TORTURE, TERROR, AND THE INVERSION OF MORAL PRINCIPLE

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Extremists on either side of the War on Terror increasingly argue that torture and the deliberate killing of noncombatants are not merely morally permitted but frequently morally required. Both factions have found unlikely allies in leading scholars whose recent work provides intellectual support for the proposed upheaval of moral thought. This article provides new interpretations of the doctrines of double effect and noncombatant immunity which escape traditional criticisms, withstand contemporary challenges, and provide moral bases for rejecting torture and terrorism with equal force. The article also shows that refusal to torture does not make one complicit in the acts one could have thereby prevented, that deontological constraints retain their conceptual coherence and moral relevance when applied to states, and that threshold deontology does not support institutionalized torture.

INTRODUCTION

It is tempting to condemn the phrase "War on Terror" as imprecise, misleading, and potentially dangerous. The reference to terrorism is imprecise because it groups together organizations with vastly different histories, ideologies, and agendas. The reference to war is misleading because it suggests that successful military operations are reliable evidence of a successful counterterrorism strategy. The conjunction of the two terms is potentially

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dangerous because it suggests a deeper moral distinction between war and terrorism than in fact exists. Despite these shortcomings, the label has at least one salutary feature, which is that it defines the underlying conflict in terms of means rather than ends. It contrasts an activity governed by rules with another which places no limits on its participants. The two sides are defined not by their political visions but by the restraints imposed on the realization of those visions. It is therefore not surprising that as evidence of the routine use of torture and related practices by the United States and its allies continues to accumulate, their adversary has been renamed Islamic Extremism, Radicalism, or Fascism. This rhetorical shift also reflects, among other things, the fact that the primary target of U.S. military operations has itself shifted from terrorist organizations to nation-states. For both reasons, and perhaps others, the two sides are increasingly distinguished by the goals they pursue rather than by the limits they observe.

Upheavals in language often accompany and sometimes accelerate upheavals in thought. Henry Shue once wrote that torture is morally wrong in part because it involves an attack on the defenseless.[1] Today, aversion to torture is condemned as "moral squeamishness,"[2] while beating handcuffed prisoners reflects the "morality of toughness."[3] Michael Walzer once argued that soldiers must accept risks themselves to reduce risks to civilians.[4] Armies were to manifest their commitment to their cause and their concern for innocent life by internalizing the costs of the conflict. Today we again hear the old saw that unlimited wars will be shorter and fewer in numbers.[5] No doubt nations fighting on foreign soil would happily shift the costs of conflict off of their soldiers and onto foreign civilians. The Holy Qur'an teaches that to fight in the way of God

1. Henry Shue, Torture, 7 Phil. & Pub. Aff. 124, 125–30 (1978).

2. Eric Posner & Adrian Vermeule, Terror in the Balance 191 (2006). See also John Gardner, Complicity and Causality, 1 Crim. Law & Phil. 127, 129 (2007) (arguing that "it is self-indulgent or squeamish to care more about one's own wrongs than about those of other people"). Cf. Charles Krauthammer, The Truth about Torture, Wkly. Standard, Dec. 5, 2005, http://www.weeklystandard.com/Content/Public/Articles/000/000/006/400rhqav.asp?pg=1 (describing "no-torture absolutism" as "moral vanity").

3. John Ashcroft, Never Again (2006).

4. Michael Walzer, Just and Unjust Wars 155–57 (1977).

5. Posner & Vermeule, supra note 2, at 262. Cf. Walzer, supra note 4, at 131.

one must protect from violence and persecution those who cannot protect themselves.[6] Today men kill the weak and the powerless and call it jihad. So cowardice is redefined as courage, massacre as mercy, and heresy as piety.

Extremists on both sides of the War on Terror seek to invert traditional moral principles regulating the use of violence by states, organizations, and individuals. Torture and the deliberate killing of noncombatants, long thought indefensible, are defended not as necessary evils or as pardonable offenses but as moral requirements.[7] The two factions share more than skill in the rhetorical reversal of moral categories. Apologists for torture and terrorism work from a common script. Both contend that they are driven to their tactics only as a last resort; they claim theirs is the only way that works.[8] Both portray themselves not as agents driven by hatred or fear but as subjects of circumstances beyond their control and responsibilities not of their own making. Where their arguments are not identical they are symmetrical. One claims the other is too big to fight by conventional means; the other complains the first is too small. One is faced with an invincible adversary, the other with an invisible adversary. Both conclude that old rules do not apply to the current conflict and that means previously forbidden are not merely permitted but required.

Both factions have found unlikely allies in leading scholars whose recent work provides intellectual support for the proposed upheaval of moral thought. Close examination of the most interesting and important arguments defending a duty to do wrong yields findings of great consequence to central issues in criminal law theory.[9] John Gardner argues that

6. Qur'an 4:75.

7. See, e.g., Krauthammer, supra note 2 ("Not only is it permissible to hang this miscreant [Khalid Sheikh Mohammed] by his thumbs. It is a moral duty."); see also id. ("It would be a gross dereliction of duty for any government not to keep Khalid Sheikh Mohammed isolated, disoriented, alone, despairing, cold and sleepless, in some godforsaken hidden location in order to find out what he knew about plans for future mass murder.").

8. See Michael Walzer, Terrorism: A Critique of Excuses, in Arguing about War 53–56 (2004).

9. Cf. Jeremy Waldron, A Right to Do Wrong, 92 Ethics 21 (1981). Waldron argued we have the right to act contrary to the balance of moral reasons but not to violate the rights of others. The authors discussed in this article support the position that we can have a duty to do the latter but not the former.

refusal to wrong one person to prevent similar wrongs to many others makes one complicit in the many wrongs.[10] Far from arguing that citizens must reject torture or be complicit in its commission, Gardner suggests that citizens must support torture or be complicit in the wrongs torture may prevent. However, a closer look at Gardner's presentation reveals that the legal significance of agent-neutral moral theories rests inescapably on a theory of complicity that is flawed on its own terms and incompatible with adjacent criminal law doctrines. Cass Sunstein and Adrian Vermeule argue that deontological constraints on killing and torture lack conceptual coherence and moral relevance when applied to states and that since such constraints can be justifiably overridden in individual cases states may justifiably institutionalize their routine violation and indeed are morally required to do so.[11] On the contrary, the victim-focused and status-based nature of deontological constraints entails symmetrical moral prohibitions on state and non-state actors and explains why a wrong that can be justified by the consequences of its infliction cannot be justified by the consequences of its institutionalization. Finally, Frances Kamm and Jeff McMahan challenge central features of the laws of war, arguing that civilians may be killed and soldiers prosecuted for the decisions of their government, permissions which become obligations when combined with duties of collective self-defense and retributive justice.[12] Meeting their challenge requires a conceptual reconstruction of the centuries-old doctrines of double effect, noncombatant immunity, and combatant immunity using theoretical tools drawn from contemporary legal philosophy.

The heart of this article, both structurally and conceptually, is the introduction of a new interpretation of the doctrine of double effect that vindicates traditional prohibitions on both torture and terrorism. The new interpretation is victim focused rather than agent focused and therefore applies to individuals and states alike. It shifts the role of intention from the theory of wrongdoing to the theory of justification and thereby escapes traditional criticisms. The new interpretation explains the moral importance of both intention and consequence in status-based terms and

10. See Gardner, supra note 2.

11. See Cass R. Sunstein & Adrian Vermeule, Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs, 58 Stan. L. Rev. 703 (2005).

12. See Frances Kamm, Failures of Just War Theory: Terror, Harm, and Justice, 114 Ethics 650 (2004); Jeff McMahan, The Ethics of Killing in War, 114 Ethics 693 (2004).

thereby resists contemporary challenges. While the new interpretation is developed in response to Sunstein and Vermeule and defended in response to Kamm and McMahan, the article begins with Gardner's innovative theory of complicity. The doctrine of double effect, like any theory of justification, presupposes a theory of responsibility. Before we draw on the doctrine of double effect to determine which of our wrongs are justified we must first determine which wrongs are ours.

I. COMPLICITY AND COLLABORATION

In what sense are governments responsible for terrorist attacks against their citizens? Assuming that a government does not commit such attacks or solicit, assist, or encourage their commission, it seems that government is not responsible for the attacks themselves, either as a principal or as an accomplice, and is at most responsible for the distinct and lesser wrong of failing to prevent the attacks. John Gardner, by contrast, argues that failure to prevent the wrongs of others makes one complicit in their wrongs even if the only way to prevent those wrongs would be to commit fewer comparable wrongs oneself. Combined with his agent-neutral theory of moral justification—according to which one ought to engage in wrongdoing oneself to reduce wrongdoing overall—Gardner's theory of "negative complicity" entails that one must accept responsibility as a principal for one wrong rather than responsibility as an accomplice for many comparable wrongs.

One might think that an agent-neutral theory of justification would naturally generate a duty to do wrong when introduced into existing criminal law categories. But while reason and morality demand justification for all our thoughts and actions, the criminal law only demands justification for our wrongs. For this reason, an agent-neutral theory of justification will generate a legal requirement to commit some wrongs to prevent more wrongs only if we are responsible for the wrongs of others that we fail to prevent. Otherwise, the need for us to justify those wrongs simply would not arise. Had Gardner invoked agent neutrality to advocate recognition of a distinct wrong of failing to minimize the wrongs of all, his argument would be fairly uninteresting and its refutation a task for moral philosophy. But Gardner introduces agent neutrality not within the theory of wrongdoing but within the theory of justification. His invocation of agent

neutrality to defend a duty to do wrong therefore presupposes responsibility for the wrongs of others which we must justify ourselves. That responsibility, in turn, is established using an innovative theory of criminal complicity which conflicts with the permissive structure of the necessity defense and is questionable on its own terms. Gardner's argument therefore bears directly on central questions of criminal law theory.

A. Justification and Responsibility

John Gardner defends two positions, one regarding the determinants of right action and another regarding the scope of responsibility for wrongs. Gardner first endorses an agent-neutral rather than an agent-relative theory of justification. There are a number of ways to distinguish such theories, none of which is entirely satisfying. Gardner suggests that the basic difference is that agent neutralists hold, while agent relativists deny, that any reason for one individual to do or fail to do something is also a reason, and a reason of equal weight, for others to aid or hinder that individual. Where one is well-positioned to do so, one has as much reason to prevent the wrongs of others as to avoid committing wrongs oneself.[13] In particular, one ought to commit a single wrong to prevent the commission of many wrongs of the same kind. Gardner describes a hypothetical scenario in which he is kidnapped and told that his captors will kill or torture many innocent people unless Gardner kills or tortures one. Gardner's conclusion is striking:

> When all this greater wrongdoing is perpetrated . . . it will be my fault. . . . For surely there is only one justified thing for me to do in such a case, and no apparent excuse for not doing it. I must commit the single wrong myself and thereby avoid the multiple and/or worse commissions of the same wrong by them.[14]

13. Gardner, supra note 2, at 131. Gardner is quick to add that our reasons to help others conform to the reasons that apply to them are frequently outweighed by the costs of routine intervention into the conduct of others. Id. at 132–33.

14. Id. at 129. Notice that Gardner says one *must* commit the single wrong, which indicates the moral compulsion of obligation, rather than that one *should* commit the single wrong, which would place the matter in the realm of the advisory. Similarly, one does not ordinarily speak of being *at fault* for something other than a wrong. Nor does one typically demand an *excuse* for an action that is optional rather than mandatory.

From the agent-neutral perspective Gardner endorses, what matters is that fewer wrongs are committed and not that he commit fewer wrongs himself.

There are two potential limitations on the scope of Gardner's claim. In her own writings on collective wrongdoing, Frances Kamm observes that scenarios like the ones Gardner describes are not the purest test cases for agent neutrality, since the one wrong does not create an obstacle to the many wrongs but is solicited in exchange for voluntary forbearance from the many wrongs.[15] It is therefore possible that Gardner's argument yields an exceedingly narrow conclusion, largely limited to fictitious cases. However, Gardner consistently states that responsibility for the many wrongs rests on the failure to prevent them.[16] Rejecting the solicitation causally contributes to the many wrongs only if the rejection reflects a refusal to prevent them. Similarly, accepting the solicitation creates a principal-accomplice relationship only if the acceptance reflects an intention to commit the wrong solicited. Gardner also restricts his attention to cases in which the one wrong prevents many wrongs of the same kind, suggesting that agent neutrality only operates within and not between categories of wrongs. This is unlikely. Forced to commit one of two wrongs, one ought to commit the less serious wrong. Agent neutralists hold that our reasons not to commit wrongs reduce to reasons to see to it that wrongs are not committed. It follows that on this view one ought to see to it that the less serious wrong is committed rather than the more serious wrong even if this requires that one commit the less serious wrong to prevent the commission of the more serious wrong by another.

Gardner next expounds a theory of criminal complicity according to which failure to prevent the wrongs of others renders one complicit in those wrongs. Gardner's argument is relatively straightforward. Causal contribution to wrongs committed by others makes one responsible for those wrongs. Failure to prevent wrongs committed by others causally contributes to those wrongs. Therefore, one is responsible for the wrongs of others which one fails to prevent. Gardner concludes that in the imagined

15. See Frances Kamm, Intricate Ethics 310 (2006).

16. See Gardner, supra note 2, at 137.

scenario described above if he fails to commit the single wrong he will be responsible as an accomplice for the many wrongs.

There are two ambiguities in Gardner's discussion of complicity that require some discussion. Gardner sometimes writes as though an accomplice is responsible not for the wrong of the principal but for the separate wrong of contributing to the wrong of the principal.[17] Yet the distinctive feature of complicity is that it makes one person liable for the acts of another. It is true that the accomplice is responsible for the wrong of the principal in virtue of her contribution to the principal's commission of the wrong; it is also true that the accomplice must justify or excuse her own contribution to the wrong and not the principal's commission of the wrong. Gardner may have these latter claims in mind in the troublesome passages. Gardner also sometimes writes that complicity is not "the thing to be justified" but "the unjustified thing," and that "at least some questions of justification need to be settled first, before classifying an agent as an accomplice."[18] In other words, "complicity" refers only to unjustified causal contribution to the wrong of another. This view renders Gardner's earlier reference to "wrongful complicity" redundant[19] and fits poorly with linguistic intuitions as well as the law governing the area. If one person assists or encourages a second person to commit a wrong with the intention that the second person commit that wrong then the first person satisfies the elements of complicity and is complicit in that wrong. Whether the first person is justified in doing so and therefore has an affirmative defense is another matter.[20] Lack of justification is not an element of intentional offenses, and it is hard to imagine why such an element should be

17. See, e.g, id. at 132 ("For the wrong she admits to is a wrong of contributing to the kidnappers' wrongs (by failing to prevent them). It is a secondary wrong. It is her wrong but it is her wrong of failing to minimise the wrongdoing of all."). But see id. at 136 ("The relationship we have to our own actions is direct: we answer for them as such. The relationship we have to the actions of others is indirect: we answer for them only inasmuch as, by our own actions, we contribute to them.").

18. Id. at 142.

19. Id. at 132.

20. For instance, a doctor who asks a passerby to break into a closed pharmacy for medical supplies needed to save a third person's life is complicit in the passerby's offense though both are justified in their actions.

imported into the definition of complicity.[21] In any case, it matters little whether we reserve the term "complicity" for unjustified contributions to the wrongs of others, so long as we remember that it is only because our contributions to the wrongs of others make us responsible for those wrongs that we must justify them in the first place.

The relationship between Gardner's agent neutrality and his theory of complicity also is not entirely clear. One might assume that the theory of complicity is an indirect argument for agent neutrality rooted not in moral argument but in what Gardner calls "the structure of rational agency."[22] The theory of complicity states that one cannot avoid responsibility for wrongdoing solely by refraining from wrongdoing oneself. One must also prevent the wrongdoing of others when one is well-positioned to do so or be responsible as an accomplice to their wrongdoing. Their wrongs are one's own to justify or excuse and if the wrongs are punishable then one may be liable to punishment for them. One therefore has as much reason to prevent the wrongdoing of others as to avoid wrongdoing oneself, all else being equal.

This would be a powerful line of argument indeed; but it does not seem that it can succeed. For remember that the theory of complicity does not relieve one of responsibility for the one wrong one commits to prevent the many wrongs of others. One will either be responsible as a principal for a single wrong or as an accomplice for the many wrongs. So far as the theory of complicity is concerned, one may be faced with situations in which one is morally blameworthy and criminally liable no matter what one does. Gardner can avoid this conclusion only by introducing agent neutrality as a premise rather than as a conclusion of his argument. Agent

21. Note that wrongs involving recklessness and negligence are partly constituted by the absence of justification. Reckless driving involves in part the wrong of imposing unjustifiable risks of harm on others. By contrast, reckless homicide involves the distinct and more serious wrong of killing; the unjustifiable imposition of a risk of death is part of what makes the killer liable for that wrong. Similarly, one can imagine a variant of criminal facilitation which involves the wrong of taking an unjustifiable risk of contributing to the wrong of another. Complicity, by contrast, involves the distinct and greater wrong committed by the principal; the unjustifiable risk of contributing to that wrong, as well as the contribution itself, at most makes the accomplice liable for that wrong. But the wrong of complicity is not among the wrongs that may be constituted by the absence of justification.

22. Id. at 132.

neutrality implies that the prevention of the many wrongs justifies the commission of the one wrong while the omission of the one wrong does not justify the failure to prevent the many wrongs. Though one remains responsible as a principal for the one wrong, one is not liable to punishment for that wrong, since only unjustified wrongdoing may be punished. By contrast, one is both responsible as an accomplice and liable to punishment for the many wrongs if one fails to commit the one wrong. This generates the surprising conclusion that in some circumstances one can escape blame and punishment as an accomplice only by committing a wrong as a principal. Though surprising, this conclusion may be less disturbing than the conclusion that an individual may be faced with circumstances not of her own making in which she cannot escape liability for serious, culpable wrongdoing.

Agent neutrality cannot be a consequence of Gardner's theory of complicity because an agent-neutral account of justification must be introduced as a premise in order to reach the desired conclusion: that one is legally required to wrong one person to prevent similar wrongs to many others. Though the truth of agent neutrality is necessary to establish Gardner's conclusion, it is not sufficient for this task. This is because while reason and morality demand that all our actions are justified, law demands only that our wrongs are justified. We need not justify wrongs for which we are not responsible. If Gardner's theory of complicity is false then, if we fail to commit the one wrong, we are not responsible for any wrong. We are not responsible for the one wrong because we did not commit it, and we are not responsible for the many wrongs because our failure to prevent those wrongs does not make us responsible for those wrongs. If we are not responsible for any wrong then so far as the law is concerned there is nothing for us to justify.

Gardner needs his theory of complicity to show that if we commit the one wrong we are responsible as principals and that if we fail to prevent the many wrongs we are responsible as accomplices. Only then can agent neutrality establish that only the one wrong would be justified and that we are liable to punishment for the many wrongs. Of course, the rejection of Gardner's theory of complicity leaves open the question of whether we would be justified in committing the one wrong. But this is just to say that it leaves open the debate between agent neutralists and agent relativists. This is presumably what Gardner means when he writes that "[i]n principle, an agent-neutralist view carries greater

scope for wrongful complicity than an agent-relativist view."[23] So if Gardner's theory of complicity is false then an agent-neutral theory of justification alone cannot ground a legal requirement to wrong some to save others. The next sections provide some reasons to question that theory of complicity.

B. Choice of Evils

One might expect Gardner's theories of justification and responsibility to converge on a theory of the affirmative defense—variously described as necessity, choice of evils, and lesser evils—which states that the commission of a wrong may be justified if it is the only way to prevent a greater evil from befalling others. On the contrary, Gardner's argument conflicts with at least two features of the necessity defense. The first feature, of which less will be said, is that many jurisdictions do not recognize necessity as a defense to certain crimes against the person. Homicide is the most-discussed example, though rape and torture are sometimes excluded as well. To the extent that the law of necessity recognizes agent-relative constraints—prohibitions on the violation of certain rights even to prevent a greater number of violations of comparable rights of others—it will of course conflict with Gardner's conclusion. But many jurisdictions permit necessity as a defense to all crimes and it is always open to Gardner to argue that all jurisdictions should do so.

The second feature, however, is common to all jurisdictions and its elimination would amount to an elimination of the necessity defense as traditionally understood. This second feature is that even where the law governing necessity does not impose a constraint it grants a prerogative: a protected option to minimize or decline to minimize adverse outcomes whether these involve wrongs or non-wrongful harms. The law permits and perhaps encourages individuals to choose the lesser of two evils but does not require them to do so. Individuals do no wrong by declining to violate a legal norm to prevent more violations of the same norm or any

23. Id. at 132; see also id. at 140 ("agent-neutralism throws, in principle, a wider net of complicity than agent-relativism: it allows each of us fewer *justified* abstentions from preventing the wrongs of others.").

other bad consequence and they need not justify or excuse their decision.[24] The permissive structure of the necessity defense conflicts not only with the ultimate conclusion of Gardner's argument but with its premises as well, and the conflict extends beyond Gardner's agent neutrality and reaches his underlying theory of complicity. Gardner's theory is intended to illuminate the structure of collective wrongdoing in both personal morality and criminal law. The conflict between his theory of complicity and the permissive structure of the necessity defense itself indicates that the former cannot be an adequate account of the criminal law concept it is intended to capture. Moral claims which conflict with legal doctrines are not thereby refuted; they are merely converted into proposals for reform. But a theory of a legal category which conflicts with an adjacent legal doctrine may be flawed beyond repair.

It is an underappreciated feature of criminal law that necessity is primarily a doctrine of responsibility and only secondarily a doctrine of justification. When one person declines to wrong a second to prevent harm to a third, the first person has committed no wrong in need of defense. It is only when one person wrongs another that the issue of justification arises, and agent-relative and agent-neutral views conflict over *which* wrongs may be committed to prevent *how many* other wrongs. It would be a mistake to think that our law adopts Gardner's theory of complicity alongside an agent-relative theory of justification such as the one reflected in the doctrine of double effect. On such a view we would be responsible both for the wrongs we unjustifiably commit and for the wrongs we justifiably fail to prevent. Nor does our law adopt the view that one is not justified in omitting the one wrong but should be excused if the omission was motivated by sincere moral conviction.[25] On the contrary, part of the point of the necessity defense is that no defense is needed for wrongs committed by another that we fail to prevent by committing similar wrongs

24. Notice that self-defense and defense of others share the same permissive structure. This is so even though one arguably commits no wrong by repelling an unjustified attack. It would therefore be incongruous if personal defense (the prevention of one wrong by committing no wrong) were to remain a mere prerogative while necessity (the prevention of many wrongs by committing one wrong) is elevated to the status of a requirement. For this reason the strong reading of agent neutrality may conflict with two entrenched features of criminal law rather than only one.

25. Cf. Tom Stacy, Acts, Omissions, and the Necessity of Killing Innocents, 29 Am. J. Crim. L. 481 (2002).

ourselves. Those who wrong one person and claim necessity must prove that they did so to save others. By contrast, those who decline to wrong one person and thereby save others need not provide their reasons for their choice; they committed no wrong calling for a justification or excuse.

The prospects appear dim for reconciling Gardner's theory of complicity with the permissive structure of the necessity defense. Recall Gardner's observation that we are seldom well-positioned to prevent the wrongs of others.[26] One could argue that it would be too costly to investigate, with respect to every crime, whether anyone other than the principal was well-positioned to prevent it. Better to shift the burden to defendants to redeem norm violations by showing that they had sufficient information to reasonably believe their violation would result in fewer violations overall. Many accomplices will go free, but few innocent defendants will suffer. Yet criminal investigation necessarily includes the identification of witnesses to a crime as well as acquaintances of the accused—precisely those individuals best positioned to intervene. It therefore seems that considerations of institutional efficiency do not strongly disfavor further inquiry into whether one or more of those individuals were sufficiently well-positioned to intervene as to be at fault for not doing so.

C. Negative Complicity

Gardner plausibly claims that causal contribution to the wrongs of another makes one responsible for those wrongs and that failure to prevent the wrongs of another causally contributes to those wrongs. Gardner's mistake is to assume that these plausible claims apply without modification to cases in which one can prevent many wrongs only by committing fewer wrongs oneself. To accommodate such cases Gardner appears to dispense with the traditional requirement that an accomplice must act with the purpose of assisting or encouraging the principal. At the very least, Gardner is silent with respect to which mental state is required to become complicit in wrongdoing. There is a rich debate over whether knowingly or recklessly assisting a crime should render one an accomplice to that crime or whether the wrongfulness of non-purposeful assistance is better captured by separate offenses such as criminal facilitation. Those who

26. See Gardner, supra note 2, at 132–33.

would reject a "true purpose" requirement typically invoke examples in which knowledge or recklessness indicates insufficient concern for the rights and interests threatened by the criminal act assisted.[27] However, an attitude of culpable indifference is not typically attributed to those who refuse to wrong one person to save others from the same fate. Such individuals need not undervalue those whose wrongs they fail to prevent; their attitudes may be fully universalizable. They may feel both that they should not be wronged for the sake of others were they in the position of the one, and also that the one should not be wronged for their sake were they among the many. Even if the intent requirement is often an imprecise measure of culpability, Gardner dispenses with that requirement in cases in which it is least plausible to do so.

Complicity typically involves providing or enhancing the means, motive, or opportunity to commit a crime. With these affirmative causal contributions Gardner lumps the absence of an impediment by designating failure to prevent as a ground of complicity.[28] Gardner's example of a parent who fails to prevent a third party from harming her child does not help matters. It may be that "a person is an accomplice . . . if . . . having a legal duty to prevent the commission of the offense [that person] fails to make proper effort to prevent [that offense]."[29] But here it is the breach of duty which distinguishes the failure to act from the indefinite number of events but for whose occurrence or nonoccurrence the offense would not have been committed. True, the law generally does not hold people responsible for failure to prevent harms caused by natural forces, and it is not clear why the law should treat the wrongs of others any differently. But agent neutralists and agent relativists alike could support creation of a general legal duty to prevent both harms and wrongs when well-positioned to do so. However, only agent neutralists can support the more specific duty to commit wrongs to prevent still greater wrongdoing by others, and the success of Gardner's argument now rests on this latter duty. Agent neutrality

27. See, e.g., Backun v. United States, 112 F.2d 635, 637 (4th Cir. 1940) (Parker, J.) ("One who sells a gun to another knowing that he is buying it to commit a murder, would hardly escape conviction as an accessory to the murder by showing that he received full price for the gun. . . .").

28. See Gardner, supra note 2, at 137 ("Procuring or causing or inducing someone to commit a wrong; failing to prevent or permitting or enabling the commission of a wrong; these are straightforwardly causal modes of complicity.").

29. Model Penal Code § 2.06(3) (Proposed Official Draft 1962).

cannot figure as a premise both in the theory of complicity itself and in the account of justification the theory makes necessary.

The application of Gardner's premises to the scenarios he describes is undermined further by Gardner's own taxonomy of causal contributions.

> Roughly, killing is causing death other than by making a causal contribution to a killing by someone else; causing death, in turn, is making a causal contribution to a death other than by making a causal contribution to an abnormal action or event (often known as a *novus actus interveniens*) that itself makes a causal contribution to the death.[30]

An accomplice to murder, then, is one who causes death by causally contributing to a killing by another but not by way of an abnormal action or event. Gardner recognizes the possibility that some may take a killing by another to *be* abnormal in the relevant sense but his response to this concern is only partly satisfying. Gardner is certainly right that a killing by a paid assassin does not relieve his client of responsibility for the resulting death: the chain of causation runs through and is not cut off by the assassin's voluntary act.[31] But this case is not the one with which Gardner's theory is primarily concerned. The client provides the assassin with both a target and an incentive; Gardner provides his fictional captors with neither when they themselves wrong the many. The client initiates a causal chain the assassin merely extends; the captors both set events into motion and (should Gardner refuse their demands) bring them to a conclusion. So while a wrongful action may not necessarily cut off a causal chain extending from a previous wrongful action, a wrongful action may nonetheless cut off a causal chain extending from an earlier permissible action.[32]

Gardner conjoined a position in moral philosophy (agent neutrality) with a theory of a criminal law category (complicity), a union that would transform moral prohibitions into moral requirements and redefine resistance to evil as collaboration with evil. But his criminal law theory conflicts

30. Gardner, supra note 2, at 134.

31. Id. at 136–37.

32. Note also that a permissible action generally does not cut off a causal chain initiated by a wrongful action. If a philosophically inclined murderer creates a real-life Trolley Problem, he will be responsible for the one death if someone (permissibly) switches the trolley onto the less-occupied track.

with an adjacent criminal law doctrine (necessity) and is questionable on its own terms. To reject Gardner's conclusion it is not necessary to deny that we may be complicit in a wrong without intending that the wrong occur. We need not deny that we are generally required to prevent the wrongs of others, even at considerable cost to ourselves. Nor need we deny that one person may be causally responsible for the wrongs of another. It is sufficient to deny that culpable indifference can be reliably inferred from refusal to commit a wrong, that one is specifically required to commit wrongs to prevent the wrongs of others, or that causal responsibility runs through the wrongdoing of others which one cannot prevent without committing a similar wrong oneself. Any one of these grounds would be sufficient to resist the inference that plausible theories of justification and responsibility together support a duty to do wrong.

II. ACTS OF STATE

It has been suggested that the legality of torturing suspected terrorists "is not about who they are" but is rather "about who we are."[33] Such agent-focused accounts of deontological constraints can seem compelling but lend themselves to manipulation. When Cass Sunstein and Adrian Vermeule argue that states are exempt from constraints on killing and torture because the state is a distinctive kind of moral agent, they presuppose that moral constraints derive from those subject to them rather than from those protected by them. They argue that governmental acts cannot be coherently distinguished from governmental omissions or governmental intentions from governmental foresight. They go on to argue that these distinctions, even if coherent, carry no moral force when applied to states. States are either exempt from ordinary morality due to their distinctive agency or are ordinary agents subject to a distinctive morality.[34]

33. Senator John McCain, It's About Us, 33 Hum. Rts. 20, 22 (2006).

34. Both positions generate a number of counter-intuitive implications which cannot be discussed at length. It seems that on either view states may commit wrongs for the sake of citizens who may not commit those same wrongs for their own sake. The prohibition of terrorism would seem to apply to paramilitary groups but not to the states they fight; but the prohibition ceases to apply to those same groups the moment they take control of a state. Finally, constitutional rights would not limit the states they are meant to bind even if the rights in question are meant to benefit the right holders rather than society as a whole.

The authors conclude that states are morally required to minimize suffering and death and are not merely permitted but also required to torture and kill as means to that end. It is argued below that constraints on torture and killing, including those reflected in the doctrine of double effect, are not agent focused but victim focused and that their purpose is not to maintain the moral purity of the potential wrongdoer but to reflect the moral status of the potential victim. Finally, the authors argue that even if deontological constraints apply to states and to individuals with equal force, these constraints can be overridden when the wrongs prevented pass a certain numerical threshold. Even if this is true, the authors are wrong to conclude that the routine violation of such constraints is either permitted or required when the average number of wrongs prevented by each wrong committed is greater than the threshold number. Each resort to killing or torture must be justified on its own terms and not by covert reference to the aggregate benefits of institutionalized wrongdoing.

A. Can States Be Moral?

Sunstein and Vermeule write that "government . . . always faces a choice among policy regimes, and in that sense cannot help but 'act'"[35] and later that "government cannot help but act, in some way or another, when choosing how individuals are to be regulated."[36] The authors reason that since the state is a policymaking entity and the selection of a policy is itself an action, the state always acts and never omits. Taken by itself, this argument has much the same structure as the argument that abandoning a drowning child is an act rather than an omission if it involves walking away. Most actions involve many omissions and most omissions involve at least one action. For this reason, application of the act/omission distinction turns on whether an agent's most direct contribution to a wrong is the commission of the wrong (an action) or the failure to prevent its

35. Sunstein & Vermeule, supra note 11, at 709.

36. Id. at 720. See also id. at 722 ("The only interesting or even meaningful question government ever faces is not whether to act, but what action should be taken-what mix of criminal justice policies government ought to pursue.").

commission by another (an omission).[37] So even if the distinction does not apply to policy choice it may still apply to the policy chosen.

The most straightforward application of the act/omission distinction to states would differentiate between the commission of wrongs by state officials and the failure of state officials to prevent wrongs committed by nonstate actors. The authors marginalize the executive branch and its officers and argue that an action is imputable to the state when its policymaking branches authorize the action or forbid the action but fail to create adequate deterrents to its commission.[38] However, both domestic and international law locate state action in the conduct of officials acting under color of law even if in violation of law and with apparent authority even if without actual authority. States provide their officials with the means and the opportunity to commit distinctive wrongs such as constitutional torts and war crimes; states are therefore responsible for the wrongs of their agents even when their agents act without authorization. The authors also maintain that the state is responsible both for the wrongs its officials commit and for the wrongs they fail to prevent. However, this response does not undermine, but in fact presupposes, the coherence of the distinction between state and nonstate action. For the state is responsible as a principal for the first set of wrongs and at most responsible as an accomplice for the second set of wrongs. Importantly, the ability to distinguish between the state as principal

37. See Warren S. Quinn, Actions, Intentions, and Consequences: The Doctrine of Doing and Allowing, in Killing and Letting Die 355, 366–67 (Bonnie Steinbock & Alistair Norcross, eds., 2d ed. 1994) ("An agent's *most direct contribution* to a harmful upshot of his agency is the contribution that most directly explains the harm. And one contribution explains harm more directly than another if the explanatory value of the second is exhausted in the way it explains the first." "Harmful positive agency is that in which an agent's most direct contribution to the harm is an action, whether his own or that of some object [under his control]. Harmful negative agency is that in which the most direct contribution is an inaction, a failure to prevent the harm.").

38. Sunstein & Vermeule, supra note 11, at 722 ("It is tautologically true that a [policy] package lacking capital punishment does not include the particular 'action' of imposing that form of punishment."); id. at 723 ("Those who emphasize intention presumably do not mean to focus narrowly on the actual individual who carries out the final action on the state's behalf."); id. ("If we put aside the intentional actions of low-level officials, the relevant policies in either regime will be set by a complex process of democratic and regulatory interaction among voters, legislators, administrators, and judges. In this large-scale process of collective decisionmaking, the concept of intention might be coherent, but it becomes too attenuated to bear the moral weight often put upon it.").

and the state as accomplice presupposes the ability to distinguish between state action (including both the acts and omissions of state officials) and non-state action. So this response is really an attack on the distinction's moral importance rather than its conceptual coherence. Nor is such an attack likely to succeed. As we have seen, one is not responsible for the wrongs one fails to prevent if their prevention requires the commission of comparable wrongs to others. Moreover, the theory of responsibility cannot guide a choice between responsibility as a principal for one wrong and responsibility as an accomplice for many wrongs. Such a choice is governed by a theory of justification the authors allude to but do not produce.

The authors go on to argue that even if the act/omission and intention/foresight distinctions can be coherently applied to states, these distinctions lack the moral relevance they might have for individuals. The authors cite the U.S. government's failure to respond adequately to Hurricane Katrina as a potentially culpable governmental omission. Nor can that omission, if culpable, be redeemed by a showing that the resulting death and devastation was not intended but merely foreseen. The authors argue that the act/omission distinction lacks moral force in the context of state activity because the reasons for limiting the affirmative duties of individuals do not apply to states. Chief among these reasons is that "human beings have a presumptive right to go about their private lives without official interference; if omissions were sanctioned, through morality or law, liberty would be badly compromised." However, "[g]overnment officials cannot plausibly claim that their liberty is abridged when citizens ask them to take steps against, say, domestic violence, occupational deaths, or rape."[39]

Eric Blumenson was the first to observe that the authors' argument involves a non sequitur. Blumenson agreed that governments have both negative duties of forbearance and positive duties of assistance toward their citizens; but he recognized that it does not follow that governments may violate the former in order to satisfy the latter.[40] Similarly, we may agree with the authors that the state has a duty to prevent foreseeable harms to its citizens; but this does not entail that the state may intentionally harm some to prevent foreseeable harms to others. The authors write that those who

39. Id. at 725.

40. Eric Blumenson, Killing in Good Conscience: What's Wrong with Sunstein and Vermeule's Lesser Evil Argument for Capital Punishment and Other Human Rights Violations? 10 New Crim. L. Rev. 210, 222–23 (2007).

accept the moral relevance of the act/omission distinction believe that there are negative duties but no positive duties.[41] They similarly indicate that those who accept the intention/foresight distinction believe that there is no moral requirement to prevent foreseen but unintended harms.[42] However, there are several ways in which a moral distinction can make a moral difference between two requirements, both of which are accepted as real and important. Killing may be a more serious wrong than letting die; purposeful wrongdoing may be more blameworthy and deserving of greater punishment than non-purposeful wrongdoing;[43] greater force may be used against someone who is killing another person than against someone who is allowing another person to die. Most importantly, it may be justifiable to let some die to save many others but not justifiable to kill some to save many others; similarly, one may be justified in causing foreseen deaths as a side effect of one's action but not be justified in intentionally killing as a means to one's end. Defenders of the act/omission and intention/foresight distinctions generally do not deny the existence of the requirements the authors defend; they primarily argue that violations of moral requirements marked by the relevant distinctions admit of different justifying circumstances.

There is, however, an even deeper problem with the authors' argument. The authors deny that deontological constraints apply to states because

41. See Sunstein & Vermeule, supra note 11, at 725 ("What is the moral importance of this distinction [between acts and omissions]? Individuals, let us suppose, are prima facie obligated not to harm others, but they have no obligation to assist them.").

42. See id. at 722 (asking the reader to "consider a situation in which regulators refuse to adopt motor vehicle or drug-safety regulations that would prevent significant numbers of statistical deaths. Is the refusal acceptable because it leads to deaths that are not, strictly speaking, intended?").

43. Cf. Carol Steiker, No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty, 58 Stan. L. Rev. 751, 759 (2005) ("[T]he relevance of purposeful action is clear: those who purposefully transgress are more blameworthy because they have affirmatively chosen their course of action and its results"). The authors correctly observe that these retrospective considerations do not significantly impact prospective decision making. See Cass Sunstein & Adrian Vermeule, Deterring Murder: A Reply, 58 Stan. L. Rev. 847, 851 (2005) ("[N]o one is talking about the appropriate punishment of governors or about how much to 'blame' individual public officials. The question is how to evaluate official policies."). Moral agents are concerned primarily with acting permissibly and only secondarily with how their impermissible acts will be judged after the fact. Steiker locates the purposeful/non-purposeful distinction within a grading rule, rather than in the content of two different conduct rules, the relative seriousness of their violations, and the conditions for their permissible violation.

they claim that states are moral agents with distinctive features. This approach presumes that because constraints direct agents not to commit wrongs rather than to ensure that fewer wrongs are committed (and are therefore agent relative) these constraints must arise from features or properties of the agent herself or of the relationship between agents and their actions (and are therefore agent focused). Only on an agent-focused view can the applicability of constraints turn on distinctive features of agents. Agent-focused views are defective, however, in part because they create an asymmetry between the ground of a constraint and a victim's ground for complaint.[44] When those protected by a constraint demand its enforcement or complain of its violation they do so because they have been harmed (a property of the victim) or treated disrespectfully (a property of the relationship between agent and victim) or treated unfairly (a property of the relationship among victims).[45] On a symmetrical view these properties would provide the basis for the constraint itself as well as for the warranted responses of others. Victims are not merely the incidental beneficiaries of duties arising from properties of the agent; their interests are among the grounds of those duties.[46]

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44. See 2 F.M. Kamm, Morality, Morality 240–41 (1996).

45. The applicability of a constraint grounded in the relationship between an agent and a victim can be affected by distinctive properties of the agent. For this reason, states may have moral duties to their citizens that they do not have to non-citizens. However, this article deals with victim-focused constraints corresponding to human or natural rights rather than with relationally grounded constraints corresponding to civil and political rights. Citizenship and other relational properties should not affect the analysis.

46. Prerogatives are thought by some to represent morality's accommodation of our natural tendency to reason from a personal point of view from which our projects, relationships, and commitments carry a weight out of proportion to their agent-neutral value. See, e.g., Samuel Scheffler, The Rejection of Consequentialism 20 (Rev. ed. 2003). It might therefore seem to display a different kind of symmetry to rest constraints on features of our own agency. However, prerogatives need not be understood in purely agent-focused terms. The demands of morality-at least that part of morality concerned with permissions, requirements, and prohibitions-can instead be understood in terms of the legitimate demands of others. On such a view, prerogatives represent the limits of how much we can legitimately demand that others sacrifice for our own sake. It is in part for this reason that it is much harder to justify options not to protect the rights or promote the well-being of others than to justify options not to fully pursue one's enlightened self-interest or promote impersonal values such as the appreciation of beauty or the acquisition of knowledge. If agents are always permitted not to pursue impersonal values or their enlightened self-interest then all prerogatives can be accounted for in victim-focused rather than agent-focused terms.

It has been argued elsewhere that the moral relevance of the act/omission distinction derives from properties of victims rather than from properties of agents.[47] This position is not obviously correct. It may be worse to kill or torture someone than to allow them to be killed or tortured; but it is not worse for the victim, who is killed or tortured either way. Some argue that it is somehow worse for the perpetrator and on that basis adopt an agent-focused account of deontological constraints.[48] But if killing one person is the only way to save many others from being killed, it would seem "self-indulgent or squeamish"[49] to care more about not becoming a killer than about the many not being killed. The crucial move in developing a victim-focused account of constraints is to observe that the value of a constraint is not exhausted by the consequences of conformity with the constraint; its value derives in part from the rights to which it gives rise. Victims have an interest not only in what happens to them but also in what permissibly may be done to them, not only in their fate but also in their status.[50] As Blumenson notes, constraints on killing and torture reflect a conception of each person as independent and inviolable, possessing an exclusive claim over her own life and bodily integrity that cannot generally be overridden to prevent harm to others. By contrast, our claim to the assistance of others is shared equally with all those similarly situated. If duties of forbearance did not constrain duties of assistance, each person would have an equal claim on the lives and bodies of others. It is in this sense that those who reject deontological constraints regard individuals as "fungible instruments of the collective interest."[51]

47. See, e.g., Quinn, supra note 37; Kamm supra note 15.

48. See, e.g., Stephen L. Darwall, Agent-Centered Restrictions from the Inside Out, 50 Phil. Stud. 291 (1986).

49. Gardner, supra note 2, at 129.

50. See Kamm, supra note 15, at 28–29.

51. Blumenson, supra note 40, at 220. But see Stacy, supra note 25. Stacy argues that deontological categories break down in cases involving conjoined twins, and that this implies that these categories are not valid in other contexts. These cases are exceptional in a number of respects, including the affirmative duties of the parents of the twins to preserve their lives and the fact that the twin who dies as a result of separation would have died shortly had the twins remained conjoined. Perhaps most importantly, the twins share a number of vital organs. Hence the assumption that each person has an exclusive claim over her own body does not apply. Rather, conjoined twins present an allocation decision which differs from ordinary organ distribution only in that their claims to the shared organs trump those of third parties. In choosing which of several equally valid claims to a resource should be satisfied, it is acceptable and indeed advisable to ask which claimant will benefit most from that resource. Nothing appears to follow about the rights of persons inhabiting separate bodies.

This section argued that the act/omission distinction applies to states and that its moral relevance derives from properties of victims rather than from properties of agents. The resulting constraints constitute and express the inviolability of each person. The state is a distinctive moral agent in many ways but cannot violate the rights of some to preserve the comparable rights of others. The task of the next section is to show that the intention/foresight distinction, like the act/omission distinction, should be understood as victim focused and status based.

B. Rediscovering Double Effect

The classical nonconsequentialist statement of the conditions which may justify the intentional and foreseeable infliction of harm is the doctrine of double effect (DDE). The DDE occupies an important place in international humanitarian law and in contemporary debates over the moral basis of the War on Terror. For one of the corollaries of the DDE is that one may not intentionally kill noncombatants as a means of preventing the foreseeable killings of others, even when the killings foreseeably prevented outnumber the killings intentionally committed.[52] Despite its centrality, the DDE is sometimes misunderstood to posit a sharper moral distinction between purposeful and non-purposeful killing than in fact exists. The DDE entails that while killing civilians as an end or as a means to an end can almost never be justified, killing civilians as a foreseeable side effect of the means employed or the ends achieved can sometimes be justified. One should not infer from this that permissibility turns on intention alone or ignore independent restrictions on non-purposeful killing. Non-purposeful killing is not justified where it is unnecessary or disproportionate to the end pursued.[53] Moreover, unjustified (because unnecessary or disproportionate) non-purposeful killing is just as wrong as unjustified (because unjustifiable) purposeful killing; this is true even if the latter is a more

52. See, e.g., Rome Statute of the International Criminal Court, art. 8.2(b)(i) (recognizing as a war crime "[i]ntentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities").

53. See id. art 8.2(b)(iv) (recognizing as a war crime "[i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects . . . which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated").

serious wrong involving greater blameworthiness and calling for more severe punishment than the former. Seriousness and blameworthiness come in degrees; punishment can be graduated; but permissibility is all or nothing.[54]

The DDE is best understood as the joint product of certain mandatory norms and the criminal law requirement of justificatory intent. A mandatory norm is constituted by a protected reason which, in turn, is both a first-order reason not to perform an action and a second-order, exclusionary reason not to act on a specified subset of first-order reasons that would ordinarily count in favor of performing the action.[55] For instance, the doctrine of noncombatant immunity (DNI) is a mandatory norm consisting of a primary reason not to kill noncombatants as well as an exclusionary reason; the causal consequences of killing noncombatants fall within the scope of that exclusionary reason such that those consequences cannot justify those killings.[56] Acts which kill noncombatants either as an end or as a chosen means are therefore unjustifiable. By contrast, acts which cause noncombatant deaths may be justified if they also have the "double effect" of producing good consequences that are not themselves caused by noncombatant deaths. Consequences of the latter kind fall outside the scope of the exclusionary reason and may be balanced directly against the first-order reasons against killing noncombatants. If these consequences outweigh or are otherwise proportional to the noncombatant deaths then the act is justifiable. By contrast, the killing of combatants may be justified either by the consequences or by the side effects of their deaths. This understanding of mandatory norms reflects the idea that individuals are not mere means to the production of good consequences, even though individuals may lose their protected status through their actions, and even

54. Cf. Frances M. Kamm, Terrorism and Several Moral Distinctions, 12 Legal Theory 19, 36 (2006) ("That one wrong is a more serious wrong than another need not mean that it is more wrong. Some hold that all wrong acts are equally wrong. However, murdering someone is a more serious wrong than breaking his arm, other things being equal.").

55. See Joseph Raz, Practical Reason and Norms (Rev. ed. 1999).

56. Threshold deontologists hold that the DNI only excludes causal consequences of killing noncombatants that fall below a qualitative or quantitative threshold. See section II. C below.

though it is otherwise permissible to balance the welfare of different individuals.[57]

Torture and the killing of noncombatants, whether intended or merely foreseen, are always wrongs in need of justification. These wrongs are justifiable when the relevant mandatory norms are overridden but are only justified when performed with justificatory intent. The purpose of a justification defense is to concede wrongdoing but argue that the offender acted for a sufficiently good reason. For such a defense to succeed, the normative reason supporting the act must also be the motivating reason for which the agent acted. A wrong is justifiable if it is supported by an undefeated reason; but a wrong is justified only if it is performed for an undefeated reason.[58] The role of justificatory intent shows why it is a mistake to oppose the DDE on the ground that the intention of an agent cannot affect the permissibility of her act. Permissibility encompasses both innocent conduct and justified wrongdoing. Intention need not make the difference between innocent and wrongful conduct to make the difference between justified and unjustified wrongdoing.

The significance of justificatory intent is generally thought to lie in the fact that a wrong committed for a sufficiently good reason does not reflect badly on an agent's character and therefore may seem at home within an agent-focused approach.[59] There is, however, an alternative foundation for the requirement. First, we know that a bad reason can compound a wrong it motivates. For instance, hate crimes are ordinary crimes motivated by

57. The relationship between the causal component of the DDE and the no-means principle explains why it is sometimes permissible to inflict a lesser harm on a person that prevents a greater harm to the same person when the person consents or is incapable of consent. In these cases the person is not treated as a means to the ends of others but is rather assisted in pursuing her own actual or imputed ends.

58. Cf. Robert Cryer & A.P. Simester, Iraq and the Use of Force: Do the Side-Effects Justify the Means? 7 Theoretical Inquiries L. 9 (2006) (invoking justificatory intent to argue that the invasion of Iraq cannot be justified by considerations which did not motivate the relevant actors). Cryer and Simester argue that when a wrong (such as aggression) is justifiable in light of its causal consequences, the wrong is justified only if it is committed in order to bring about those consequences. By contrast, this article uses the concept of a protected reason to elaborate the claim that some wrongs (such as killing noncombatants) are rendered justifiable not by their causal consequences but by the causal consequences of the act which causes the wrong which are not consequences of the wrong itself.

59. See, e.g., John Gardner, Justification and Reasons, in Harm and Culpability (Andrew Simester & A.T.H. Smith eds., 1996).

animosity toward a social group. The offender's motivating reasons do not make her act wrong. Nor does the mere entertainment of malicious thoughts constitute an independent wrong. Rather, the commission of a more basic wrong for a discriminatory reason inflicts an additional expressive harm on her victim, which compounds the underlying wrong and which may call for additional punishment.[60] Second, we know that we need not reduce the value of a norm to the value of actions which conform to that norm; the norm may instead reflect an important aspect of our moral status. Just as mandatory norms such as the DNI reflect our inviolability, the requirement of justificatory intent reflects our dignity by ensuring that acts which violate our rights nonetheless express respect for our value. Dignity demands that we be treated with respect and not merely as if we are respected. To the extent that dignity makes demands on our thoughts as well as our actions, the law's enforcement of its claims will be limited. Morality regulates all our thoughts and actions, including both our treatment of others and our attitudes toward them. Law, by contrast, demands only that we have good reasons for our wrongs. When we commit wrongs our motivating reasons become a legitimate subject for the criminal law. If those reasons respect the moral worth of the victim, they may justify the wrong; if those reasons regard the victim as a disposable instrument, they may aggravate the wrong.

The victim-focused and status-based view proposed above dispels a longstanding confusion regarding the concept of dignity. Dignity is often cited as a basic moral value but in fact is not a value in the strict sense. A person's dignity may be denied or ignored or forgotten but cannot be damaged or repaired or enhanced; it is not affected by human action in the way we expect values, whose preservation and promotion are to guide human action, to be affected. For this reason a person whose dignity has been attacked is said to suffer *diminishment*: the appearance of degradation or loss of value where none actually occurs.[61] Similarly, though the phrases "expressive harm" and "dignitary harm" are often used interchangeably, expressive harms are not harms to one's dignity. It is better for

60. See Adil Ahmad Haque, Group Violence and Group Vengeance: Toward a Retributivist Theory of International Criminal Law, 9 Buff. Crim. L. Rev. 273, 313–15 (2005).

61. Jean Hampton, Correcting Harms versus Righting Wrongs: The Goal of Retribution, 39 UCLA L. Rev. 1659, 1673 (1992).

a person to be treated with respect rather than with contempt; it is better not for the person's dignity, which remains unaltered no matter how greatly or how frequently it is ignored, but for the person whose dignity it is. Inappropriate attitudes diminish our welfare in a broad sense; though their bare existence causes no subjective suffering, their existence makes us worse off.[62] The added harm inflicted by a denial of our equal moral worth is a setback to our interest in being properly valued. This denial ignores and disrespects our equal moral worth, but it does not affect our equal moral worth one way or the other.

Dignity is not a value but a status the possession of which has value for its possessor. It is a status the law protects, not pervasively but selectively, by punishing wrongs which, though justifiable, are not justified. It is a mistake to think that the value of having dignity is exhausted by the value of being treated with dignity. The possession of dignity is no guarantee that we will not be disrespected, just as the possession of inviolability is no guarantee that we will not be wronged. The value of having dignity is the value of being the sort of entity which may not be disrespected, but whose moral worth must be honored even, and especially, when breached. The DDE receives further elaboration and defense in part III. For now it is enough to observe that the DDE is immune to Sunstein and Vermeule's attempts to show that the intention/foresight distinction does not apply to states because states are moral agents with distinctive features. The DDE does not derive its moral force from features of the agents to whom it applies but from features of victims and their moral status.[63]

C. Routinizing Wrongdoing

Sunstein and Vermeule fail to establish their most ambitious claim: that deontological constraints against torture and killing lack conceptual coherence and moral relevance when applied to states. But their fallback

62. See Meir Dan-Cohen, Harmful Thoughts, in Harmful Thoughts: Essays on Law, Self, and Morality 172 (2002).

63. The authors also attack a final distinction between authorizing and forbidding wrongdoing. They argue that the state is responsible not only for the wrongdoing it authorizes but also for the wrongdoing it forbids but fails to adequately deter. Echoing Blumenson, we may agree that the state must create the strongest permissible deterrents to wrongdoing while denying that wrongdoing is a permissible deterrent to further wrongdoing. See Blumenson, supra note 40.

position is perhaps their most powerful. As they observe, most deontologists admit that constraints such as the DDE are not absolute and may be justifiably breached if the wrongs thereby prevented are sufficiently more numerous or sufficiently more grave than the wrongs committed.[64] The threshold of sufficiency can be understood quantitatively—as by those who argue that constraints against torture and killing noncombatants may be violated to save a specified number of others from a similar fate—or qualitatively—as by those who argue that such constraints may only be violated to prevent the destruction of a national, ethnic, or religious group as such.[65] On the quantitative view, reasons arising from intrinsic properties of individuals can be aggregated and at a certain point become overriding; on the qualitative view, reasons arising from relational properties of groups tip the balance between competing claims of individuals.[66] Threshold deontology of either kind differs from pure consequentialism in two important ways: lesser wrongs to many people may not be aggregated to outweigh greater wrongs to fewer people; and wrongs may not be committed to prevent an equal number of comparable wrong to others. The authors do not distinguish between quantitative and qualitative thresholds but their arguments presuppose the former. This presupposition, though undefended and possibly unwarranted, will be accepted for the purposes of argument.

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64. Judith Thomson denies that wrongs can be justified by the prevention of a greater number of comparable wrongs to others. She argues that since wrongs cannot be aggregated across persons, a wrong to one person can be justified only by the prevention of a substantially more serious wrong to at least one other person. Killing and torture can never be justified because there are no wrongs substantially more serious than these which their commission might prevent. See Judith Jarvis Thomson, The Realm of Rights (1990). It is not clear if her view is properly described as a form of threshold deontology.

65. See, e.g., Walzer, supra note 4, at 254, 268. Cf. Kevin Jon Heller, The Rhetoric of Necessity (or Sanford Levinson's Pinteresque Conversation), 40 Ga. L. Rev. 779 (2006) (arguing that a president may only violate the Constitution to protect the constitutional order from complete destruction but not to save many lives). Note that on the quantitative view there is a constant ratio between the wrongs committed and the wrongs prevented; on the qualitative view the preservation of a community can justify many wrongs while a single wrong cannot be justified by the prevention of many wrongs that do not result in the destruction of a community.

66. Posner and Vermeule are therefore incorrect when they write that threshold deontologists are "already in the business of aggregating harms across persons." Eric A. Posner & Adrian Vermeule, Should Coercive Interrogation Be Legal?, 104 Mich. L. Rev. 671, 677 (2006). Defenders of qualitative thresholds need not aggregate the claims of individuals to recognize the supervening and irreducible value of groups.

For the sake of their argument, the authors assume a quantitative form of threshold deontology and accept that those executed or tortured retain their rights despite their past behavior. The authors go on to argue that if it is justifiable to wrong one person to prevent comparable wrongs to N people then it must be justifiable to institutionalize a practice which over time will wrong X people and prevent comparable wrongs to at least N(X) people. In the authors' primary example, if the number of deaths deterred by institutionalized capital punishment divided by the number of persons executed is equal to or greater than the number of deaths the prevention of which would justify a single act of killing, then the institution of capital punishment is justified. Sunstein and Vermeule argue that capital punishment prevents eighteen times more killings than are committed through executions, and that threshold deontologists would agree that otherwise wrongful killing would be permissible to save eighteen lives. Similarly, if the number of deaths prevented using information gleaned through institutionalized torture divided by the number of persons tortured is equal to or greater than the number of deaths the prevention of which would justify a single act of torture, then the institution of torture is justified. The authors argue that those who deny the validity of the above inferences display an irrational cognitive bias in favor of identifiable lives over statistical lives.[67] The authors conclude that under the factual conditions stipulated above, torture is not only permitted but required because an "agent is obliged (not merely permitted) to promote the best overall consequences once the threshold has been crossed."[68]

The above argument draws its power from its appearance of arithmetic logic. The argument draws its relevance from its reflection of actual practice. Rather than defending the institution of torture by defending real or imagined instances of torture, the authors defend instances of torture by justifying the institution. The ritual invocation of ticking time-bomb scenarios misrepresents the nature of contemporary torture. The United States and its allies do not identify individuals known to have information regarding impending attacks and then forcibly extract that information. Rather, they detain hundreds of people whose possession of relevant information is unknown and subject all of them to techniques aimed at

67. Sunstein & Vermeule, supra note 11, at 740–41.
68. Id. at 727 n.68.

their psychological disintegration, hoping that over time this practice will yield information leading to the identification of individuals and groups planning future terrorist attacks. Rather than deploy fictional cases to defend fictional practices, the authors' argument engages directly with the way we torture now.

The authors accuse opponents of capital punishment and institutionalized torture of an irrational bias in favor of identifiable people over statistical people. But the problem with the institutions the authors defend is not that we cannot identify in advance which individuals will be saved by executing or torturing a given person but rather that the execution or torture of any given person may save too few or even none. The claim that killing or torturing actual people can only be justified if this saves a sufficient number of actual people from a similar fate is neither irrational nor a bias; it forms the core of threshold deontology, which the authors accept for the sake of their argument. The authors sometimes write that each execution deters an average of eighteen murders and sometimes that each execution deters eighteen murders.[69] Yet there is no valid inference from the first claim to the second. Averages are properties of statistical distributions that should not be confused for properties of individual events. To say that each execution deters an average of eighteen murders is to say that the total number of murders deterred by the institution of capital punishment divided by the total number of executions is eighteen; it is not to say that each execution actually deters eighteen murders. Nor can one conclude, absent data regarding the linearity of the deterrence function, that each execution deters "some eighteen murders"[70] or approximately or more or less eighteen murders. Depending on the shape of the function a given execution may deter many more or many fewer. Nor, finally, can one conclude that the number of murders deterred by each execution will probably or more often than not exceed the threshold number or that an execution that fails to deter that many murders can be excused by the reasonable belief that it would do so. The statistical mean may fall above the threshold while the statistical median falls below the threshold. In that case each execution will have an expected value that crosses the threshold, but the antecedent probability that its actual value will cross the threshold will be less than .5. Threshold deontologists cannot endorse a practice most applications

69. See, e.g., id. at 727.

70. Id. at 706, 708, 719, 731.

of which are unjustified just because in a minority of applications the threshold is exceeded by a very wide margin. If a type of act is more likely to be unjustified than justified then its commission in a particular case cannot be excused by the average consequences of its routine performance.

The preceding point parallels a familiar approach to the theory of criminal punishment. It is plausible to think that the enormous expense of institutionalized punishment is justified if and only if its future benefits substantially outweigh its many costs. But it does not follow from this that the application of punishment in a particular case is justified by those aggregate consequences. The good consequences of punishing any particular individual might be outweighed by the suffering inflicted; the good consequences might be very great but punishment may be limited by the culpability of the defendant. So, it is argued, the application of punishment to particular individuals must be defended on retributivist grounds. While the institution of punishment is justified by its aggregate consequences, the distribution of punishment is justified by the wrongdoing, fault, and responsibility of each individual defendant. The authors, by contrast, defend both the institution of torture and the torture of particular individuals not as a response to past wrongdoing by the person tortured but as a means of preventing future wrongdoing by others. The authors mistakenly conclude that if enough future wrongdoing is prevented by the institution of torture, then both the institution and its application to individuals are justified. On the contrary, both the institution and each application must prevent comparable wrongs to others for either to have even a plausible claim to justification.

III. THE END OF INNOCENCE

This final part completes the reconstruction and defense of three doctrines of international humanitarian law designed to protect noncombatants from attack and lawful combatants from punishment. Earlier it was argued that, as applied to the laws of war, the doctrine of double effect (DDE) is best understood as the joint product of the doctrine of noncombatant immunity (DNI)—characterized as a protected reason against killing noncombatants which excludes the consequences of noncombatant deaths but competes with the other consequences of a military strike—and the requirement of justificatory intent—which states that a wrong is justified

only if it is not only supported by sufficient reasons but also performed for those reasons. This interpretation of the DDE is impervious to traditional arguments that the permissibility of an action does not turn on the intention of the actor. The new interpretation can be expanded in light of Frances Kamm's distinction between reasons for action and conditions on action and contracted in light of her distinction between producing and sustaining good consequences but in any case retains its basic structure and function. Importantly, the latter distinction can be used to defend the DNI against Jeff McMahan's argument that noncombatants who are responsible for the threat posed by combatants in an unjust war may be intentionally killed. Finally, the earlier discussion of justification and responsibility helps explain why McMahan's argument that every killing committed in an unjust war is itself unjust does not undermine the doctrine of combatant immunity (DCI).

A. Defending Double Effect

In a justifiably celebrated essay, Jonathan Bennett argued that the DDE yields unacceptable results in cases of "narrow intention."[71] Bennett imagined an aerial bomber who does not strictly intend to kill noncombatants but only to make them appear dead and thereby create terror in the community. The bomber would stage an attack that would create the illusion of death without killing, but would not stage an attack that would kill without creating the appearance of death. Bennett concluded that permissibility cannot turn on the scope of intention in this way. However, the interpretation of the DDE put forward in this article turns the objection on its head. For on the traditional understanding of the DDE a narrow intention is needed to inculpate, while on the new interpretation a narrow intention is needed to exculpate. The terror bomber commits a wrong by killing noncombatants and this wrong does not turn on the bomber's intention. The bomber's intention enters at the stage of justification. The bombing is justifiable only if the noncombatant deaths are proportional to the consequences of the bombing which are not also consequences of the noncombatant deaths, and the bomber is justified only if she acts to produce those consequences. On the traditional view, an act falls afoul of

71. See Jonathan Bennett, Morality and Consequences, in The Tanner Lectures on Human Values II, at 110–11 (Sterling M. McMurrin ed., 1981).

the DDE only if it is performed with a specific intention; otherwise it is permissible. On the view proposed here, an act falls afoul of the DDE unless it is performed with a specific intention; otherwise it is unjustified. It is no longer an objection to the DDE that it is too easy to evade, though it might be an objection that it is too hard to satisfy.

In an equally important work, Judith Jarvis Thomson argued that the DDE unduly restricts military strategy by resting the permissibility of a planned attack on the intentions of those charged with carrying it out.[72] A commander should not have to abandon a strike on a legitimate target, causing only necessary and proportionate noncombatant deaths, simply because her pilots are motivated by the desire to kill the innocent. Similarly, a pilot should not have to refuse an order that would be lawful but for her commander's sinister motives. The traditional interpretation of the DDE is vulnerable to this objection because it treats intention as a matter of permissibility rather than justification. Permissibility attaches to acts, and one person cannot solicit an impermissible act from another even if the act is only impermissible because the perpetrator acts with a bad intention. Justification, by contrast, attaches to actors, and a perpetrator's lack of justification does not entail a solicitor's lack of justification or vise versa. If the commander acts for good reasons, she need not refrain from sending a pilot into action who will act for bad reasons. Similarly, the reconstructed DDE is impervious to Sunstein and Vermeule's argument that it is not always possible or meaningful to attribute intentions to entire states.[73] Their argument presupposes that the state can only commit intentional wrongs if the state as a whole has identifiable intentions. On the interpretation proposed above, the state commits intentional wrongs when state actors commit (as principals) or contribute to (as accomplices) primary wrongs without justificatory intent. It is the status of the actors that makes their actions imputable to the state for such purposes as determining what law applies or what remedies are available. The relevant intentions are not those of the state as a whole but those of each state actor who commits or contributes to the primary wrong. Collective intentions are unnecessary given such an individualized approach.

Frances Kamm endorses the views of Bennett and Thomson but goes beyond them to argue that the DDE fails to recognize morally important

72. Judith Thomson, Self-Defense, 20 Phil. & Pub. Aff. 283 (1991).

73. Sunstein & Vermeule, supra note 11, at 723.

distinctions between producing and sustaining good consequences and between reasons for action and conditions on action. Kamm imagines a scenario in which a bombing disables a military facility and causes civilian deaths which in turn cause grief in the affected community. The killings are proportionate to the importance of disabling the facility, but only because the survivors' grief delays them from quickly rebuilding the facility. Kamm argues that the evil of killing the civilians sustains but does not produce the good of disabling the facility.[74] Kamm also argues that the bomber may act because of and not merely in spite of the fact that the noncombatant deaths will sustain the disabling of the facility without thereby acting in order to cause those deaths.[75] The bomber's reason for action may be simply to disable the facility, even though this reason would not justify the killings were the facility quickly rebuilt. The defeater of this defeater (the survivor's immobilizing grief) is not a reason for action but merely a condition on action.[76] Kamm argues that for these reasons the bombing described above is permissible. Kamm's argument invites us to ask, first, whether consequences sustained but not produced by killing noncombatants can render such killings justifiable and, second, whether an agent can be justified in committing a wrong if the facts which render the wrong justifiable are not her reasons for action but only conditions of her action.

Contrary to Kamm's suggestion, the distinction between producing and sustaining good consequences contracts rather than expands the scope of permissible harm. Noncombatant deaths cannot be justified by consequences that are sustained but not produced by the acts which cause those deaths. Were it possible to destroy the factory without causing civilian deaths, the attacking force could not justifiably do both. The only consequences that can justify killing noncombatants are those produced by the act that causes their deaths but that are not themselves produced by their deaths. However, some such consequences lose their justificatory force because they are sustained by the effects of noncombatants deaths and would not be self-sustaining were their continued existence causally parallel with the noncombatant deaths. Consider another of Kamm's hypothetical scenarios: The standard Track Case is one in which we

74. Kamm, supra note 12, at 668–69 nn.26–27; Kamm, supra note 54, at 41–42, 41 n.21.
75. Kamm, supra note 15, at 23, 119.
76. Cf. Jonathan Dancy, Practical Reality 127–30 (2000).

may permissibly divert a trolley from a track on which five people are trapped onto another on which one person is trapped. The Loop Case is a variation in which the tracks merge into a loop, such that the diversion of the trolley produces the good of saving the five which the death of the one sustains by preventing the trolley from looping around and striking the five from the other side.[77] It is permissible to divert the trolley in the Loop Case because the good of saving the five would be self-sustaining were the death of the one and the saving of the five causally parallel as in the Track Case. By contrast, were the death of the civilians and the disabling of the facility causally parallel, the good of disabling the facility would be undone. In the Loop Case the point of causal intersection between the greater good and the lesser evil is provided by the track; in the Grief Case it is provided by the community's grief. The greater good would be self-sustaining absent the former but not absent the latter. In this way the substance scope of the exclusionary reason generated by the DNI is not narrower but broader than initially supposed.

Kamm's second distinction, between reasons for action and conditions on action, succeeds in expanding the scope of justified harm but not in subverting the purpose of justificatory intent. Kamm observes that it is possible to perform an act because it will produce a certain consequence but not in order to produce that consequence. One can imagine an aerial bomber whose reason for bombing is to create terror by killing civilians, but who fears criminal liability and therefore will only act on the condition that the civilian deaths are necessary and proportionate to the destruction of a military target. The bomber acts in order to kill and spread fear, but only because he will not be punished for doing so. The evasion of criminal punishment is a condition but for which he would not act, but not a reason for which he acts. The question, then, is whether we are justified in committing a wrong only when we act for the reason that renders the wrong justifiable, or whether it is sufficient that we act on the condition that the justifying fact obtains.[78] Kamm seems to endorse the second position, which occupies a middle ground between the first position

77. Kamm distinguishes the Loop Case from the Bystander Case, in which one person is thrown onto the tracks thereby producing rather than sustaining the good consequence of saving the five.

78. Cf. David Enoch, Ends, Means, Side-Effects, and Beyond: A Comment on the Justification of the Use of Force, 7 Theoretical Inquiries L. 43, 50–51 (2006).

and a third position that states that our actions are justified so long as a justifying fact obtains. The third position would exculpate wrongdoers who are unaware that a justifying fact obtains or for whom such awareness plays no motivational role. If the justifying fact does not make a practical difference to the commission of the wrong, it is unclear why a wrongdoer should be heard to raise the fact in defense of their conduct. The second position is nonetheless too permissive. The purpose of justificatory intent is to ensure that even when we are wronged we are not disrespected and that due regard is paid to our moral status. The second position undermines this purpose by exculpating individuals who commit wrongs for excluded reasons, as means to their ends or out of malice or discriminatory animus. The same could not be said of cases in which a justifiable wrong is committed for reasons that are merely outweighed. For instance, we may attack a military target on the condition that the attack is necessary and the civilian casualties proportionate to the achievement of a concrete military advantage, but for the reason that the attack will also save a disproportionately small number of our own soldiers from being killed.[79] The motivating reason does not justify the wrong but it is a reason of the right kind which could justify the wrong in other circumstances. In such cases, the doctrine of justificatory intent can be modified without undermining its purpose. An act, therefore, is justified if and only if it is performed (i) for the reason that supports the action or (ii) on the condition that the justifying fact obtains and for a reason which is outweighed but not excluded.

B. Invidious Discrimination

It was shown above that the distinction between producing and sustaining expands the exclusionary scope of the DNI. The same distinction also fixes the scope of the DNI's protection. Jeff McMahan argues that liability to defensive killing turns not on whether one poses an unjust threat but on whether one is responsible for an unjust threat or for a grievance that provides just cause for the use of force.[80] McMahan argues that some people may not be responsible for the threat they pose while others may be

79. Cf. Kamm, supra 15, at 117.

80. McMahan, supra note 12, at 722.

responsible for threats posed by others.[81] McMahan infers from this that not all combatants (those not responsible for the threat they pose) are liable to attack and that some noncombatants (those responsible for the threats posed by others) are liable to attack. McMahan freely admits that his criterion for liability exposes to attack many voters and all taxpayers of a nation waging an unjust war.[82] McMahan argues, however, that liability comes in degrees, and that most citizens and taxpayers bear so little individual responsibility for the unjust threat posed by their government, and their deaths typically do so little to eliminate that threat, that attacks upon them generally would be unnecessary and disproportionate.[83] McMahan further argues that the practical significance of his criterion is limited given the intermingling of individuals with varying degrees of responsibility as well as limited information with which to discriminate amongst them.[84] The principle of discrimination is thereby converted from a moral standard into an epistemic rule of thumb.

McMahan's attempts to restrict the implications of his argument do not inspire confidence. To be clear, applicability of the DNI is an all-or-nothing affair. When McMahan claims that liability to killing comes in degrees, he means that the greater an individual's responsibility for an unjust threat, the fewer good consequences are needed to render her death proportionate. Importantly, on McMahan's view the good consequences that render a civilian death proportionate include the consequences of the death itself and not merely other consequences of the attack. So when McMahan invokes the requirements of necessity and proportionality, he applies the variants of these requirements traditionally reserved for military personnel to civilians. Moreover, if liability does come in degrees then the extent of an individual's liability presumably should turn both on the degree of her responsibility for the threat or grievance and on the magnitude of the threat or grievance. Considering the magnitude of the grievances that

81. Id. at 719–21 (imagining a scenario in which one person controls the mind of another).

82. Id. at 726. Importantly, Osama Bin Laden has argued that American citizens are responsible for deaths caused by U.S. military strikes and economic sanctions because they elect U.S. leaders and finance U.S. foreign policy and are therefore liable to direct attack. See Osama Bin Laden: America's Enemy in His Own Words ch. 9 (Randall B. Hamud, ed., 2005).

83. McMahan, supra note 12, at 727.

84. Id. at 728.

justify armed opposition—aggression, belligerent occupation, genocide, and crimes against humanity—the liability of marginal contributors may be substantial. Finally, while the general utility of killing noncombatants is a hotly disputed empirical question, it would be surprising if terror killing could never have strategic benefits given its long history.

Is there nevertheless a sound basis for determining which noncombatants who are responsible for the threat posed by combatants are nonetheless protected by the DNI? Kamm's distinction between producing and sustaining harm to others provides the basis for an alternative view. On this view, the DNI does not apply to those who produce the threat posed by combatants: primarily the civilian and military leadership that orders soldiers into combat. The DNI does apply to those who merely sustain the threat posed by others: taxpayers, voters, and medics, among others. The threat would not exist but for necessary causal contributions by both groups. But while the former group provides soldiers with their reasons for action the latter merely enables soldiers and their commanders to act on those reasons. The most difficult groups to categorize, as always, are munitions workers and military support personnel. Neither group provides combat troops with their reasons for action, suggesting that they merely sustain the threat. Yet both provide the means and not merely the opportunity to threaten others, suggesting that they share in the production of the threat. Both may be killed as necessary and proportionate by-products of attacks on their equipment and facilities. The question is whether either or both may be directly attacked simply to end their contribution to the war effort. The correct view seems to be that both merely sustain the threat posed by individual soldiers, but that support personnel may be directly attacked because they are part of the collective threat posed by a larger military force. Munitions workers, despite their contribution to the war effort, remain civilians and cannot be directly attacked.

The reinterpretation of the DNI presented above coheres well with international humanitarian law and with the moral intuitions the law reflects. Moreover, McMahan's view seems to rest on a flawed theory of defensive force. McMahan writes that defensive force is justified because it shifts the costs of wrongdoing away from its victims and onto those responsible for its occurrence.[85] On this view, defensive force is a distributive

85. See id. at 721 ("Because the Initiator is the one who is morally responsible for the fact that someone must die, he should, as a matter of justice, bear the costs of his own voluntary and culpable action.").

principle based on a background notion of comparative desert. Since even the slightest degree of responsibility for a threat differentiates an innocent victim from a marginal contributor, it is always permissible to reallocate its associated costs from the former to the latter. The theory is flawed on a number of grounds, only one of which can be discussed here. Consider a case in which someone is unjustly attacked and has no reasonable hope of preventing the crime from continuing to completion. In such a case, the full costs of the wrong will fall on the victim no matter what she does; her use of defensive force, doomed to failure, will merely create new costs which fall on her attackers. Nonetheless, it seems permissible for her, so to speak, to go down swinging. This intuition is supported by theories which understand self-defense as a vindication of a victim's autonomy but not by redistributive theories such as McMahan's. Even on autonomy-based theories, however, futile resistance seems appropriately directed to those who produced the threat but not to those who merely sustain the threat. It is one thing to direct futile resistance against assailants as well as accomplices who solicit, assist, or encourage an assault. It is quite another to direct such resistance at those who provide all-purpose means that assailants decide to use for unjust ends.[86] For this reason, among others, the interpretation of the DNI presented above seems preferable to McMahan's revisionist theory.

C. Privileges of Belligerency

The first section of this article explored the relationship between justification and responsibility; this final section uses those concepts to defend the doctrine of combatant immunity (DCI). Jeff McMahan argues that the traditional distinction between *jus ad bellum* and *jus in bello* is overdrawn and that any killing committed in furtherance of an

86. It is true that just war theory traditionally requires a reasonable probability for success before pursuing a just cause through war. However, the efficacy requirement exists precisely because the cause must justify not only harm to those who produce the threat resisted but also collateral harm to civilians on both sides who ought not to die for nothing when surrender would save their lives. It would be perverse to read the efficacy requirement to support a view that would permit the killing of civilians as a means or chosen end. Note also that the permissibility of futile resistance against combatants suggests that the applicable requirements of necessity and proportionality have an important nonconsequentialist dimension.

unjust cause is itself unjust. From this it seems to follow that the DCI lacks a compelling moral foundation and that criminal liability for ordinary soldiers should turn not only on the means they employ but also on the ends they pursue.[87] McMahan rightly rejects "the idea that unjust combatants do no wrong merely by participating in an unjust war."[88] As we have seen, killing is always a wrong calling for justification or excuse. McMahan argues that the manipulation, deception, coercion, and misplaced loyalties of soldiers amount at most to a plea of duress, available to some but not all, and unlikely to fully excuse an act of homicide.[89] McMahan argues, finally, that killings in furtherance of an unjust war are almost always unjustifiable, in part because a soldier's institutional obligations are generally inadequate to redeem the loss of innocent life.[90]

McMahan's claims are largely sound but they do not undermine the DCI because an assertion of combatant immunity denies neither wrongdoing nor fault but responsibility. Denials of responsibility do not dispute that a wrong was committed or assert that the wrong was justified or excused; they claim instead that it would be unfair to demand that the perpetrator respond to the reasons that give rise to the wrong. Defenses such as infancy and insanity are denials of capacity responsibility: they claim that at the time of the offense the offender was incapable of being guided by the reasons that governed her activity. The DCI amounts to a denial of role responsibility: it claims that soldiers need not respond to the reasons that make a war unjust; they need not independently evaluate the factual and legal basis of their leaders' decision to go to war but may instead obey

87. McMahan suggests a shallower, consequentialist foundation for the DCI but his arguments are inconclusive. See McMahan, supra note 12, at 731 (arguing that the DCI prevents selective prosecution and victors' justice and encourages surrender). Selective prosecution is an inevitable feature of any legal response to mass violence. Victors' justice is a threat to impartial adjudication irrespective of whether domestic or international criminal law is applied, a threat only recently ameliorated by the creation of a standing international criminal court. Finally, soldiers always have an incentive to surrender when doing so substitutes certain death for uncertain punishment. Eliminating the DCI might result in politically motivated prosecutions of soldiers for their government's foreign policy; but this concern is widespread even under current law.

88. McMahan, supra note 12, at 700.

89. Id.

90. Id. at 704–08.

orders that are not manifestly unlawful.[91] McMahan is entirely correct that killings committed in an unjust war cannot be justified by the benefits of "an institutional division of moral labor that assigns responsibility for important decisions such as whether to go to war to those who have access to the relevant information, are positioned to coordinate an effective response to external threats, and can be held accountable for their decisions."[92] But the same considerations support the restriction of responsibility for unjustified killings to those who most deserve to bear it. It is of course true that political leaders often fail to respond appropriately to the reasons that apply to them and soldiers often go astray by obeying their orders. But the appropriate corrective for this defect is not to deny immunity to soldiers for lawful acts committed in furtherance of an unlawful cause but to impose liability on leaders for the crime of aggression: "the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."[93]

The DCI might be defended on the related but distinct ground that soldiers are agents of the state and that so long as agents act within the scope of a legitimate agency relationship the principal is responsible for the results of their actions.[94] But this account is potentially misleading. Causal responsibility, of the kind involved in the earlier discussion of complicity, is backward looking: it attributes an act or result to an agent from whom accountability may be demanded in the form of an explanation of the agent's motivating reasons. Role responsibility is forward looking: it identifies the class of normative reasons to which an agent must attend on an ongoing basis.[95] The DCI does not deny the causal responsibility

91. The DCI grants combatants qualified rather than absolute immunity. For this reason, the DCI may not protect soldiers whose political leaders openly announce that an ordered invasion is motivated exclusively by a naked desire for territorial expansion.

92. McMahan, supra note 12, at 704–05.

93. 1 Trial of the Major War Criminals before the International Military Tribunal 171, 186 (1946).

94. See Samuel Pufendorf, De Jure Naturae et Gentium 66, 88 (C.H. Oldfather & W.A. Oldfather trans., 1935). Cf. Kamm, supra note 12, at 676 ("This is because sometimes it may be right for one to act as the agent of a state, especially a generally just democratic one, even when the act one does is unjust, without one being held accountable for the injustice of what one is doing.").

95. See Henry S. Richardson, Institutionally Divided Moral Responsibility, 16 Soc. Phil. & Pol'y 218 (1999).

of soldiers for their actions or the effects thereof; the DCI asserts that in virtue of their roles, soldiers may restrict their attention to the laws of war and leave the laws of peace to others. It is for this reason that responsibility for the deaths caused by wars of aggression fought using just means can be said to pass through the actions of soldiers and fall entirely on the civilian and military leadership that controls, directs, shapes, or influences the decision to initiate and perpetuate armed conflict.

Finally, McMahan argues that participants in an unjust war cannot fight in accordance with the laws of war because every death is disproportionate to the achievement of an unjust cause. The success of this argument would leave the DCI empty because the DCI only relieves combatants of responsibility for lawful acts. Critically, McMahan denies that killings need only be proportional to the concrete and direct military objective achieved. McMahan argues that the fact that an army may kill many enemy soldiers to save few of their own shows that the ultimate aims of the two sides must enter the proportionality calculus.[96] On the contrary, such cases reaffirm the conclusion of the previous section that there is an important nonconsequentialist component to the justification of deadly force. McMahan also argues that participants in an unjust war may not kill others to save themselves because they are unjust attackers who have no right to resist those who resist them.[97] On the contrary, participants in an unjust war are causally responsible for the unjust threat they pose but not role responsible for the injustice of the threat; they may be directly attacked to repel the threat but lose no rights due to its injustice.

The DCI remains a fundamental principle of humanitarian law despite confusion regarding its nature and importance created by a related doctrinal dispute. According to the U.S. State Department, an "unlawful enemy combatant" is a belligerent who forfeits the protections of the Geneva Conventions.[98] Captured unlawful combatants are not prisoners of war (POWs) since they violate the laws of war by attacking civilians, by intermingling with civilian populations, or by failing to

96. Id. at 716.

97. Id. at 716–17.

98. See U.S. State Department Legal Advisor John Bellinger, Unlawful Enemy Combatants, Opinio Juris, at http://www.opiniojuris.org/posts/1169000173.shtml.

wear a distinctive mark. Nor are unlawful combatants civilians, since they bear arms and actively participate in hostilities. The treatment of unlawful combatants is not regulated by international law and prior to Supreme Court intervention was considered a matter of policy not subject to legal review.[99] Supporters of the current administration argue that granting POW status to those who violate the laws of war reduces incentives to comply with its strictures.[100] Others argue that unlawful combatants simply do not deserve the protections afforded lawful combatants.[101] Both arguments suggest that humane treatment is a reward for good behavior rather than a matter of right. Neither supports the conclusion sought.

The apparent benefit of humane treatment is merely the flip side of two far greater detriments: unlawful combatants enjoy neither the protection granted noncombatants by the DNI nor the protection granted lawful combatants by the DCI. They are subject to direct attack throughout armed conflict and to criminal prosecution under the laws of war or under domestic criminal law. Both liabilities serve as deterrents to unlawful conduct and the latter facilitates deserved punishment. Advocates on different sides of the issue frequently assume that unlawful combatants must be treated exactly like lawful combatants or exactly like civilians in all three domains—conduct of hostilities, detention and treatment, and criminal liability—or must be denied protection under humanitarian law. The current administration draws the latter inference. The Israeli Supreme Court makes the opposite mistake, reasoning that because unlawful combatants, like civilians, are not protected by the DCI, they must also, like civilians,

99. See Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (holding that Common Article 3 of the 1949 Geneva Conventions applies to the armed conflict with al Qaeda and Taliban fighters in Afghanistan).

100. See Bellinger, supra note 98 ("POW status is perhaps best seen then as an incentive to follow the rules in armed conflict."); Krauthammer, supra note 2 (arguing that the "deeper purpose" of the Geneva Conventions was "to deter the abuse of civilians by promising combatants who treated noncombatants well that they themselves would be treated according to a code of dignity if captured—and, crucially, that they would be denied the protections of that code if they broke the laws of war and abused civilians themselves").

101. Krauthammer, supra note 2 ("Breaking the laws of war and abusing civilians are what, to understate the matter vastly, terrorists do for a living. They are entitled, therefore, to nothing. Anyone who blows up a car bomb in a market deserves to spend the rest of his life roasting on a spit over an open fire.").

be protected by the DNI.[102] Neither side appreciates that the right to humane treatment is independent of both the DNI and the DCI and applies to captured and injured combatants as well as to civilians.[103] There is no sound moral or legal basis for denying this right to unlawful combatants. Importantly, similar treatment of civilians, lawful combatants, and unlawful combatants ends when the latter are convicted for war crimes. Hopefully distaste at similar treatment will limit detention and hasten fair trial.[104]

CONCLUSION

This article began with the distinction between means and ends and the suggestion that the phrase "War on Terror" differentiates the two sides of the conflict it describes not by the ends they embrace but by the means they employ. The subsequent adoption of torture and coercive interrogation as routine methods of intelligence gathering has caused many "to doubt

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102. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr. [Dec. 11, 2006] slip op. paras. 25, 31, available at http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf (holding that unlawful combatants are civilians and can only be directly killed during direct participation in hostilities). Interestingly, both sides deny captured unlawful combatants the same treatment as POWs based on the same legal ground:

> The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
>
> 1. To be commanded by a person responsible for his subordinates;
> 2. To have a fixed distinctive emblem recognizable at a distance;
> 3. To carry arms openly; and
> 4. To conduct their operations in accordance with the laws and customs of war.

It is plausible to argue that those who fail "[t]o conduct their operations in accordance with the laws and customs of war" should not receive the "rights" of POWs. It is absurd to hold that the "laws" and "duties" of war apply to those who obey them but not to those who violate them. Yet the two readings stand or fall together.

103. See Geneva Convention III, Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135, 6 U.S.T. 3316, T.I.A.S. No. 3364 art. 3 ("Persons taking no active part in hostilities . . . shall in all circumstances be treated humanely. . . ."). See also Larry May, War Crimes and Just War (2007) (arguing that humane treatment rests not on the past conduct of detainees but on their status as vulnerable human beings in the power of the detaining authority).

104. Of course, not all terrorists are unlawful combatants because many terrorist groups are not parties to an armed conflict. Paramilitary groups like al Qaeda are distinguished from criminal gangs like the Ku Klux Klan by their command structure, strategic objectives, tactical training, and operational scope.

the moral basis of our fight against terrorism."[105] Yet absent such a basis, there is no right side and no wrong side to the conflict; there is only our side and their side. The article defends the view that legitimate ends cannot make up for illegitimate means. The article presents a new interpretation of the doctrine of double effect which escapes traditional criticisms, withstands contemporary challenges, and provides a moral basis for rejecting torture and terrorism with equal force. Neither the doctrine of criminal complicity nor the distinctive moral agency of states nor the theory of threshold deontology provides a basis for permitting let alone requiring the routine use of torture. Neither the intentional killing of noncombatants nor the criminal prosecution of lawful combatants can be justified by their responsibility for the unjust threat produced by their political and military leaders. It is not easy, for a writer or for a reader, to dwell at such length and with such dispassion on the death and degradation of our brothers and sisters in humanity. Substantive criminal law is concerned with the prohibition of destructive tactics rather than with the development of creative strategies. Yet strategic innovation is desperately needed to restrict the scope and contain the consequences of global conflict.

Ideas can change the world. But when ideas fail to change the world as promised they are discredited and people look for new ones with which to imagine a better future. In the past five years two very old ideas have resurfaced: that the purpose of government is not to implement principles of justice but to keep its citizens safe; and that national security can be achieved with military force and without moral credibility. On the basis of these ideas many embraced preventative war and punitive diplomacy, racial profiling and warrantless surveillance, indefinite detention and torture. But the purchase of safety at the price of liberty and the exchange of justice for expediency has yielded disappointing returns. It is time to invest in a national security strategy that pursues long-term peace and stability through the skillful alignment of diverse interests and the development of political integration and economic interdependence among states as well as political participation and economic opportunity among individuals. Only when each nation has a stake in the security of every nation and each person has a stake in the stability of their society can future generations live safe from war and free from fear.

105. Colin Powell, Letter to Senator John McCain, Sept. 13, 2006, available at http://i.a.cnn.net/cnn/2006/images/09/14/powell.article.pdf.