the civilians and prevents them from suffering a greater harm, and thus is on balance better for them.

Either of these descriptions seems acceptable. One can plausibly say that the bombing does not harm the civilians because it is not worse for them and is indeed better for them. Or one can say that the bombing harms the civilians but justifiably, the justification being that although it harms them, it also

prevents them from suffering a greater harm. If we adopt the second description, we should add this form of justification for harming to the list given earlier in section 2.2. According to this understanding, an eighth form of justification for harming someone is that the act that causes the harm also prevents an even greater harm to the same person, thereby reducing the overall harm the person suffers. We can refer to this as a *compensated harm* justification.

It is worth noting three points of clarification. First, this is not a form of lesser-evil justification, which requires that a bad effect be greatly outweighed by a good effect. Here the requirement is only that the harm prevented be greater than the harm caused.

Second, the notion of a compensated harm justification as I have presented it would not, strictly speaking, justify going to war in Help the Aggressor 1. For in that case the action by which B's soldiers would harm some of A's soldiers would also prevent the latter from suffering only an equivalent harm, not a greater harm. (Hence Kamm's use of the phrase "equivalent or compensated" to describe the range of cases that includes both Help the Aggressor 1 and Scare the Criminals.) The fact that these soldiers in A are only compensated and not made better off by the action that harms them is arguably not a sufficient justification for harming them. For it to be justifiable to kill these soldiers, it may also be necessary that the action that kills them (thereby preventing them from being killed by C) also saves certain other soldiers in A from being killed by C. This seems a distinct form of justification: that an act that harms a person also prevents an equivalent harm to that same person *and* benefits or is better for others.

Third, and finally, a compensated harm justification, as stated, allows only the prevention of harms to weigh against the causation of harm. One might wonder whether there is also a ninth form of justification for harming according to which a bad effect on a person (that is, a harm or apparent harm) caused by a certain act can be outweighed in the assessment of proportionality not only by the prevention of a greater harm but also by a pure benefit bestowed on the same person by the same act. Some are skeptical about this form of justification.<sup>14</sup> I think, however, that even if pure benefits have less weight than the prevention of corresponding harms, they do count and can outweigh bad effects caused to the same person by the same act. It is, after all, a fundamental presupposition of corrective justice that pure benefits can compensate morally for imposed losses. More importantly, to save someone's life is not to

---

14 Seana Shiffrin, "Wrongful Life, Procreative Responsibility, and the Significance of Harm," *Legal Theory* 5 (1999): 117–48.

prevent an intrinsic harm but to enable the person to continue to have pure benefits; yet it can clearly be permissible to inflict an intrinsic harm on a person as a means or side-effect of saving her life.

## 5 Aims and Conditions of Action

Kamm's point might thus be that in the assessment of proportionality in war, even if the prevention of a harm to certain people is a non-just-cause good, it always weighs against and outweighs any lesser harm caused to the same people by the same act that prevents the greater harm. If this is her point, I think it is essentially correct, though I think it is no different in substance from the claim that the act does not harm these people at all in the sense relevant to proportionality, since doing the act is not worse for them, and is indeed better for them, than not doing it.

Yet Kamm's discussion of Scare the Criminals is intended to support a quite different claim. Scare the Criminals is one of a number of examples she deploys to illustrate and defend the claim that, although non-just-cause goods may not count in the assessment of proportionality if they are intended as *aims* of action, they may well count if they are instead mere *conditions* of action – that is, if the agent acts not *in order* to bring them about but nevertheless *because* or *on condition* that they will be brought about by the action. Kamm is well-known for having recognized and analyzed this subtle but important distinction, and the greater part of her argument about *ad bellum* proportionality is devoted to exploring its implications for this issue.

Most of the cases in her discussion of proportionality are intended to illustrate the plausibility of the application of this distinction to the issue of *ad bellum* proportionality, but I am skeptical about whether the distinction is as important in this context as Kamm suggests. The distinction between an aim of action and a condition of action may well be relevant to the weight that *harms* may have in the determination of whether a harmful act is proportionate. There may, for example, be an ascending order of stringency in the constraints against the following ways of causing a harm: (1) the harm is foreseen but neither intended nor a condition of action, (2) the harm is not intended but is a condition of action, (3) the harm is intended but is merely eliminative, and (4) the harm is intended and opportunistic.<sup>15</sup> But the idea that *good* effects

15 For the distinction between eliminative and opportunistic harming, see Warren S. Quinn, "Actions, Intentions, and Consequences," *Philosophy and Public Affairs* 18 (1989): 334–51, p. 344.

may not count, or may have less weight, in the assessment of proportionality if they are intended seems unintuitive. If anything, it seems better to intend a good effect or benefit than to act only on condition that it will come about, and it thus seems that, if anything, an intended benefit should have greater weight in the determination of proportionality than an equivalent benefit that is not intended, even if it is a condition of action.

The examples Kamm provides to illustrate and defend the application of the aim-condition distinction to the issue of proportionality are divided into two categories. There are cases in which the people who are prevented from suffering a greater harm are the same people who are caused to suffer a lesser harm (or apparent harm, depending on which of the two alternative descriptions distinguished earlier one thinks is more apt). She refers to these as “equivalent or compensated” cases (148). They include Help the Aggressor 1, Relocation, Scare the Criminals, Help the Aggressor 2, and, arguably, Parents. But she also has cases in which the people who are prevented from suffering a greater harm are different from the people on whom a lesser harm is inflicted by the same act that prevents the greater harm. These she calls “morally outweighing” cases (148). The most important of these is *Outweighing Help the Aggressor*, which I will discuss in the next section.<sup>16</sup> All the cases she presents of both types are ones in which she believes that an act’s production of non-just-cause goods renders the act proportionate despite the fact that the harms the act causes are disproportionate when considered solely in relation to the achievement of the just cause, or only in relation to the contribution the act makes to the achievement of the just cause. In all these cases, Kamm thinks it makes a difference whether the non-just-cause goods are aims of action or conditions of action. I think, by contrast, that the explanation of why the acts are proportionate need not appeal to the distinction between aims and conditions. The reason why the harm inflicted in the “equivalent or compensated” cases is proportionate is that there is a “compensated harm” justification for its infliction (or, alternatively, that the harm in these cases is merely apparent). And the reason why the harm inflicted in the “morally outweighing” cases is proportionate is that there is a lesser-evil justification for the infliction of harms to which the

---

16 Two of the cases that Kamm classifies as “equivalent or compensated” cases are, I think, actually “morally outweighing” cases. These are the Artifacts case and the variant of Help the Aggressor, both presented on page 147. In the Artifacts case, for example, the people who are killed are not themselves compensated by the recovery of the artifacts. The act that kills them is worse *for them*; hence there is no compensated harm justification for harming them.

victims are not liable and thus, in some cases, a combined justification for the aggregate of all the harms inflicted.

In “equivalent or compensated” cases, there are, as I have suggested, two acceptable descriptions of what is done. One can say that an act that causes an apparent harm, such as a reduction in the food supply, does not in fact harm the people affected in the relevant, counterfactual comparative sense, because it is not worse but in fact better for them (because, for example, it also saves their lives, as in *Scare the Criminals*). Given that there is no harm, there is no issue of proportionality at all. Alternatively, one can say that although the act harms these people, it also prevents them from suffering a greater harm, so that there is a compensated harm justification for the infliction of the lesser harm. Even if the prevention of the greater harm is a non-just-cause good, it outweighs the lesser harm inflicted on the same people, thereby rendering that harm proportionate.

Kamm, I think, agrees with the second description. But, unlike Kamm, I think that the good of preventing the greater harm is not disqualified from counting in the determination of proportionality if it is an intended effect or aim rather than merely a condition of action. In *Scare the Criminals*, for example, it seems permissible for the just combatants to have two aims or intentions in bombing the munitions site: to contribute to the achievement of their just cause and to scare off the criminals, thereby saving the lives of the civilians whose food supply will be reduced by the bombing. (An alternative interpretation of this case that is compatible with Kamm’s view is that saving the lives of the civilians by scaring off the criminals is actually an element of the just cause for war, though it might not have been foreseen at the time the war was initiated. This is because there is a liability justification for scaring the criminals by military means. But if scaring the criminals is a just-cause good, Kamm can accept that it weighs in the assessment of proportionality even if it is an intended aim rather than a mere condition of action. Although this interpretation is consistent with the account of just cause I presented in section 2.1, I suspect that Kamm and many others will resist the suggestion that preventing ordinary murders in another society by frightening the potential murderers can be an element of a just cause for war.)

## 6 A Defense of an Additive Approach to Costs

In morally outweighing cases, the question that is relevant to proportionality is whether an act’s production of non-just-cause goods for some can outweigh the act’s infliction of harm on *others* who are not liable to those harms and are

not individually compensated for them. Kamm argues that these goods can outweigh the harms to others provided that two conditions are satisfied. First, the production of non-just-cause goods must be a condition rather than an aim of action. And, second, the harms against which these good effects weigh must be necessary for the achievement of the just cause. If the just cause can be achieved without causing these further harms to people who are not liable to suffer them, so that the only justification for causing these harms is that they are necessary for the production of the non-just-cause goods, then the harms are not proportionate, for they cannot be outweighed by non-just-cause goods in the determination of proportionality.

Kamm illustrates and defends these claims with the case called *Outweighing Help the Aggressor*. In this example, to achieve a just cause, it is necessary to kill more civilians as a side-effect than is proportionate in relation to the value of achieving the just cause. The number of enemy civilians it would be proportionate to kill is  $n$  but the number it is necessary to kill to achieve the just cause is  $n + x$ , “where  $x$  is considerably less than  $n$ ” (154, italics in original). Yet either the means of achieving the just cause or the achievement of the just cause itself will have as a side-effect the saving of  $2n$  different enemy civilians. While Kamm expresses her conclusion about this case rather tentatively, what she believes is that it is permissible for just combatants to kill  $n + x$  enemy civilians, given that killing the additional  $x$  civilians is necessary for the achievement of the just cause, the saving of  $2n$  enemy civilians is merely a condition rather than an aim of the just combatants’ action, and  $x$  is very considerably less than  $2n$ . For when the first two of these three conditions are met, the non-just-cause good of saving  $2n$  civilians weighs against the side-effect killing of  $x$  other civilians in the determination of proportionality. And given that the third condition is met, the saving of  $2n$  outweighs the side-effect killing of  $x$ , thereby rendering the just combatants’ action proportionate. If, however, the just cause could be achieved by killing only  $n$  civilians as a side-effect, it would then, according to Kamm, be permissible to kill only  $n$ , not  $n + x$ , even if the other  $2n$  civilians can be saved only if the additional  $x$  civilians are killed.

Kamm refers to this view as the “Asymmetrical Justification of Harm.” For there is, she claims, an “*asymmetry* between (i) adding goods to help justify costs necessary for achieving a standard just cause and (ii) *adding costs* so that more goods may be achieved. The former may be permissible when the latter is not” (153). The Asymmetrical Justification of Harm, she continues, also “implies that it could be impermissible when starting a war to pursue [a non-just-cause good] at cost  $x$  when one could also achieve the just cause at  $n$ , even if one could permissibly pursue [the non-just-cause good] at cost  $x$  on its own” (153). This view is thus opposed to what Kamm calls an “additive approach to

costs," which would justify killing  $n + x$  on the ground that killing  $n$  is proportionate in relation to the achievement of the just cause, while killing  $x$  is proportionate in relation to producing the relevant non-just-cause good.

As complicated as Kamm's view may seem, I think it is nonetheless overly simple. There is an important element of truth in the Asymmetrical Justification of Harm but the explanation of why it matters whether killing the additional  $x$  civilians is necessary for the achievement of the just cause is not just that there is a moral asymmetry between adding goods to justify costs necessary for a just cause and adding costs to justify non-just-cause goods.

To explain these claims, it will help to refer to *Outweighing Help the Aggressor*. In this case, there are two possibilities. One is that to achieve the just cause, it is necessary to do Act 1, which will kill the additional  $x$  civilians (beyond the proportionate number,  $n$ ) but will also produce the non-just-cause good of saving  $2n$  different civilians. The other is that it is sufficient to achieve the just cause to do Act 2, which will kill only  $n$  civilians. Kamm's view is that if only Act 1 is possible, it can be permissible to do it. But if Act 2 is possible, one is permitted to achieve the just cause only in that way, and Act 1 is impermissible. Even if killing the additional  $x$  civilians is necessary to save the far more numerous  $2n$  civilians, killing them is permissible only if it is necessary to achieve the just cause.

There are two reasons why a non-absolute version of this claim is plausible. One derives from the fact that a liability justification is usually a more imperative form of justification than a lesser-evil justification. When there is a just cause for war, there is a liability justification for killing certain people. Thus, when killing  $x$  people who are not liable to be killed is necessary for acting on the basis of a liability justification (as in Act 1), it may be more imperative, or "less optional," to kill the  $x$  people than it would be if all that were at stake in killing them were a lesser-evil justification (as in Act 2). For it is worse to forgo both the achievement of the just cause, for which there is a liability justification, *and* the non-just-cause good of saving the  $2n$  civilians, as the cost of not killing the additional  $x$  civilians, than it is to forgo only the saving of the  $2n$ , for which there is only a lesser-evil justification.

But there is a second and, to my mind, more important reason why Act 1 might be permissible when Act 2 is not possible but impermissible when Act 2 is possible. This is that, when Act 2 is not possible, the killing of the additional  $x$  civilians need not be intended as a means of saving the  $2n$  other civilians. As Kamm perceptively observes, the saving of the  $2n$  can be a condition of doing Act 1 without Act 1's killing of the  $x$  civilians being a means of saving the  $2n$ . This is because there is another reason for doing Act 1 and thus killing the  $x$  civilians as a side-effect: namely, to achieve the just cause. But if Act 2 is

possible, so that killing the additional  $x$  civilians is not necessary for achieving the just cause, the only reason for doing Act 1 rather than Act 2 is to save the  $2n$  civilians. If one does Act 1 when one knows that Act 2 is both possible and sufficient for achieving the just cause, one is then using the killing of the additional  $x$  civilians as a means of saving the other  $2n$  civilians. Since the constraint against killing people who are not liable to be killed as a means is stronger than the constraint against killing the same people as an unintended side-effect, it seems to follow that it is more difficult to justify doing Act 1 when Act 2 is possible than it is to justify doing Act 1 when Act 2 is not possible. It may be that the non-just-cause good of saving  $2n$  civilians is sufficient to outweigh the killing of  $x$  civilians as a side-effect but insufficient, in the circumstances, to outweigh the killing of  $x$  civilians as a means.

But it does not follow that if Act 2 is possible, doing Act 1 cannot be permissible. For recall Kamm's stipulation that the number  $x$  is considerably smaller than the number  $n$ . It may therefore be that the difference between  $x$  and  $2n$  is so great that there is an independent lesser-evil justification for killing  $x$  civilians even *as a means* of saving  $2n$  civilians. In that case, there would be a combined justification for doing Act 1 even when Act 2 is also possible. We can assume that there would be a liability justification for any harm that Act 1 would inflict on unjust combatants. And there would be lesser-evil justifications for the killing of both the  $n$  civilians and the  $x$  civilians. The killing of  $n$  civilians as a side-effect would be proportionate in the wide sense in relation to the value of achieving the just cause, and the killing of the additional  $x$  civilians as a means would be proportionate in the wide sense in relation to the value of saving the lives of  $2n$  civilians.

This combined justification for killing  $n + x$  by doing Act 1 is of course an instance of an additive approach to costs, about which Kamm expresses skepticism. But an additive approach seems unobjectionable when there are different but full and independent justifications for causing the two different harms – for example, when there is a lesser-evil justification for killing  $n$  civilians as a side-effect of achieving the just cause *and*, in Kamm's words, "one could permissibly pursue [the non-just-cause good – that is, the saving of  $2n$ ] at cost  $x$  on its own" (153). If it would be permissible to impose each of these costs or harms through separate acts, it should also be permissible to impose both through the same act, provided that the one act would have all the good effects that the two separate acts would have and no other bad effects.

It is curious that Kamm would be skeptical regarding an additive approach to costs in such a case. I suspect that her skepticism may be traceable, at least in part, to her acceptance of a mistaken assumption she may have got from my discussion of the notion of a just cause in earlier work. The assumption is that



the only intended aims or ends that can justify the resort to war, or contribute to the justification for war, are those that are constitutive of the achievement of the just cause. As I put it in the earlier paper from which Kamm quotes my statement of the No Sense Argument, “just cause specifies the ends for which it is permissible to engage in war, or that it is permissible to pursue by means of war.”<sup>17</sup> That she at least implicitly accepts this assumption would explain the significance she attributes to the idea that non-just-cause goods can count in the determination of proportionality only if they are merely conditions of action rather than intended aims. It would explain, for example, her otherwise puzzling claim that “if [the non-just-cause good of saving  $2n$  civilians] is just a condition of action, and not an appropriate aim, an agent could reasonably refuse to do anything extra costing  $x$  just to achieve [this non-just-cause good]” (152). It is hard to see why she might suppose that saving the lives of  $2n$  civilians is “not an appropriate aim” unless she were assuming that the only *aims* that may permissibly be pursued by means of war are those constitutive of the achievement of the just cause.

Yet it seems clear, contrary to what I said in the earlier paper, that it can be permissible to intend to produce non-just-cause goods by means of war if there is a lesser-evil justification for doing so. In the just war tradition, there is a pervasive assumption that it can be permissible to harm or kill civilians provided the harming or killing is both proportionate and an unavoidable *side-effect* of an attack on a legitimate military target. Just war theory, in other words, recognizes that there can be a lesser-evil justification for the *unintended* killing of people who are not liable to be killed. And most just war theorists recognize that there can also be a lesser-evil justification for the *intentional* killing of people who are not liable to be killed. It is just that this is a more demanding form of justification, in that the amount of wrongful harm that must be prevented to justify intentionally killing such people is greater than that which must be prevented to justify unintentionally killing the same people.

The assumption that there can be a lesser-evil justification even for the intentional killing of people who are not liable to be killed is, I think, the assumption that underlies Michael Walzer’s “supreme emergency exemption,” according to which the moral constraints on the conduct of war can be overridden in conditions of extremity.<sup>18</sup> There are, of course, some just war theorists who believe that the prohibition on the intentional killing of a person who is not liable to be killed is absolute. I have argued against absolutism

17 “Just Cause for War,” p. 2.

18 Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977), chapter 16.

elsewhere and will not rehearse my objections here, as most people already find it deeply implausible.<sup>19</sup> Since the rejection of absolutism entails the possibility of a lesser-evil justification for the intentional killing of people who are not liable to be killed, and since Kamm rejects absolutism, she should reject my earlier mistaken assumption and recognize that the *aim* of producing non-just-cause goods can be a justification for going to war – or, more realistically, part of the justification for going to war.

It remains true that the best and most imperative justification for the resort to war is a liability justification for all the harming and killing that is necessary as a means of achieving the aims of the war. A just war is better and more imperative than a merely justified war. But in the world as it is, it is inevitable that some of the harming and killing caused by even a just war cannot have a liability justification and must be justified, if it can be justified at all, as the lesser evil in the circumstances. This is true of most of the harm that is inflicted on civilians as a side-effect of military operations. But there can also be a lesser-evil justification for harming or killing people as a means achieving aims that, while good, are not elements of a just cause because those who must be harmed as a means of achieving them are not even potentially liable to be harmed for that reason. Thus, while Kamm's Asymmetrical Justification of Harm is plausible and has a role in justifying and constraining war, it does not rule out a role for an additive approach to costs, as exemplified, for example, in a combined justification.

---

19 Jeff McMahan, "Torture in Principle and in Practice," *Public Affairs Quarterly* 22 (2008): 11–28, esp. pp. 11–14.