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Fight or Flight:

Moral Intuitions, Institutions, and the Right to Stand One's Ground

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Reductivists claim that the exact same moral principles apply to killing in self- and other-defense, whether those acts occur in war or in contexts other than war.¹ On this point, they are correct. However, most reductivists claim that justifications for war reduce to the individual right of personal self-defense or can be explained by exploring intuitions derived from cases of personal self-defense.² Conversely, non-reductivists reject reductivism by arguing that intuitions derived from cases of personal self-defense and war are incompatible. The titles of reductivist and non-reductivist books and articles fixate on self-defense,³ reductivist and non-reductivist moral analysis relies on intuitions derived from thought examples involving hypothetical cases of self-defense, and individualist arguments emphasize self-defense at the expense of other-defense.⁴ When philosophers do treat other-defense, they sometimes deny that it has an important relationship with the right to self-defense,⁵ and they almost always claim that the positive duty to other-defense carries less moral weight than the negative duty to refrain from killing non-culpable agents.⁶ Existing individualist literature insists that other-defense is, at most, a relatively weak

¹ Reductivists include Jeff McMahan, David Rodin, Helen Frowe, Cecil Fabre, and BJ Strawser.

² Non-reductivists still devote large portions of their arguments to comparisons between self-defense and war, but they claim that reductivism cannot survive rigorous scrutiny. David Rodin and Cheyney Ryan fall into this category. See David Rodin, *War and Self-Defense* (Oxford University Press: Oxford, 2002) and Cheyney Ryan, "Self-Defense, Pacifism, and the Possibility of Killing," *Ethics* Vol. 93, No. 3 (Apr. 1983), pp. 508-524.

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

⁴ Jeff McMahan, for example spends almost an entire book analyzing the wrong of killing in war, but only a few pages of that book are devoted to analyzing the wrong of allowing others to be killed in war. McMahan, *Killing in War*.

⁵ Rodin, *War and Self-Defense*, p. 32.

⁶ "Our negative duty not to kill, which is the correlate of people's negative right not to be killed, is in general stronger than our positive duty to prevent people from being killed, which is the correlate of people's right to be

positive duty that only obtains when an agent can carry out other-defense without exposing herself to great risk.⁷ If the agent can only carry out other-defense at great personal risk, then she is permitted to act, but she is not morally required to. Such acts of other-defense are considered supererogatory, unless the agent makes a voluntary commitment to carry out other-defense.

In arguments about self-defense and war, philosophers arguments de-emphasize the positive duty to protect (i.e. other-defense) and neglect the relationship between self-defense and other-defense. This results in a less robust analysis of the relational claims between non-culpable persons. In evidence-relative morality⁸, self-defense and other-defense cannot be analyzed separately, nor are they reducible to the same principle. They can only be understood in relationship to each other. Specifically, as evidence that others will come to the aid of a defender increases, the defender's right to use force in self-defense is increasingly constrained by necessity and proportionality. As evidence that others will come to the aid of a defender decreases, the right to self-defense is permitted to use more force according to necessity and proportionality.

In order to overcome these this shortcoming I will analyze the somewhat broader moral problem of securing rights from culpable threats from the perspective of common defense. I refer to the approach as *common defense* because it incorporates self- and other-defense into a comprehensive whole. I use the terminology 'securing rights from culpable threats' to highlight the fact that I am addressing a topic that is narrower than human security, but broader than war. When I use the term 'culpable threat,' I am referring

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

⁷ Cecile Fabre, "Mandatory Rescue Killings," *The Journal of Political Philosophy*, Vol. 15, No. 4 (December 2007), pp. 363-384.

⁸ An act is fact-relative justified just when the act would be justified if we know all the morally relevant facts. An act is evidence-relative justified just when the act would be justified if the acting agent believes what the available evidence gives her reason to believe and acts as if those beliefs were true. In evidence-relative justifications, the evidence provides a justification if it gives an agent reason to believe that a moral principle is satisfied, even if the evidence leads an agent to make a fact-relative moral mistake. Parfit, D., *On What Matters: Volume One* (Oxford: Oxford University Press, 2011), pp. 150-1. Parfit discusses wrong in the fact-relative, belief-relative, and evidence-relative sense. I have slightly modified it to accommodate justifications.

to a human agent who is morally culpable (i.e. blameworthy, or unexcused) for an unjust threat to another agent's human rights. Primarily, my argument is concerned with moral justifications for violence intended to secure human rights from unjustified violence or conditional threats of unjust violence. In this respect, common defense is concerned with a subset of human security. It is concerned with all violent threats to individuals, including threats originating from the state. However, it is not concerned with threats whose underlying cause cannot be traced to humans (e.g. disease and natural disasters). It is concerned with self-defense, war, and criminal justice, including deterrent punishment.

Ordinarily, inflicting violence on a person⁹ is considered a grave wrong. Securing rights¹⁰ from persons who are culpable for unjust threats or actions¹¹ (i.e. culpable threats) is normally considered a moral imperative. Assuming that securing rights is a moral imperative and that killing is sometimes necessary to secure rights, people face a moral problem. Persons must decide how to act when the reasons against inflicting violence are in tension with the reasons for securing rights. This in turn generates a need for practical (i.e. action-guiding) principles for moral persons deciding whether to carry out acts of violence intended to secure rights from culpable threats. One common approach to this problem is to claim that harming culpable threats is not morally wrong, so long as 1) the harm inflicted on culpable threats is proportionate to the unjust threat they pose and 2) the harm is likely to prevent the realization of the threat or deter like threats. Accordingly, so long as rights are secured solely by killing

⁹ Hereafter, the terms 'inflicting violence' and 'harm' to refer exclusively to violence and harm carried out by humans against humans.

¹⁰ I consider rights to be morally valid claims. The following four points are worth noting. 1) Morally valid claims are normatively important because they facilitate challenging an unjust status quo. 2) Morally valid claims ought to incorporate fairness and respect for individual agents. 3) Morally valid claims ought to incorporate the costs that they impose on others. 4) Social recognition is morally important because it is imperative that morally valid claims are recognized by others. For more on this, see Annex A.

¹¹ Securing rights from all threats is normally considered a moral imperative, but this argument is focused on treating culpable threats posed by humans. Primarily, this is concerned with unjustified violence, or rights violations with a background threat of unjust violence. In this respect, common defense is concerned with a subset of human security but is more inclusive than national security. It is concerned with all violent threats to individuals, not just those threatening the state. However, it is not concerned with threats to individuals whose underlying cause cannot be traced to humans (e.g. disease and natural disasters). It can be a theoretical framework for understanding the Responsibility to Protect Doctrine (R2P). For more on R2P, see Bellamy A., "Realizing the Responsibility to Protect," *International Studies Perspectives*, Vol. 10, Issue 2, (May 2009), pp. 111-128, and Doyle M., "International Ethics and the Responsibility to Protect," *International Studies Review*, Vol. 13, Issue 1, (March 2011), pp. 72-84.

culpable threats in the aforementioned manner, there is no moral dilemma. Unfortunately, securing rights necessarily requires harming non-culpable persons.¹²

Granting that, under certain conditions, harming culpable persons to secure rights is not morally wrong, there are still at least three problematic features of the culpable threat problem. First, it is, in large part, a *deterrence problem*. Human beings respond to deterrence. Or, putting the point another way, human beings respond to a lack of deterrence. The problem of securing rights from human threats is different from other aspects of human security because human threats can be deterred. Murder is deterred by effective police work and collective aggression is deterred by a strong military. Natural disasters (e.g. earthquakes and floods) cannot be deterred, but can only be prevented or mitigated.¹³ If enough culpable threats are allowed to escape justice in order to prevent harms to non-culpable persons, then the threats posed by culpable threats will increase to an intolerable level. Inaction invites aggression.

Second, the culpable threat problem is plagued by *unavoidable uncertainty*. There are two types of uncertainty inherent to the problem. One form of uncertainty is that it is impossible to know for certain what the consequences of action (doing) or inaction (allowing) will be. This is the classic problem with consequentialism, and it has been used to argue that consequentialism cannot provide useful action-guiding moral principles. This criticism is unconvincing though. Just because it is impossible to know for ‘certain’ what the consequences of an action will be, it does not follow that it is impossible to determine action-guiding principles from expected consequences. ‘Certain’ consequences are inaccessible to deliberating agents, but the likelihood or probability of particular consequences is

¹² I have deliberately chosen to use the term ‘necessarily’ here, even though it is somewhat controversial. Single acts of common defense do not necessarily involve harming non-culpable persons, although they often do. However, single actions always carry the risk of harming non-culpable persons, and once we consider these single acts together, repeated indefinitely over time, it becomes increasingly likely that non-culpable persons will be harmed. I am making the common sense assertion that, given pragmatic constraints in contemporary society, any institution that will secure rights effectively on a large scale is so likely to harm non-culpable persons that we can plausibly claim that the institution will certainly harm non-culpable persons. Those who would refute this claim assert that a criminal justice system not only could be effective without ever convicting an innocent person, but that it would never put an innocent person through the trouble of a trial. I find this highly implausible.

¹³ There will be some overlap between common defense and natural disasters though. Sometimes, human beings are culpable for natural disasters. Global warming and other forms of pollution are examples of this.

accessible. The problem of uncertainty plagues the culpable threat problem, so there is always risk that culpable or non-culpable persons may be killed to no effect or too little effect. When this happens to non-culpable persons in war it is referred to as excessive collateral damage. However, if some force is not used to secure rights then there is a risk those rights will not be secured. Another form of uncertainty that common defense suffers from is inherent uncertainty about the culpability of the persons to be harmed.¹⁴ An agent cannot access the culpability or excusing conditions pertinent to particular persons. There are indicators, such as persons bearing weapons, previous behavior, and relational factors. Nonetheless, it is entirely possible for an agent to honestly misidentify a threat. This means that non-culpable persons are always at risk of being mistakenly targeted by other non-culpable persons. Therefore, in the non-ideal world, non-culpable persons are at risk from culpable threats and misdirected defenders.

Third, solutions to the culpable threat problem must be *collective* in order to be effective, therefore they are susceptible to collective action problems. For one thing, dilettante individuals acting in self-defense are going to be less effective at restricting harms to culpable threats. They will be more likely to make mistakes in a position of inherent uncertainty than trained professionals. This means that the risk of being misidentified and accidentally targeted will increase, trust will deteriorate, and security will devolve to something more akin, as a matter of degree, to an anarchical 'state of nature'. If individuals must rely on themselves for self-defense, they will find themselves in a security dilemma, which is a variety of the prisoner's dilemma. In violent encounters, he who strikes first often gains a considerable advantage, so aggression will triumph over restraint more often than not. Then the problem of deterrence will be exacerbated and less scrupulous individuals, seeing the benefits of such aggression, will succumb to the temptation to commit aggression themselves. Even those morally stalwart individuals who resist temptation to aggress will find themselves compelled to strike first in order to defend themselves. These pre-emptive strikes will result in an increase in indiscriminate and

¹⁴ For an excellent articulation of the problem of uncertainty regarding culpability and threats in personal self-defense see Frowe, H., "A Practical Account of Self-Defence," *Law and Philosophy*, Vol. 29, No. 3 (May 2010), pp. 245-72.

disproportionate violence. The way to avoid or get out of this security dilemma is to organize a collective security apparatus that secures rights effectively. Additionally, individual self-defense is unlikely to be effective at securing rights from collective aggression. Unscrupulous individuals often organize into collectives for the express purpose of committing collective aggression in order to exploit others. The only effective way to deter, thwart, and defeat such aggression and defend one's rights is to organize for collective defense. One cannot stand effectively against many.

Furthermore, when individuals come together for collective defense a secondary set of problems arises. The first of these is a basic free rider problem. Collective defense requires the payment of high costs by some, including loss of life. Individuals have incentives to shirk paying their fair share of these costs while still gaining the benefits of securing rights. Furthermore, the most effective collective defense has some form of division of labor, where a subset of society devotes more time to preparing for defense. That subset is given resources, including dangerous weaponry and training that is too expensive to provide for society at large. This division of labor is more effective at deterring threats. Unfortunately, it also carries serious risks. The security apparatus can deter external threats, but it can also be directed at the very people it was designed to protect. In fact, throughout history, more people have been victimized by their own government than by foreign governments.¹⁵ Internal and external human security are fundamentally related; increased security from one's own government often comes at the cost of decreased security from other threats and vice-versa. Finally, the collective security apparatus can be manipulated to conduct collective aggression against external political entities. Individuals concerned with justice can be manipulated to fight under the auspices of collective defense, while the political elites may have ulterior motives to commit collective aggression.

Reasonable persons would reject principles that uniformly favored acts that assume the risk of allowing instead of acts that assume the risk of doing. They would reject such a principle because

¹⁵ See "Statistics of Democide" at www.hawaii.edu/powerkills/NOTES.HTM. See, in particular, chapter 23, "Democide Through the Years." See also Rummel, *Power Kills: Democracy as a Method of Nonviolence*. New Brunswick, NJ: Transaction Publishers, 1997.

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

2.1 First Principle of Common Defense: Necessity

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

2.2 Second Principle of Common Defense: Proportionality

Proportionality is sometimes cited using Henry Sidgwick’s claim that it is not permissible to do “any mischief of which the conduciveness of the end is slight in comparison with the amount of

mischievous.”¹⁶ Another way of saying this is that disvalue of harms must outweigh the value of the rights secured for innocents. This is not a crude utilitarian calculus that maximizes utility though. They would not agree to apply proportionality to culpable threats who suffer harms commensurate with their culpability. It is permissible to kill one-hundred fully culpable murderers who are trying to kill one innocent. This is not a case that merely fails to violate proportionality. Rather, proportionality does not apply to this case at all.¹⁷

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

The best that reasonable persons can do is to agree on principles that distribute risk of harms among innocent individuals in a maximally fair manner. This is an extension of Rawls’s first principle into the non-ideal ethics of violence. According to Rawls, “Each person is to have an equal right to the

¹⁶ Henry Sidgwick, *The Elements of Politics* (London, 1891), p. 254. Michael Walzer refers to Sidgwick’s rule in *Just and Unjust Wars* (New York, 2006), p. 129. Also see Brant “Utilitarianism and the Rules of War.”

¹⁷ “Harms to multiple aggressors are not aggregated for purposes of assessing liability to defensive harm, but harms to affected parties clearly are aggregated...” David Rodin, “Justifying Harm,” *Ethics* Vol. 122, No. 1 (October 2011), p. 75. Some are hesitant to agree with this point because scale seems to matter. For example, if one million culpable threats are attempting to murder one non-culpable person, some are hesitant to claim that killing the one million culpable threats is justified. See Jeff McMahan, “Duty, Obedience, Desert, and Proportionality in War: A Response,” *Ethics* Vol. 122, No. 1 (October 2011), p. 153. I disagree. However, I think the intuition driving the reluctance is that it is hard to think of a real world situation where one million fully culpable threats would be trying to murder one fully innocent person. In actuality, events that take place on such a large scale, such as war, involve significant excusing conditions. In that case, it is plausible to argue that the degree of excuse would render killing the one million partially excused culpable threats disproportionate and, therefore, unjustifiable.

most extensive total system of equal basic liberties compatible with a similar system of liberty for all.”¹⁸ This aspect of proportionality is divided into two categories. The first is the distribution of harms *to* innocents who carry out common defense and the second is the distribution of harms inflicted on innocents *by* those who carry out common defense. With respect to the first category, reasonable persons would agree that all innocents have a positive duty to the common defense that incorporates self-defense and other-defense into a comprehensive whole.

The second category is the fair distribution of risk to other innocents by those carrying out common defense. Reasonable persons might agree on a minimax principle for the distribution of harms. Innocent persons’ rights against harms would be limited in scope in the following manner.¹⁹ Common defense situations arise where risk of harm to innocents is unavoidable. In such situations, the innocent have a right not to be subjected to more risk of harm than that which can be fairly distributed to other innocents. This is not a utilitarian calculus. In the first place, proportionality does not apply in the same degree to agents who waive or forfeit their right against harms. Furthermore, in cases where proportionality is applicable, the harms must be distributed as evenly among innocent people as possible, even if this results in increased overall suffering. According to proportionality, non-culpable persons are liable to the worst necessary harm that must be borne to secure rights, commensurate with the rest of the innocents in society bearing as much of the harm as they can. This is similar to Rawls’s difference

¹⁸ John Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press, 1999), p. 266.

¹⁹ The relational nature of claim rights germane to common defense include rights forfeitures, rights waivers, and rights that are limited in scope. Individualists have given disproportionate weight to the former with little respect to the latter. This problem is captured in David Rodin’s claim that, “...both (rights forfeiture and rights that are limited in scope) seem to be ways of articulating the same underlying moral idea: that the right to life is subject to conditions specified in terms of facts about the mutual relationship between an aggressor and defender (or more generally between any two interacting parties). Whether we choose to describe the right to life as limited in scope or as subject to forfeiture seems, from a theoretical point of view, immaterial.” See Rodin, D, *War and Self-Defense* (Oxford: Oxford University Press, 2002), p. 74. The right to life as limited in scope and the right to life as subject to forfeiture overlap so long as we restrict the discussion to aggressors and defenders. However, when we discuss the relational claims between innocents, rights forfeiture and limitations in scope come apart. Rights forfeiture is ordinarily used to describe rights that are taken away from an agent because of something that agent does, even though the agent does not want to voluntarily give the right up. Limitations in scope can include much more than that, including proportionality. It does not make sense to say that persons liable to harm under proportionality forfeit their rights, because they do not do anything that merits taking their rights away. Nonetheless, they do not have a claim against being harmed by other innocents (although they still have a claim against culpable threats that make such harms necessary).

principle for the distribution of wealth, except that it is akin to a minimax principle, not a maximin principle. The distribution is designed to protect those at the top of the scale (suffering the most harm) and keep those at the bottom of the scale (suffering the least harm) from unjustly exploiting those at the top of the scale.

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

Innocents harmed as collateral damage are often entitled to compensation in accord with the principle of proportionality. This should not be confused with the notion of rights infringement, where individuals are owed compensation because others justifiably infringe their rights. I deny that there is such a thing as rights infringement, because I deny that non-culpable persons have a right against proportionate harms. Individuals have a morally valid claim to compensation, but it is not because the other innocents in society, including the non-culpable person or persons who actually inflict the harm, wrong the harmed innocent. As a matter of justice, reasonable agents would agree ex ante to the common defense principles that justify the action. Therefore, the harmed innocent has no claim against the individual who carries out an evidence-relative justified act of common defense. Her claims are 1)

against culpable threat(s) and (2) against the whole of society. It is culpable threats generally²⁰ that wrong the innocent person. It might also be the case that specific individuals are culpable for creating the triggering conditions that justified the harm. In that case, specific persons wrong the harmed innocent. If an agent harms another innocent in the course of an act that satisfies the principles of common defense, she ought to experience regret, not guilt. Furthermore, regret is the appropriate response for all innocents in society, not just the individual or individuals who actually carry out the act of common defense. The regret is the proper reaction to the fact that something bad happened as a result of an evidence-relative justified action, even though the act was not morally wrong. Nonetheless, even though they do not wrong the harmed innocent, the other innocents in society owe the harmed innocent compensation in order to redistribute the harms inherent in common defense as maximally fairly as possible. The physical harms are concentrated unfairly in one or a few, and compensation from others is needed to offset that imbalance. Ex ante, reasonable persons would agree to guarantee compensation in order to distribute the costs of harms. The compensation is a kind of insurance scheme that redistributes uneven costs more fairly. If society owes compensation and fails to pay, then an individual's rights may be violated, because proportionality is violated. However, the infliction of the harm itself is not a 'rights infringement,' for the individual's morally valid claim (i.e. right) against harm is limited in scope to accommodate proportionate harms.

There is a powerful objection that can be raised to the difference principle for liability to harm, though. The objection parallels common objections to Rawls's difference principle for the distribution of income and wealth. Some question Rawls's assertion that hypothetical contractors in the original position would be risk averse. Why is it rational for Rawls's hypothetical contractors to give up a significantly greater chance at increased wealth in a best case outcome in order to gain a guarantee that they will have a slightly better worst-case outcome? Rawls can offer a convincing reply (I think) by insisting that

²⁰ I say culpable threats generally, because it is irrelevant whether, from a God's-eye point of view, the harm was actually necessary to defeat or deter a specific culpable threat. Rather, action in accord with common defense principles is necessary to secure rights from culpable threats generally.

significant differences among individual wealth will eventually undermine the basic structure and the just distribution of basic liberties. However, I do not think that this argument carries over to the distribution of risk of harm in common defense. It is not plausible that re-allocating the risk of harms in this way will eventually undermine the basic structure or the distribution of basic liberties. Exchanging a greater risk of many slight harms (i.e. accepting increased risk that one will be harmed slightly) for a smaller risk of catastrophic harms will not result in the same power asymmetries as unequal distribution of wealth. Therefore, it is not the same threat to the basic structure. Contractors in the original position might very well accept a slight risk of greater harms in order to avoid a significantly greater risk of lesser harms. It is therefore plausible that a reasonable person cannot reject a principle other than the difference principle for liability to harm.

Reasonable persons, however, would agree to distribute the agreed upon acceptable risks (whatever magnitude they are) as evenly as possible without regard for race, sex, sexual orientation or social class. Furthermore, I agree with David Rodin that justice demands that harms that cannot or will not be compensated for are, other things being equal, harder to justify than harms that can and will be compensated for.²¹ Noncompensable harms, such as death, are such a great disvalue that it is reasonable for many to suffer a greater risk of compensable harms (e.g. loss of a finger) in order to slightly reduce the risk that one person will die. I do not know the exact point where an exchange of greater risk of slighter harms is justifiably exchanged for slighter risk of graver harms to a few. It is enough for current purposes to acknowledge that reasonable persons would agree to distribute risk as equally as possible among non-culpable persons.

2.3 Third Principle of Common Defense: Discrimination

Reasonable agents would agree that, unless an individual does something that justifies singling her out for an increased risk of harms, she should be treated in accord with proportionality. However,

²¹ David Rodin, "Justifying Harm," p. 106.

they would also agree that individuals can do things that single them out for disproportionate harms (i.e. harms that would ordinarily violate proportionality). These justified disproportionate harms are covered by the principle of *discrimination*. In the common defense paradigm, morally valid claims (i.e. rights) about discrimination can be divided into two categories. The first category, which is often referred to as rights forfeiture, involves relational claims between culpable threats and non-culpable defenders.²² Rights forfeiture is primarily about moral asymmetries and claims of this type usually allow for an unequal distribution of harms among agents, with culpable threats liable to much greater risk of harm than non-culpable agents. Rights forfeiture is a reciprocal concept that outlines how cooperators can justifiably treat non-cooperators. When an agent fails to act in a way that justice prescribes (i.e. fails to cooperate with the principles of reciprocity), she forfeits some of her rights that she would have had if she acted in accord with the principles of justice (i.e. cooperated with principles of reciprocity). Under certain conditions, rights forfeitures can render agents liable to disproportionate harms. The second category involves relational claims between non-culpable agents. The second category, which is often referred to as rights waiver, occurs when an agent freely volunteers to accept more than her fair share of the risk of harms inherent in the common defense. Under certain conditions, rights waivers can render agents liable to disproportionate harm.

The concept of rights forfeiture is extremely important to current individualist accounts of ethics in war. For example, Rodin correctly asserts that the right to self-defense is relational and reciprocal. He writes, “obligations should be viewed at least in part as reciprocal. In other words, we have the obligation to refrain from behaving in certain threatening and harmful ways to others just as long as they do the same to us...”²³ This notion of relational, reciprocity-based rights is fully compatible with contractualism and the common defense paradigm. Individualists maintain that when an agent culpably threatens another

²² This type of relational claim receives the most attention in the literatures on self-defense and war. The relational claims between innocent threats and innocent defenders also receive considerable attention. The other types of relational claims between innocents dealing with culpable threats is underdeveloped though.

²³ Rodin, D., *War and Self Defense* (Oxford: Oxford University Press, 2002), p. 78. Rodin is citing Phillip Montague’s interpretation of Locke. Montague, P., “Self-Defense and Choosing between Lives,” *Philosophical Studies*, V. 40 (1981), 207-19.

agent, that this action creates a ‘negative bond’ between the aggressor and the victim. This negative bond is a kind of moral asymmetry that grounds victim’s right to kill aggressor and aggressor’s loss of his right not to be killed by victim.²⁴ Aggressor’s forfeiture of his right to life and victim’s right to kill aggressor describe the same normative fact in two different ways.²⁵ By culpably behaving in a threatening way, aggressor renders himself liable to justified violence, if and only if evidence indicates that the harms:

A) do not exceed the degree of the harms that the culpable threat is culpably threatening²⁶, and

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

Rights forfeiture, as individualists construe it, is a combination of deontological and consequentialist components. A) is a deontological component that simultaneously permits the prima facie wrong of disproportionately harming others and places restrictions on that disproportionate harm. It asserts that an agent’s moral rights are contingent on that agent’s respect for other agents’ rights. If an agent violates²⁷ or threatens to violate the rights of others, then she forfeits her own rights.²⁸ Rights forfeiture is predicated on the principle of reciprocity that is reflected in the ‘golden rule’ and Kant’s categorical imperative. However, A) is not wholly permissive, because it constrains the amount of harms that can justifiably be inflicted on a culpable threat. The culpable threat only forfeits rights of comparable degree to the rights she violates or threatens to violate. If the culpable threat only unjustly threatens to punch someone in the arm, a defender cannot justifiably inflict harms that are excessively severe compared to a punch in the arm. A defender cannot, for example, kill the culpable threat solely based on a discrimination justification. Rights forfeiture alone does not justify harms that exceed this deontological constraint, regardless of the consequences.

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

²⁵ Ibid, p. 75.

²⁶ David Rodin, *War and Self-Defense* (Oxford: Clarendon Press, 2002) This is what Jeff McMahan terms ‘narrow proportionality’. See Jeff McMahan, *Killing in War* (Oxford: Clarendon Press, 2009), pp. 20-32.

²⁷ Violate is an unjust act that contradicts someone’s right; it is often held in contrast with a rights infringement, which contradicts someone’s rights justifiably. I deny that there is such a thing as rights infringement. The prescriptions associated with rights infringement are actually captured in the principle of proportionality.

²⁸ See David Rodin, *War and Self-Defense*, pp. 72-6.

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

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

...obligations should be viewed at least in part as reciprocal. In other words, we have the obligation to refrain from behaving in certain threatening and harmful ways to others just as long as they do the same to us...²⁹

Obligations should be "viewed as reciprocal," but why should reciprocal obligations be limited to "the obligation to *refrain* from behaving in certain... ways"? The common defense paradigm augments the duty to refrain with the duty to act, treating restraint and action as two aspects of the same reciprocal principle. If an agent either fails to refrain when she should or if she fails to act when she should, then she may forfeit her some of her rights.

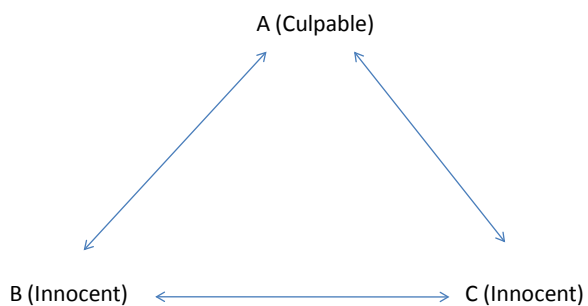
This point is overlooked by current individualists because they emphasize self-defense and fail to appreciate the relationship between self- and other-defense in evidence-relative justifications. Although common defense treats individuals as the fundamental unit of moral analysis, it is not reducible to personal self-defense. The right to personal self-defense is a relational claim that is fundamentally dependent on the evidence an agent has about the actions (including consequences) and intentions of

²⁹ Rodin, D., *War and Self Defense* (Oxford: Oxford University Press, 2002), p. 78. REDUNDANT

others. Pace individualists like Rodin, it is not a ‘stand alone claim’.³⁰ Every agent’s act of personal self-defense is justified in terms of the risk it imposes on others and the risks that others impose on the agent. The agent can often enhance her self-defense by relaxing the triggering conditions for self-defense and imposing greater risks on others. Thus, any restraint in self-defense is also an act of other-defense. Since all justified acts of self-defense satisfy certain restraining principles, all justified acts of self-defense are simultaneously justified acts of other defense. Any act of self-defense that demonstrates too little restraint imposes too much risk on others and is unjustified because it is a failure of other-defense. Any act of restraint that imposes risk to the self in excess of that which distributive justice requires is a form of supererogatory other-defense. Additionally, if others impose greater risks on an agent, then that agent is justified in imposing greater risks on them. In other words, the agent’s triggering conditions for justifiable self-defense are more relaxed when others show less restraint. Therefore, the distinction between posing a direct threat and failing to defend others can become blurry in evidence-relative justifications. They are really two ways of describing the same moral fact about triggering conditions.

³⁰ Ibid, pp. 31-2. Rodin writes, “First, the right of self-defense may contain claims against others to assist in the act of self-defense. Secondly, it may contain claims against others not to interfere. My (Rodin’s) view is that, though it may be tempting to see claims against others as part of the right of self-defense, it is more appropriate and less misleading to analyse the right of self-defense as a simple liberty without any attendant claims.”

Minimal Relational Claims for an Act of Common Defense



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

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

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

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

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

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

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

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

Individuals do not have a stand-alone right to self-defense that imposes more risk on others than it imposes on the self. Rather, individuals only gain that right when they have evidence that others forfeit others' right to other-defense. Therefore, it is a moral fact that others can impose more restrictive self-defense triggering conditions on individuals by merely providing evidence that they will carry out other defense. Consent is not necessary to impose more restrictive self-defense triggering conditions.

This point illuminates why George Zimmerman was not justified when he recently confronted and shot Trayvon Martin.³¹ He only possessed a stand-alone right to self-defense where the risk of harms was distributed fairly. Because law enforcement institutions provided ample evidence that they could protect everyone's rights better than Zimmerman, he was morally obligated to let law enforcement handle the situation instead of pursuing Martin on his own. I suspect that most individualists would agree with me on this point, however they might disagree on the following points.

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

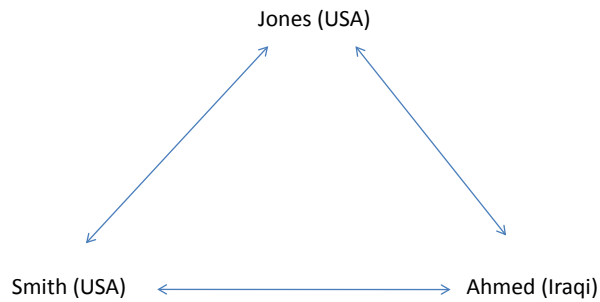
B) Additionally, if Martin had evidence that others would culpably refrain from carrying out other-defense on Martin's behalf, then Martin would be justified in lowering his triggering conditions for inflicting violence on Zimmerman.

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

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

³¹ Transcript of George Zimmerman's Call to the Police, <http://www.motherjones.com/documents/326700-full-transcript-zimmerman>, City of Sanford, Florida, online in *Mother Jones* magazine, accessed 24 May 2012.

Common Defense in War



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

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

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

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

individuals should suspect their own government's motives and compensate for it by adhering to more restrictive triggering conditions for participation in war.³² Unfortunately, individualists overlook the moral significance of the fact that the same evidence indicates that foreigners in other political communities will not fulfill their duties of other-defense to the individual. That is, the evidence also indicates that foreigners will utilize less restrictive triggering conditions for going to war against the individual. For example, McMahan's mistake is that he chooses to emphasize different aspects of the same characteristic in the different cases. In "War as Self-Defense", he emphasizes the fact that a lack of institutions provides evidence that defender is more vulnerable. In *Killing in War*, he emphasizes the fact that a lack of institutions provides evidence that the perceived threat is more vulnerable. But, in actuality, the lack of just institutions *simultaneously* makes defender and perceived threat more vulnerable in 'war.' This is why the security dilemma in 'war' is tragic. Everyone ends up worse off and everyone's human security suffers for it; they share a condition of victimhood.

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

³² McMahan, *Killing in War*, pp. 60-6.

participating in war. Individuals are justified in acting on triggering conditions that impose disproportionate risks on foreigners.

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

harms disproportionately on foreigners. This would have limits; if a war is obviously unjust, then individual combatants would be morally required to refrain from combat. But, individual combatants are justified in acting on triggering conditions that presume in favor of participating in their countries wars within a context of epistemic uncertainty.