

**A Problem of Paradigms: Grounding
Asymmetric Institutional Permissions for the Use
of Lethal Force**

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Declaration

I, Adam C. Gastineau, hereby declare that all work presented in this thesis is my own original work. Ideas and concepts taken from the literature are cited and referenced accordingly. My thanks to Seth Lazar and the members of my panel for valuable feedback on previous drafts. Thanks as well to the members of the School of Philosophy, ANU, who attended my talks on this topic and raised valuable points in discussion. All mistakes herein are my own.

Abstract

In this thesis I seek to demonstrate that the legal and customary norms defining the permissible use of lethal force by police are more restrictive than those defining the permissible use of lethal force by military personnel. I argue that in many cases this asymmetry can rest on a foundation provided by the moral norms of individual self-defense, but that the strength of this foundation is contingent on the context in which lethal force is used. Provided that three contextual asymmetries between police and military operations hold, we can morally justify the asymmetric legal and customary permissions granted to these two institutions on the basis of threat, liability, necessity, and proportionality. However, there are limits to the moral grounds these norms can provide. In cases where the three contextual asymmetries begin to break down, the moral foundation offered by the moral norms of individual self-defense weakens. In cases of contextual equivalence, we are forced to adopt one of two conclusions. Either we accept that our legal and customary norms are without moral foundation in such cases, or we must find alternative moral reasons to morally justify the asymmetry. In the final section I briefly draw out the strengths and weaknesses of both positions and offered some discussion of what other moral reasons we might use to shore-up the moral foundation for the asymmetry in the legal and customary norms regulating the permissible use by military and police institutions.

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Introduction

The question I propose to address is: Do we have moral grounds for placing more stringent requirements on police officers than military personnel when it comes to use of lethal force? To begin to answer this question I seek to demonstrate that the legal and customary norms defining the permissible use of lethal force by police are more restrictive than those defining the permissible use of lethal force by military personnel. I argue that in many cases this asymmetry can rest on a foundation provided by the moral norms of individual self-defense, but that the strength of this foundation is contingent on the context in which lethal force is used. Provided that three contextual asymmetries between police and military operations hold, we can morally justify the asymmetric legal and customary permissions granted to these two institutions on the basis of threat, liability, necessity, and proportionality. However, there are limits to the moral grounds these norms can provide. In cases where the three contextual asymmetries begin to break down, the moral foundation offered by the moral norms of individual self-defense weakens. In cases of contextual equivalence, we are forced to adopt one of two conclusions. Either we accept that our legal and customary norms are without moral foundation in such cases, or we must find alternative moral reasons to morally justify the asymmetry. In the final section I briefly draw out the strengths and weaknesses of both positions and offered some discussion of what other moral reasons we might use to shore-up the moral foundation for the asymmetry in the legal and customary norms regulating the permissible use by military and police institutions.

Motivation of the Project

Recent conflicts, such as the ‘War on Terror’ and policies like the Responsibility to Protect (R2P) have lead to a convergence of the roles of policing and military institutions. Police are increasingly using military tactics and technologies to respond to threats to the communities they are policing. Military institutions are being tasked with protecting foreign populations while attempting to seek out and detain or eliminate threats within that population. It is precisely the normative permissibility of this convergence that I wish to call into question. If it is the case that we have no moral reason to preserve the legal and customary asymmetry between norms governing the use of force by the military and by the police, then such convergence is not morally problematic. However, if we do have moral reasons to preserve that asymmetry, these reasons would have implications for how policy makers ought to employ these two agencies against security threats.

The traditional expectations for the use of lethal force by police and military personnel might be summarized this way: Soldiers are trained to kill to protect the society they serve, while police protect the society they serve, and in pursuit of this goal, are sometimes required to kill.¹ This summary points to a developing issue for both police and military institutions. Security institutions are being called upon to act outside of the roles to which they, and the public they serve, have become accustomed. This has led to a blurring of the lines between public security institutions such as the police and the military, which in turn has raised a variety of normative issues pertaining to the way such institutions should conduct their operations.² One of these normative questions centers around the justifiable use of lethal force by police and military institutions in removing threats to the communities they represent. Traditionally the criteria governing use of lethal force have been much more stringent for police forces than for military forces when dealing with potential and actual threats. However, the ‘militarization’ of many police forces in response to terrorism, and the use of military forces as a sort of international police force engaging in ‘nation building’ or humanitarian intervention, is challenging these traditional standards.³

¹ This is a common view perhaps best expressed in popular media by Commander Adama of Battlestar Galactica: “There’s a reason you separate military and the police. One fights the enemies of the state, the other serves and protects the people. When the military becomes both, then the enemies of the state tend to become the people.” *Water* (Sci-Fi Channel, 2005), Marita Grabiak (dir.).

² This blurring is evident in the statements made by many politicians and policy makers when speaking about irregular conflict. For example, see the remarks made by President Barack Obama after the death of Osama Bin Laden in which it is unclear if the purpose of the operation was to kill a combatant, or bring a criminal to justice. B. Obama, 'Remarks by the President on Osama Bin Laden', (Washington D.C.: Office of the Press Secretary, 2011). It is also evident in the descriptive accounts of current security challenges faced by police and military institutions. See David Kilcullen, *Out of the Mountains* (Oxford, UK: Oxford University Press, 2013) 342., David Kilcullen, 'Blood Year: Terror and the Islamic State', *Quarterly Essay*, /58 (2015), 1-99., and David Kilcullen, *Blood Year: Islamic State and the Failures of the War on Terror* (Victoria, Australia: Black Inc., 2016) 288.

³ For a white paper on the problem within the U.S. see: Radley Balko, 'Overkill: The Rise of Paramilitary Police Raids in America', www.cato.org (07/17/2006 edn.; <http://www.cato.org/publications/white-paper/overkill-rise-paramilitary-police-raids-america>: The CATO Institute, 2006), Radley Balko, *Rise of the Warrior Cop: The Militarization of America's Police Forces* (New York, NY: Public Affairs, 2014) 336. For two recent articles on this problem by an author with experience in both police and military institutions see: A Rizer, 'Asking Our Soldiers to Do Police Work: Why It Can Lead to Disaster', *The Atlantic*, (2012), Arthur Rizer and Joseph Hartman, 'How the War on Terror Has Militarized the Police', *ibid.* (2011).

What moral reasons, if any, do we have for the traditional view stated above? Are we morally justified in applying the criteria that justify use of lethal force more stringently to police than to military personnel, particularly in grey areas such as irregular conflict? If we are, why are soldiers, who arguably cause much greater harm, held to less stringent standards than police even when they are functioning in a similar role? My goal with this thesis is to make a start at answering these questions by attempting to clarify the extent to which our current legal and customary norms can be justified by the moral norms pertaining to individual self-defense. As such the claims I am making here assume a deontological, rights-based, normative theory. However, provided one does not adopt a militarist viewpoint, consequentialists are likely to come to similar conclusions; albeit by a different line of reasoning.

It may be objected at this stage that the lines that exist between the police and the military are simply empirical facts dependent on politics or culture and that the placement of these lines is less of a normative question than an empirical or pragmatic one. However, there are a few reasons to think that there is an important normative aspect to this question.

First, we regularly make moral judgments about these acts that reflect our intuition that police use of lethal force is only narrowly permissible while granting military personnel a much wider range of permissible acts. We generally expect police to ‘shout’ first and ‘shoot’ only as a last resort. When they fail to do so such acts are condemned as wrongful, often because they are seen to somehow violate either the rights of the individual against whom the force was used, or to violate the duty owed by the police to the victim, or to the victim’s community, which the police have a duty to protect. Military personnel, on the other hand, are not expected to first identify themselves and demand the surrender of their adversary. They are not required to risk their own safety and that of their colleagues to detain an opposing combatant. In fact, many common military tactics depend upon the adversary being taken completely by surprise. These tactics are still considered to be morally permissible provided other conditions (such as the conditions of *jus ad bellum* and *jus in bello* laid out by Just War Theory; or the

corresponding legal requirements spelled out in international law) are met.⁴ Even in cases where such tactics are not employed, merely appearing to pose a threat to military personnel may legally, if not morally, permit use of lethal force by those personnel.⁵ In short ‘force protection’, the focus on preserving the lives of one’s own group in combat, is generally one of the highest priorities in military operations, often eclipsed only by the accomplishment of the mission for which the force was deployed in the first place.⁶ On the other hand the rights of the individuals are often emphasized in police operations, even in cases where preserving those rights places officers at a greater risk of harm. There are many examples in the media of the public expressing moral outrage at what is considered to be excessive force by policing agencies in situations that would not be considered excessive in a military operation.⁷

Next, these judgments have become internalized, both in the norms that guide the training and practice of these two institutions and the public’s moral expectations of the institutions in question. If these intuitions, and the judgments that rely on them, cannot be shown to have relevant moral basis, it leaves such norms unsupported and perhaps in need of change. There are many examples in the media of the public expressing moral outrage at what is considered to be excessive force by policing agencies in situations that would not be considered excessive in a military operation. Furthermore, these institutions have institutionalized these judgments in the policies and procedures that guide their training and practice. These norms are evident in police and military training and administrative policy related to situations where officers or soldiers choose to use lethal force in the field. For police stringent moral expectations hold even in

⁴ See Case Study #3: Stephen Coleman, *Military Ethics: An Introduction with Case Studies* (New York: Oxford University Press, 2012b).

⁵ See the case of Esequiel Hernández: Sam H. Verhovek, 'Pentagon Halts Drug Patrols after Killing at the Border', *The New York Times* (www.nytimes.com; <http://www.nytimes.com/1997/07/31/us/pentagon-halts-drug-patrols-after-a-killing-at-the-border.html>: New York Times, 1997). Compare with the case of Jose Guerena: Radley Balko, 'Jose Guerena Killed: Arizona Cops Shoot Former Marine in Botched Pot Raid', *Huffington Post* (www.huffingtonpost.com; http://www.huffingtonpost.com/2011/05/25/jose-guerena-arizona_n_867020.html, 2011).

⁶ There have been recent calls to change this. The question is why we should. It does seem that a commanding officer or squad leader has an obligation to ‘bring his boys home’. The question is: When does this obligation need to be overridden by other moral concerns? This becomes particularly problematic when ROEs may give commanding officers and NCOs mixed signals about one’s obligations regarding the mission at hand. See Fn 24 below.

⁷ Cases such as the shooting of Jean Charles de Menezes in London and Jose Guerena in Arizona are two good examples.

cases where the opposing party is visibly armed, and sometimes even if that party is threatening to harm officers or other innocent parties involved in the standoff.⁸ The norms embedded in military training are quite different however, setting more permissible standards of threat, necessity, and proportionality criteria. The greater permissibility of the use of lethal force is reflected in both military training and policy, often including Rules of Engagement, or ROEs, that are meant to guide decision-making in a particular theatre of operations.⁹ If these institutions, and the judgments that rely on them, cannot be shown to have relevant moral basis, it leaves such norms unsupported and perhaps in need of change.

Lastly, given that we make such moral judgments on such cases already, and that these judgments have been internalized by both the public and the institutions in question, we should have good moral reasons for determining where and on what basis we should draw the line between permissible and impermissible use of lethal force by agents of these two institutions. Both military and police institutions have a mandate, if not a monopoly, on the 'justified' use of lethal force in situations where private citizens or civilians would not be so justified. This mandate gives these institutions, and their agents, a great deal of power. With that power comes the ability to abuse it unless clear boundaries are placed on its use. Recent operational overlaps have blurred pre-existing boundaries. If some clarity can be brought to the boundaries of this power, practitioners, policy makers, and private citizens would be better able to guide their actions and formulate their judgments to avoid abuse. In cases where abuse has already occurred, such boundaries could also be utilized to highlight such abuse and formulate well-grounded moral objections to such abuse. This would be particularly useful in grey areas where the law has not yet caught up with practice, such as irregular conflict, as well as guiding our judgment about punishment and accountability for seemingly wrongful acts on which the law is silent.

⁸ See the cases pertaining to Turner/Sherwell & Graeme Jensen as examples of police being threatened with weapons and still attempting to negotiate prior to using lethal force on their opponent. Seumas Miller and John Blackler, *Ethical Issues in Policing* (Aldershot: Ashgate Publishing Ltd., 2005) 165.

⁹ "Commanders have the inherent authority and *obligation* to use all necessary means available and to take all appropriate action in self-defense of their units and other US Forces and Coalition Forces" (emphasis added), Anonymous, 'Annex E (Consolidated Roe) to 3-187 Frago 02, Opord 02-005', <http://wikileaks.org/wiki/US_Rules_of_Engagement_for_Iraq>

General Parameters

On Lethal Force

There is a great deal of literature on the question of justifying the use of lethal force, particularly in cases of self or other defense. Generally speaking, attempts have been made to justify lethal force in self-defense using the following criteria.¹⁰

- Threat Criterion
- Necessity Criterion
- Proportionality Criterion
- Liability Criterion

There is much debate about how these criteria interrelate and how they should be weighed in various cases. I will briefly address them here before moving on, though greater treatment will be given in the second section of the thesis.

The threat criterion requires that use of defensive force be aimed at averting a threat, to which the target of that force must be appropriately related. Precisely what kind of threat can justify the use of lethal defensive force is controversial. Some theorists simply think that any threat of sufficient severity can warrant the justified use of lethal defensive force.¹¹ Others, most notably Jeff McMahan, maintain that the threat must be unjustified, that is, all things considered impermissible.¹² Others maintain that the threat itself must be unjust, in that it violates the defender's rights in some respect (which is consistent with it being all things considered permissible).¹³ There is also some debate about the how severe and how likely the threat must be for lethal defensive force to be justified. Only threats of a particular severity permit use of lethal force.¹⁴ Likewise I must be sufficiently certain that what I perceive as a threat is in fact

¹⁰ Seth Lazar, 'Necessity in Self-Defense and War', *Philosophy & Public Affairs*, 40/1 (Winter 2012), 3-44. These criteria will be addressed again in more detail in the second section of the thesis.

¹¹ Michal Walzer seems to hold this view. See Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (Fourth edn.; New York: Basic Books, 2006).

¹² See Jeff McMahan, *Killing in War*, ed. Julian Savulescu (Uehiro Series in Practical Ethics; Oxford: Oxford University Press, 2009) 250.

¹³ David Rodin and J.J. Thompson hold this view. See David Rodin, *War & Self-Defense* (Oxford: Oxford University Press, 2002b) 213, Judith Jarvis Thomson, 'Self-Defense', *Philosophy & Public Affairs*, 20/4 (1991), 283-310.

¹⁴ Thomas Hurka points out that one cannot use lethal force against a threat to be tickled, even if other conditions required for permissible self-defense are satisfied. This also speaks to the

a threat.¹⁵ Some attention is also paid, particularly in discussions about laws of self and other defense, to the imminence of the threat. However, in most philosophical discussion the permissibility of using lethal force in response to an imminent threat is based not in the imminent nature of the threat itself, but rather in the necessity that this imminent threat implies, which leads us to our second criterion.¹⁶

The necessity criterion, in its simplest form, requires that the threat to the defending agent or those being defended be such that the defending agent has no choice but to use lethal force to prevent the harm threatened.¹⁷ Necessity also comes up in discussions of permissible harm to bystanders or third parties in cases where ‘collateral damage’ is likely. In some cases, collateral damage may not be acceptable insofar as it seems to constitute an unnecessary harm to an innocent third party relative to the benefit that the harm is intended to bring about.

The proportionality criterion requires that the force used to prevent the harm be proportional to the harm that is threatened. Strictly interpreted, one could not use lethal force against an aggressor unless one reasonably believed that the aggressor was attempting to kill them and that the defender’s use of lethal force would not cause greater harm overall than the harm that would be caused by the aggressor if she succeeded in her attack. Therefore, if the defender’s lethal response to aggressor’s potentially lethal attack harmed bystanders, some story would have to be told about why that lethal response was permissible given the apparent discrepancy between the harm threatened to the defender and the harm that defender caused in preventing the harm threatened. So there seem to be two types of proportionality to be taken into

proportionality criterion see Thomas Hurka, 'Proportionality in the Morality of War', *ibid.*33/1 (2005b), 34-66.

¹⁵ See the discussion of objective and agent-perspectival justification of acts in Suzanne Uniacke, *Permissible Killing: The Self-Defense Justification of Homicide* (Cambridge Studies in Philosophy and Law; Cambridge: Cambridge University Press, 1994). And the Russian-Roulette case in Kimberly Ferzan, 'Justifying Self-Defense', *Law and Philosophy*, 24/6 (2005), 711-49.

¹⁶ Some philosophers do talk about how the imminence of a particular threat may make lethal force more or less permissible. For an example where lethal force in warfare is made permissible by the necessity to respond to an imminent threat see, C.A.J. Coady, *Morality and Political Violence* (New York: Cambridge, 2008) 317. For an example pertaining to self-defense wherein permissibility based on the imminence of the threat is derived from necessity criterion see pg. 41 Rodin, *War & Self-Defense*.

¹⁷ For a more detailed discussion of necessity, see Lazar, 'Necessity in Self-Defense and War', (pp.1-42)

consideration: proportionality as it pertains to the attacker and defender directly involved in the conflict; and proportionality as it pertains to all parties who may be affected by the actions of the attacker and defender.¹⁸ There is some argument around this criterion as well concerning cases of non-lethal, but severe, harm. For example, it seems plausible to me that one might use lethal force to prevent an unjust attacker from cutting off one's legs, provided the other criteria were met, as this would constitute severe unjustified harm. However, where exactly lethal force becomes disproportionate in such cases is a matter of some debate.¹⁹

The liability criterion requires that the target of lethal defensive force be liable to be killed by the defender: that is, we must have some moral reason to discount harms done to her. Often it is argued that this liability stems from the target herself contributing to a wrongful threat to the defender. In constituting such a threat, her right to life, or right not to be killed, is lost, suspended, or discounted in some way relative to the defender's rights for at least as long as the attack continues. How exactly one's right to life might be so suspended, lost, or discounted is controversial. Generally, attempts are made to explain this discounting in two ways, and often both are incorporated in explanations of liability. One might claim that the nature of the threat, which may be affected by the culpability of the attacker for the unjustified threat²⁰ causes this discounting of the attacker's right to life. That is, the actions taken by the attacker make her liable to attack. However, one might also point to the fact that the defender defending themselves or others in a particular relationship to the defender has some right to be partial to the life or lives being defended over the life of the one who is attacking. This partiality further discounts the rights of the attacker relative to those of the defender.²¹

¹⁸ These correspond to McMahan's 'narrow' and 'wide' proportionality respectively, see Jeff McMahan, 'Proportionate Defense', *Journal of Transnational Law & Policy*, 1/23 (2014), 1-36.

¹⁹ For an interesting discussion of the integration of proportionality and liability see David Rodin, 'Justifying Harm', *Ethics*, 122/1 (2011), 74-110. For discussion of the relation between necessity and proportionality see Hurka, 'Proportionality in the Morality of War', (pp. 37-39), and Seth Lazar, 'Necessity in Self-Defense and War', *ibid.* 40 (Winter 2012), 3-44.

²⁰ To say that the threat is unjustified is to say that the attacker lacks a just cause or that it is otherwise unjust that the attacker violates a defender's rights in some way.

²¹ For discussion see Thomson, 'Self-Defense', (283-310), David Rodin, *War and Self-Defense* (Oxford: Clarendon Press, 2002a), Jeff McMahan, 'Debate: Justification and Liability in War*', *Journal of Political Philosophy*, 16/2 (2008a), 227-44. Uwe Steinhoff, 'Debate: Jeff McMahan on the Moral Inequality of Combatants', *ibid.* (220-26), Seth Lazar, 'Responsibility, Risk, and Killing in Self-Defense', *Ethics*, 119/4 (2009), 699-728, Seth Lazar, 'A Liberal Defence of (Some) Duties to

All four of these criteria are incorporated into the norms governing the use of lethal force for police and military personnel. These criteria are also the basis of the internal policies of both institutions that govern the use of force by their respective agents. However, while in many cases these criteria are less stringently applied to members of both institutions than to private individuals, we seem to apply these criteria more strictly to one group than the other. Police officers are often expected to use lethal force only in very limited circumstances, even when their restraint puts them at greater risk of harm. The standards for military personnel on the other hand are often quite permissive, allowing for permissible use of lethal force in situations of perceived threats, which may or may not be actual threats, or situations where collateral damage, where third parties are harmed in the course of employing lethal force against the intended target, is foreseeable if not intended. Such acts are impermissible for police officers, and similar use of lethal force by police would be met by public outcry at the very least. However, in some cases operational overlap between these two institutions has caused confusion over when lethal force is permissible and for whom. Current events, such as the rise of ISIS, recent terrorist attacks in Turkey, Pakistan, Belgium, Paris, and Mumbai, the more recently concluded “War on Terror” internationally and domestically, and other other ‘irregular conflicts’ such as the ongoing conflict between Israel and the non-state actors Hamas and Hezbollah, and the conflict between state agents and Transnational Organized Crime groups, such as the Mexican drug cartels, have highlighted this issue as an important one for practitioners, policy makers and ethicists alike.

Epistemic Standards

This leaves the question of how we are to judge whether or not a particular defensive act can meet these four criteria. There are three epistemic standards we might use to do so: belief-relative, evidence-relative, and fact-relative.²² I will not attempt to go into any deep discussion of these three standards here. Instead, I will assume that we ought to judge all four criteria on an evidence-relative standard for the following reasons.

Compatriots', *Journal of Applied Philosophy*, 27/3 (2010), 246-57, Jonathan Quong, 'Killing in Self-Defense', *Ethics*, 119/3 (2009), 507-37.

²² Derek Parfit, *On What Matters* (Vol. 1; Oxford: Oxford University Press, 2011). Lazar, 'Necessity in Self-Defense and War', (Pp.7-8)

First, it seems most relevant if we are to use these criteria as action-guiding principles in cases of self-defense. In this regard I share Lazar's concerns about the demandingness of the fact-relative standard when applied in cases of self-defense and armed conflict.²³ Additionally, I worry that the belief relative standard is not demanding enough, as it only requires that one hold a reasonable belief about the necessity of a particular means without imposing any *explicit* obligation on the decision-maker to take *all* available evidence into account.²⁴ Given the degree of harm caused by lethal force, the requirement that Defender take all available evidence into account seems an important constraint. That said, most of the discussion that follows would still hold if Necessity were judged on a fact-relative standard as well.

Structure

This thesis will be divided into three main sections, or chapters. In the first section I will examine the current legal and customary norms that restrict the use of lethal force by military and police institutions to demonstrate two claims. First, I will show that there is an asymmetry between the legal and customary permissions granted police and military personnel with regard to their use of lethal force. Second, I will argue that current legal and customary norms regulating the use of lethal force by police are more stringent than those that regulate the use of lethal force by the military. Military institutions are permitted to shift between two legal paradigms: the more stringent Law Enforcement Paradigm and the more permissive Hostilities Paradigm. This ability to shift from one legal paradigm to the other broadens the legal and customary permissions granted to military personnel. Police operate under the Law Enforcement paradigm, but are not permitted to shift to the more permissive Hostilities Paradigm without ceasing to be considered a policing institution. As such, police have protected status under International Humanitarian Law, but are not granted combatants' privilege given to military personnel.

²³ Lazar, 'Necessity in Self-Defense and War', (Pp. 7-9)

²⁴ One might claim that taking all available evidence into account is implicit in the qualifier 'reasonable', and so the belief and evidence relative standards are for all intents and purposes equivalent. This may well be the case, but I think an explicit requirement is more robust than an implicit one. Even if I am wrong about this, adopting this claim about what constitutes 'reasonable' merely renders the two standards equivalent and so would not undermine what I am stipulating here or impact heavily on the following analysis.

My focus in the second section will be on the degree to which the moral norms governing the use of force in self-defense can provide a moral foundation for the asymmetry between the permissible use of lethal force by police and military personnel. I will argue that provided that certain contextual asymmetries exist between police and military operations, these norms provide firm foundations for the asymmetry in permission. Asymmetries in threat, means, and epistemic status make it less likely that the use of lethal force by police will meet the four criteria necessary to morally justify the use of lethal force in self-defense. I will discuss how these contextual asymmetries impact the four criteria of threat, liability, necessity, and proportionality and thereby form a foundation for the asymmetry in permissions granted to police and military personnel. However, I will also argue that as these contextual asymmetries degrade so too does the moral foundation justifying the asymmetric legal and customary permissions granted to police and military personnel.

In the final section of this paper I will look at the implications of this contextual dependence. It leaves us with two possible conclusions: Either the asymmetry in legal and customary norms is without moral foundation in cases where the contextual asymmetries have become degraded, or we will need to incorporate other moral norms to extend the moral foundation of the asymmetry in such cases. I will discuss the strengths and weaknesses of both of these conclusions, before offering some discussion of why we might look beyond the norms of individual self-defense to shore-up our legal and customary norms, and what moral reasons we might appeal to, in conjunction with the moral norms of self-defense, to provide moral support for existing legal and customary norms governing the use of lethal force by these two institutions.

Charting Asymmetric Norms

Introduction

In this chapter I seek to motivate two related descriptive claims. First, I contend that the norms that determine the permissible use of lethal force for military personnel differ from those that determine the permissibility of lethal force by police. This claim is not meant to be a specific claim about the scope of international law, as much of the legal constraints placed on police result from domestic legislation and administrative policy. This may be influenced by so-called ‘soft-law’ issued by international organizations such as the UN, but the legislatures or departments that form the policy determine the

degree of influence of such international norms.²⁵ Second, I will argue that the permissions granted by these two sets of norms are broader for military personnel than police, and so allow for a broader use of lethal force by military personnel, and military institutions. I take neither of these claims to be controversial. However, it seems advisable to start my argument from commonly held ground before moving into more controversial claims. Here I will offer a brief account of the legal norms that restrict the use of lethal force by the two institutions mentioned above. This account will clearly demonstrate my first claim. I will then move on to offer some analysis of the account that will motivate the second claim.

One caveat must be offered before beginning. Both International Humanitarian Law, which applies to the conduct of armed conflict, and the domestic and international law and policy that defines the permissions granted to police officers and military personnel are incredibly complex. There is much controversy over how to best interpret these norms. I will not attempt to resolve any such controversy here. My intention in this section is to give an account of current legal and customary norms regulating the use of lethal force by the two institutions in question sufficient to demonstrate the normative asymmetry I claim above. When possible I will point to authors who take a contrary point in the literature, or failing this, highlight that the claim is one that is controversial. However, given my focus in this thesis, it seems unnecessary, if not reckless, to attempt to comment on questions that would require a separate thesis to sufficiently address.

Permissible Use of Lethal Force by the Military

The permissible use of lethal force by military personnel is defined by three sets of restrictions. When operating in armed conflict, the permissible use of lethal force is defined by three primary principles of International Humanitarian Law, distinction, proportionality, and necessity.²⁶ Military use of lethal force outside of the conduct of

²⁵ See for example: Committee Of Ministers *The European Code of Police Ethics* Strasbourg, Cedex, UNGA, 'Code of Conduct for Law Enforcement Officials', in General Assembly (ed.), 34/169 (New York, NY: United Nations General Assembly, 1979).

²⁶ There are multiple interpretations of what principles in IHL are 'primary'. Some of these will be highlighted later in this section. However, all 'primary' principles mentioned, including principles such as the principle of humanity or the principle of precaution, can plausibly be incorporated into one or more of the principles given above. These three principles also track most directly to *in Bello* principles in the Just War Tradition, which, I hope, will help simplify things somewhat. For these reasons I will focus on these three as 'primary' principles governing the use of lethal force in IHL.

hostilities is restricted by a combination of IHL, International, Human Rights Law,²⁷ and in some cases the laws pertaining to the use of lethal force in the country where the military is conducting operations. Under this Law Enforcement Paradigm three principles define the permissibility of lethal force: precaution, proportionality, and necessity. These three principles narrow the permissible use of lethal force requiring military units to avoid the use of lethal force whenever possible, and impose stricter formulations of proportionality and necessity when such force is unavoidable.²⁸ Finally, military use of lethal force is restricted by Rules of Engagement (ROEs). These rules are the primary means by which lethal force is restricted in the field. The rules are military directives that incorporate appropriate international and domestic law as well as the political objectives of the state the military represents. These rules restrict the military use of lethal force by clarifying when such force is permitted, and give grounds for military investigations of reported violations. They also allow a state's political goals and domestic policies to help define the permissible use of lethal force. However, because they are so specific, they may cause confusion if they clash with ROEs of partner states or limit a soldier's scope to to defend themselves and their comrades.

Preliminaries on International Law and Armed Conflict

Before addressing the specific principles embodied in international law that restrict the use of lethal force by military agents, some general background is required. To give a full account of the workings of international law in this context is beyond the scope of this project, however two important distinctions need to be drawn before moving on. The legal norms governing the use of lethal force by military personnel can be subdivided into two legal paradigms: Law Enforcement Paradigm (LEP) and the Hostilities Paradigm (HP).²⁹ Two bodies of international law, International

²⁷ It should be mentioned that International Human Rights Law also applies during armed conflict. However, due to the nature of the conflict it is often supervised by International Humanitarian Law in accordance with *lex specialis*. More will be said about this later.

²⁸ These concepts of proportionality and necessity are quite complex. I will say more about them in what follows.

²⁹ Here I follow the distinction drawn by Nils Melzer, 'Conceptual Distinction and Overlaps between Law Enforcement and the Conduct of Hostilities', in Terry D. Gill and Dieter Fleck (eds.), *The Handbook of the International Law of Military Operations* (Oxford: Oxford University Press, 2011c), 33-49.

Humanitarian Law (IHL) and Human Rights Law (HRL), govern the use of lethal force under these two paradigms.³⁰

To avoid oversimplification, it should be noted that portions of IHL and HRL apply under both paradigms. This is most notable with respect to the role of HRL as the ‘base’ law that applies in both peacetime and during armed conflict. However, under the Hostilities Paradigm, IHL has a much greater role in regulating the permissible use of force due to the legal principle of *lex specialis*.³¹ This principle allows IHL to take precedence over HRL in cases where HRL and IHL are in tension, or where lacuna in HRL must be filled. How exactly this principle is best applied is a matter of considerable controversy in the literature on international law and armed conflict. While the importance of the concept forces me to make reference to it, I will not attempt to offer any detailed discussion of the concept or its application in my discussion here. The important thing to note is that it is broadly accepted that IHL supervenes on HRL when forces are operating under the Hostilities Paradigm and, more controversially, in some cases when operating under the Law Enforcement Paradigm.

Two Legal Paradigms

The Hostilities Paradigm consists of “the body of rules and principles that govern the conduct of hostilities”.³² The term hostilities is not explicitly defined in law, however in treaty law the term is used to refer specifically to international or intra-national armed conflict. Any armed confrontations occurring outside of an armed conflict are not considered to be the same as ‘hostilities’ referred to in international law.³³ ‘Hostilities’ in international law are differentiated by other uses of force by their purpose: to “weaken the military forces of the enemy in order to achieve the

³⁰ International Court Of Justice, 'Legality of the Threat or Use of Nuclear Weapons', (Advisory Opinion of 8 July, 1996).

³¹ *Lex specialis derogat legi generali* in complete form. The term itself refers to the norm that law governing specific subject matter takes precedence over law applying to general matters. For a direct translation and definition of the norm see Aaron X. Fellmeth and Maurice Horwitz, 'Guide to Latin in International Law', (Oxford: Oxford University Press, 2009).

³² Melzer, 'Conceptual Distinction and Overlaps between Law Enforcement and the Conduct of Hostilities'.

³³ While ‘hostilities’ is not defined, the definition of “Attack” sheds some light on the concept. See Adam Roberts and Richard Guelff (eds.), *Documents on the Laws of War* (3rd edn., Oxford: Oxford University Press, 2000). Article 49 (1) AP1, Pg. 447

submission of the enemy as quickly as possible with the least expenditure of life and resources".³⁴ The primary source of law for this paradigm is IHL. IHL distinguishes between 'direct' and 'indirect' participation in hostilities. Melzer claims that strictly speaking the 'conduct' of hostilities includes only direct participation in hostilities. Such conduct comes down to direct participation in combat, retreat, preparation for attack, and deployment in preparation for attack.³⁵

The legal standards that apply under the Law Enforcement Paradigm (LEP) are derived from HRL, other international law, and in times of armed conflict, from IHL. The HRL focus demands, "any operation subject to the LEP must be planned, prepared, and conducted so as to minimize, to the greatest extent possible, the recourse to lethal force."³⁶ Law enforcement, even when carried out by military institutions, is distinct from combat operations, which specifically involve the conduct of hostilities against other parties in the conflict. Like the concept of hostilities, the concept of law enforcement is not explicitly defined by international law. Rather it is defined functionally. Generally speaking, enforcing the law comprises all efforts within and outside of a state's territory to maintain or restore public security, law and order, or for the state to otherwise exercise its authority over individuals, objects, or territory. Multi-lateral organizations such as the UN Congress on the Prevention of Crime and Treatment of Offenders and the UNGA define the practice in this way, and have thereby produced 'soft-law', if not international law, institutionalizing this definition. The CCLEO specifically describes the core duty of law enforcement officials as "serving the community" and "protecting persons against illegal acts".³⁷ This functional definition is also echoed in the European Code of Police Ethics.³⁸ This functional definition coupled with the LEP focus on HRL is carried through in

³⁴ Melzer, 'Conceptual Distinction and Overlaps between Law Enforcement and the Conduct of Hostilities'.

³⁵ Some take Melzer's views on this to be extreme. For an alternate view see Dinstein Yoram, *The Conduct of Hostilities under the Law of International Armed Conflict* (London: Cambridge University Press, 2004).

³⁶ Melzer, 'Conceptual Distinction and Overlaps between Law Enforcement and the Conduct of Hostilities'.

³⁷ Code of Conduct for Law Enforcement Officials: see Un, 'Basic Principles on the Use of Force and Firearms by Law Enforcement Officials', in United Nations Congress on the Prevention of Crime and the Treatment Of Offenders (ed.), (Havana, Cuba: Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1990).

³⁸ (PC-PO), 'The European Code of Police Ethics'.

discussions of the permissible use of force in international policing policies pertaining to the use of lethal force, and military policy, which sharply distinguishes between policing and combat operations.³⁹

Melzer maintains that lethal force under the LEP is moderated by three general principles: 1) Precaution (any operation must be planned, prepared, and conducted so as to minimize, to the greatest extent possible, the recourse to lethal force) 2) Proportionality (lethal force is only permissible in self-defense or defense of others against an imminent lethal threat, to prevent a serious crime from occurring, or to affect the arrest of a person presenting the danger of such who is resisting arrest, or attempting to escape) and 3) Necessity (lethal force is to be used only when strictly unavoidable to protect life). While the principles of proportionality and necessity must be met under the HP as defined by IHL, the principles are much more restrictive under LEP where they are defined by HRL. This asymmetric application of these two principles begins to give us some idea of the asymmetry between the permissibility of the use of lethal force by military agents and institutions, and the permissible use of lethal force by police agents and institutions.

International Humanitarian Law vs. Human Rights Law

International Humanitarian Law can be defined as “comprising the whole of established law serving the protection of man in armed conflict”.⁴⁰ It applies only in cases of armed conflict, and is binding on all who take active part in that conflict from governments, to military commanders, to individual soldiers. The legal force of IHL comes from both treaty law, specifically the Geneva Conventions, their common articles, and Additional Protocols, and from customary law stemming from treaties and agreements such as the

³⁹ See (PC-PO), 'The European Code of Police Ethics', U.S. Army and U.S. Marine Corps, 'U.S. Army/Marine Corps Counterinsurgency Field Manual', in U.S. Army (ed.), (2007 edn., FM 3-24/WP 3-33.5; Chicago: University of Chicago Press, 2007), 246-47, James J. Fyfe, 'Blind Justice: Police Shootings in Memphis', *The Journal of Criminal Law & Criminology*, 73/2 (1982), 708-22, Anonymous, 'Domestic Investigations and Operations Guide', in Fbi (ed.), (Washington DC: FBIHQ, Director's Office, Resource Planning Office, Division(00), Corporate Policy Office, 2008), 269, James J. Fyfe, 'Tennessee V. Garner: The Issue Not Addressed', *New York University Review of Law and Social Change*, 14 (1986), 721-31, James J. Fyfe and Mark Blumberg, 'Response to Griswold: A More Valid Test of the Justifiability of Police Actions', *American Journal of Police*, 4/2 (1985), 110-32.

⁴⁰ Christopher Greenwood, 'Scope of Application of Humanitarian Law', in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* (Second Edition edn.; Oxford Oxford University Press, 2008a), 47-78.

1907 Hague Conventions.⁴¹ There are references in the literature to core principles of IHL that bridge across customary and treaty law. Solis lists four such principles: distinction, military necessity, prohibition of unnecessary suffering (of combatants) and proportionality.⁴² Kleffner agrees that there are core principles that form the framework of IHL, but lists these principles as distinction, proportionality (determined by harm caused v. military necessity), humane treatment (of combatants) and protection (of those at the mercy of one of the parties to the conflict). She also adds a principle prohibiting superfluous injury to combatants.⁴³

Kleffner highlights the shared purpose of IHL and HRL, which she notes is to “protect human dignity”, but also makes clear that these are two distinct bodies of law.⁴⁴ IHL applies to military operations which amount to armed conflict. HRL applies to the extent that individuals are subject to the jurisdiction of a state, or to international jurisdiction. IHL is concerned solely with *in bello* considerations not *ad bellum*. The justice (or lack thereof) of a cause has no effect on the applicability of IHL. Once it has been applied, the obligations under IHL are also not dependent on other actors in the conflict accepting their own obligations. Kleffner notes that there are three sub-sets of conflict to which IHL might apply: interstate armed conflict, belligerent occupation, and intrastate armed conflict. Determining which of these types of conflict is actually taking place is necessary to determine proper application of IHL.

Solis echoes this analysis in his first foundational question that must be asked when determining how to apply IHL: “What is the conflict status?”⁴⁵ He notes that it is possible for more than one of these types of armed conflict to be occurring at the same time in the same general area. One such case, suggested by Solis, is the current conflict in Afghanistan where at least two of the sub-sets of conflict have occurred over the

⁴¹ Greenwood, 'Historical Developments and Legal Basis'.

⁴² Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (New York, NY: Cambridge University Press, 2010) 653.

⁴³ Jann K. Kleffner, 'Human Rights and International Humanitarian Law: General Issues', in Terry D. Gill and Dieter Fleck (eds.), *The Handbook of the International Law of Military Operations* (Oxford: Oxford University Press, 2010), 51-77.

⁴⁴ Kleffner, 'Human Rights and International Humanitarian Law: General Issues'.

⁴⁵ Solis, *The Law of Armed Conflict: International Humanitarian Law in War*.

history of the armed conflict there.⁴⁶ There is some debate over how exactly IHL should be applied in these cases. Common Article 3 of the Geneva Conventions ensures minimal humanitarian restrictions are applied, but it does not affect the legal status of those involved in intrastate conflict with regard to domestic law. This means that those opposing the state may be prosecuted by the state for ‘crimes’ that take place during the conflict. However, even in such cases IHL is binding on parties to an armed conflict (be they states, international organizations, or armed groups), and also directly binds the individuals, both those who participate directly and those who do not, caught up in the conflict. IHL applies from the ‘first shot’ of the armed conflict and ceases to apply “on the close of military operations”.⁴⁷ The Fourth Geneva Convention ceases to apply in cases of belligerent occupation one year after the cessation of military operations except for certain articles that apply until the end of the occupation.⁴⁸

Human Rights Law, on the other hand, is focused on moderating how a state exercises its powers with respect to individuals, particularly individual citizens of that state. Kleffner claims that state human rights obligations have three dimensions: to respect, to protect, and to fulfill human rights. The first dimension requires that states not interfere with an individual’s exercise of a particular right. The second requires that the state has an obligation to ensure that third parties do not interfere with an individual’s exercise of their rights. The third obligates the state to “provide, facilitate, and promote” human rights by institutional means to ensure the rights are fully realizable by individuals.⁴⁹ HRL applies to states by treaty and to international organizations by customary law, however Kleffner does not believe that such law has been applied to armed groups. HRL applies in areas under state control. In areas outside of the state’s control it is not clear that HRL can be justly applied, as the state cannot be expected to fulfill its obligations until it has sufficient control of the territory in question. In such cases where sufficient control has not yet been established IHL may be applied to fill the vacuum. Another thing to note is that HRL applies to a state even when that state is operating outside of its own territory. The test is whether or not the state has sufficient

⁴⁶ Solis, *The Law of Armed Conflict: International Humanitarian Law in War*.

⁴⁷ Kleffner, 'Human Rights and International Humanitarian Law: General Issues'.

⁴⁸ See G.C. IV article 6(3) for a list of the relevant articles: Roberts and Guelff (eds.), *Documents on the Laws of War*.

⁴⁹ Kleffner, 'Human Rights and International Humanitarian Law: General Issues'.

control over the area to impose order. The ICCPR⁵⁰ states that HRL demands that the state respect, protect, and fulfill the civil and political rights of "...all individuals within (their) territory *AND* subject to (their) jurisdiction."⁵¹

Strictly speaking the bulk of IHL applies only to international armed conflicts under Common Article 2 of the Geneva Conventions.⁵² Greenwood defines an 'international armed conflict' as an incident where one state uses force of arms against another state for the total or partial military occupation of a state by another, even in cases where the occupied state offers no resistance. Greenwood takes a firm position that armed individuals or a group of individuals using force, even "military force", is not sufficient to bring about a state of 'international' armed conflict. He notes that Additional Protocol 1 does allow for some non-state actors to engage in armed conflict; granting its members combatants' privilege to fight, within the laws of war, without criminal liability and with protected status as POWs if captured. However, these privileges are granted only in cases where the armed group is fighting against colonial repression, foreign occupation, or racist regimes. Greenwood argues that this permission to resort to legally permissible armed force was meant to be quite narrow. Solis concurs with Greenwood's general definition, but adds that armed conflict may occur in situations 'short of war' where armed force is used by two or more states. Such conflict is to be distinguished from "armed incidents" on the basis of whether or not the conflict was sufficiently protracted, the way in which the parties involved viewed the incident, and the intentions of the parties at the time of the incident. This formulation allows more room for non-state actors to resort to armed force under the Geneva Conventions than Greenwood's position does. However, both Greenwood and Solis note that a formal declaration of war is not necessary for IHL to be applied.

The majority of treaty-based IHL does not cover most cases of intrastate, or non-international armed conflict. In terms of treaty law, only Common Article 3 and the

⁵⁰ The International Covenant on Civil and Political Rights (19/12/1966)

⁵¹ Kleffner, 'Human Rights and International Humanitarian Law: General Issues'.

⁵² Greenwood, 'Scope of Application of Humanitarian Law', Kleffner, 'Human Rights and International Humanitarian Law: General Issues', Solis, *The Law of Armed Conflict: International Humanitarian Law in War*. In cases of non-international armed conflict only Article 3 of the Geneva Conventions, and the second Additional Protocol apply.

second Additional Protocol apply. Common Article 3 demands that basic humanitarian concerns included in the Geneva Conventions, such as the status of protected persons, the duty to care for the sick and wounded, and the humane treatment of those detained by the state, be extended to those caught up in intrastate armed conflict. Solis claims that this means that no other part of the Geneva Conventions applies in these cases, and that instead HRL and domestic law of the country in conflict govern these conflicts. This means that there is no POW status for insurgent fighters, and no ‘protected persons’ as defined by the Geneva Conventions in such conflicts. However, he does note that in practice much of IHL has been applied in cases of non-international armed conflict as customary law, incorporated into one or more of the warring parties’ wartime policies regarding the use of lethal force, which may extend these protections to non-state actors in some cases.

As mentioned, during armed conflict IHL has precedence over HRL in accordance with the legal maxim of *lex specialis*⁵³ when the two bodies of law come into conflict. While it is broadly agreed that *lex specialis* applies granting IHL precedence over HRL in some cases, what exactly this means is unclear and a matter of some controversy in the literature. Greenwood notes that this principle of *lex specialis* is not meant to govern the general relationship between both bodies of law, but rather to govern the implementation of specific rules according to specific circumstances.⁵⁴ This is echoed in Kleffner’s treatment of cases where IHL and HRL conflict as well.⁵⁵ Melzer concurs in his description of the interplay between the HP and LEP. He maintains that the LEP is the “default” paradigm and so governs all cases in which the parties to the conflict exercise their authority outside of the conduct of hostilities.⁵⁶ However, Kenneth Watkins argues that this rule-by-rule implementation of *lex specialis* should flow both ways, allowing for the incorporation of HRL even in cases of armed conflict normally governed by IHL when no specific IHL rule applies.⁵⁷

⁵³ See section 4.02 pp. 72-75 Kleffner, 'Human Rights and International Humanitarian Law: General Issues'.

⁵⁴ Greenwood, 'Scope of Application of Humanitarian Law'.

⁵⁵ Kleffner, 'Human Rights and International Humanitarian Law: General Issues'.

⁵⁶ Nils Melzer, 'Conceptual Distinction and Overlaps between Law Enforcement and the Conduct of Hostilities', *ibid.*(2011c), 33-49.

⁵⁷ Kenneth Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict', *The American Journal of International Law*, 98/1 (2004), 1-34.

Permissible use of Lethal Force Under IHL/HP

During armed conflict the permissible use of lethal force is determined by three primary legal principles: distinction, proportionality, and military necessity. Distinction restricts the permissible targets or objects of lethal force to military objectives.⁵⁸ Proportionality restricts the amount of harm it is permissible to do as a side effect of one's attack on military objectives to those not directly participating in the conflict, and military necessity restricts the use of lethal force those directly participating in the conflict can use against one another in pursuit of military ends. These principles have their basis in ethical principles from Just War Theory. While these principles restrict the use of lethal force to some degree, they allow for a broader use of lethal force than HRL principles.

Distinction:

The primary restriction on the use of lethal force by military personnel is the principle of distinction. This principle demands that parties to an armed conflict differentiate between those combatants, who are liable to be attacked with lethal force during armed conflict, and civilians, who are not. This principle not only demands that one engaged in armed conflict distinguish, or discriminate, between these two groups, but also prohibits the direct targeting of those who are not liable to attack.⁵⁹ Distinction is considered to be the most important constraint on the use of lethal force in IHL. Kleffner describes this principle as “a cardinal principle” of IHL while Solis names it as the “most significant battlefield concept” in IHL/LOAC, and considers the question “What is the individual's status?” to be secondary only to determining the status of the conflict⁶⁰ when seeking to understand and apply IHL.⁶¹ Before going further some discussion of how these two statuses are defined in IHL.

⁵⁸ Military objectives include both persons and objects directly involved in hostilities during armed conflict. How ‘direct’ this directness must be is a matter of some controversy and will not be discussed here at any length.

⁵⁹ I use the term here in a broad sense wherein being liable to attack means that one has some sufficient reason to discount their claim rights against attack rather than the more stringent legal usage which requires specific descriptive criteria be met.

⁶⁰ That is, what is the status of the conflict as an international or non-international armed conflict. If the conflict is the former, or an “Article 2” conflict, the Geneva Conventions and Additional Protocols apply as a matter of treaty law. If the conflict is classed as the latter, or an “Article 3” conflict, only Article 3 and the second Additional Protocol of the Geneva Conventions apply as

Combatants are those who are legally permitted to take direct part in hostilities.⁶² Traditionally, this refers to all members of a state's armed forces, any militias or volunteer corps associated with those armed forces, and/or those who participate in a spontaneous armed response to an invasion or *levee en masse*. Additional Protocol 1 has broadened this category to include non-state armed groups, provided they distinguish themselves from non-combatants by bearing arms openly when engaging in hostilities and having a sufficient level of command and control to ensure that members of such groups are accountable to IHL and LOAC.⁶³

Combatants are granted special legal permission to use lethal force against military targets for the duration of the conflict, while civilians have no such permission. The special permission is known as "combatant's privilege". Medics and chaplains who are members of the armed forces of the parties involved in the conflict are only permitted to use force in defense of themselves or those under their care. They are considered to be 'protected persons' under international law and so are immune from attack, provided they only use lethal force within these narrow parameters.⁶⁴ Does this use of lethal force equate to a narrow form of combatants' privilege? I believe that it does. Medics and religious personnel are not criminally liable for any harm they cause when using lethal force, provided they use it within the limited parameters specified above. They are legally permitted to bear small arms for this purpose.⁶⁵ Civilians are legally permitted to use lethal force in self-defense, but they are also open to prosecution, if not

treaty law. In these cases, customary law, HRL, and the domestic laws of the state in which the conflict is occurring govern conduct during the conflict.

⁶¹ Kleffner, 'Human Rights and International Humanitarian Law: General Issues', Solis, *The Law of Armed Conflict: International Humanitarian Law in War*.

⁶² According to both Article 3 of The Hague Regulations and Article 43, paragraph 2 of Additional Protocol 1 to the Geneva Conventions Again see Roberts and Guelff (eds.), *Documents on the Laws of War*.

⁶³ See Additional Protocol 1 Articles 43 & 44 in Roberts and Guelff (eds.), *Documents on the Laws of War*.

⁶⁴ It is permissible under IHL for medics and chaplains to bear small arms or pistols to allow them to do so, but unless they, or those in their care, are directly attacked they are not permitted to use them against other combatants without violating IHL.

⁶⁵ See Knut Ipsen, 'Combatants and Non-Combatants', in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* (Second edn.; Oxford: Oxford University Press, 2008), 79-117. Pp. 103-105. He cites the following as the legal basis for this claim: Article 22(1) GC 1; Article 35(1) GCII; Article 13(2a) API Roberts and Guelff (eds.), *Documents on the Laws of War*.

conviction, for such actions.⁶⁶ Furthermore, chaplains and medics do not lose their protected status, even during their engagement in hostilities in such cases, which differentiates them from civilians and other protected persons. If captured they are considered neutral parties and may only be detained if they are needed to treat or minister to other POWs, and are granted the same legal protections as POWs.⁶⁷

Solis and others use the term non-combatant to refer to anyone who is not legally permitted take direct part in hostilities. This usage of the term originates in The Lieber Code established in 1863 and the customary international law that flowed from that code.⁶⁸ However, Knut Ipsen argues that this broad usage of non-combatant does not fit with current treaty law. He highlights the fact that the armed forces of a particular party to an armed conflict include both combatants and non-combatants. By customary law those who most obviously fall into this category are both medical and religious personnel (medics and chaplains). However, Ipsen argues that this category of non-combatants should also include "persons who are members of the armed forces, but who, by virtue of national regulations, have no combat mission". This latter group includes judges, government officials, and blue-collar workers.⁶⁹ If captured such non-combatants are considered as POWs, as members of the state's armed forces, and must

⁶⁶ There is more to be said about the distinction here, but in the interests of space I cannot argue the position in detail. The rough idea is this: It seems to me that a civilian who shoots a combatant during armed conflict is in breach of local, if not international, law though he or she may be legally justified, in cases of self-defense, for that breach. Medics and chaplains who use lethal force are not accountable for breaches of local law, because of *lex specialis*, nor are they in breach of IHL/LOAC provided they are acting in defense of themselves or others in their care. This is reflected in the fact that they do not lose their status as POWs, and their immunity from prosecution provided they have not violated IHL/LOAC.

⁶⁷ Articles 28 & 30: GC I; Articles 36 & 37 GCII; Article 33: GCIII Roberts and Guelff (eds.), *Documents on the Laws of War*. See also discussion in section 314 & 315 in Ipsen, 'Combatants and Non-Combatants'.

⁶⁸ Ipsen, 'Combatants and Non-Combatants', Solis, *The Law of Armed Conflict: International Humanitarian Law in War*.

⁶⁹ By "blue-collar workers" I take Ipsen to mean people such as mechanics, truck drivers, loaders, cooks, etc. who are members of the state armed forces, but whose roles do not, generally speaking, include the participation in hostilities. By "government officials" I take Ipsen to be referring to officials such as the President of the United States or other officials who are within the military chain of command, but whose role does not include sufficiently direct participation in hostilities. With regard to medics and chaplains, Ipsen argues that medical and religious personnel are legally distinct from other 'non-combatants' that are part of a state's armed forces, and so should not be considered a sub-category of such non-combatants. I take no position on this here. The fact that they are protected from direct attack, unless they give up that protection by engaging in hostilities, is sufficient to distinguish them from combatants for the purposes of the thesis. See Ipsen, 'Combatants and Non-Combatants'.

be treated accordingly. Unlike medics and chaplains however, they are not 'protected persons' under Article 51 of Additional Protocol 1. All else being equal they are permissible targets of lethal force by opposing combatants. Ipsen argues this status results as a function of domestic law pertaining to the armed forces that prohibits these members from engaging in the combatants 'right' to take direct part in conflict. He also maintains that civilians, insofar as their protection is "the basic object and purpose of IHL", should be clearly distinguished in law from members of the armed forces who are not permitted to take direct part in hostilities, and so not merely be considered to be a sub-class of non-combatants.

Anyone who is not a member of the armed forces, associated militias/volunteer corps of a state involved in the conflict, a participant in a *levee en masse*, or an armed group that falls under the description in Article 43 of the First Additional Protocol is considered to be a civilian by IHL/LOAC.⁷⁰ Civilians are protected persons under IHL and as such are not permissible targets for direct attack. However, this immunity is not unconditional, and so it is legally permissible, in some cases, to kill civilians. There are at least two cases in which it is permissible for combatants to kill civilians. First, a civilian can forfeit their protected status by participating in hostilities. Civilians who directly participate in hostilities during an armed conflict are not legally protected from criminal prosecution; they lack combatants' privilege. Civilians who engage in hostilities lose their status as protected persons for as long as they participate in a specific attack.⁷¹ It is this immunity from direct attack that differentiates civilians from 'non-combatants' in Ipsen's sense of the term, and their lack of any claim to combatants' privilege differentiates them from medical and religious military personnel, making them open to prosecution, if not conviction, under local laws. Medics and chaplains on the other hand are permitted a very narrow range of legal immunity for the use of lethal force when defending themselves or those they are

⁷⁰ To paraphrase the definition given in Article 50 of the First Additional Protocol: one has civilian status if one does not meet the descriptions laid out in Article 4 (1), (2), (3) or (6) of the Third Geneva Convention or Article 43 of the First Additional Protocol. See Roberts and Guelff (eds.), *Documents on the Laws of War*.

⁷¹ Again this is controversial ground. For further discussion see Solis, *The Law of Armed Conflict: International Humanitarian Law in War*. And Nils Melzer, 'Interpretive Guidance on the Notion of Direct Participation of Hostilities under International Humanitarian Law', (Geneva, Switzerland: ICRC, 2009), 85.

responsible for in armed conflict, without losing their status as protected persons thereby.⁷²

Secondly, it is legally permissible to kill civilians in the course of an attack on a military target. Provided the civilians killed were not the targets of the lethal attack, and reasonable precaution was taken to avoid such casualties, instances of ‘collateral damage’ may be legally permissible when proportionate to the benefit gained by the attack.⁷³ The principle of distinction permits combatants to attack any and all military targets with lethal force. A military objective is defined in IHL as a target whose primary function is to serve a military purpose, directly aiding in the party’s conduct of hostilities.⁷⁴ Such objectives include munitions factories, and other production facilities that may be operated by civilians. In such cases it is legally permissible to attack such objectives even though it is highly likely that civilians will be killed in the process. Similarly, in some cases it may be permissible to use lethal force against combatants even when such force is likely to kill or otherwise harm nearby civilians. For example, combatants fighting in urban conflict often come under fire from private residences. It is permissible for combatants to direct lethal force against those firing at them even though it is possible that the residence may contain civilians as well as opposing combatants, provided that those using lethal force do not directly target the non-combatants and any harm done is proportionate to the anticipated military advantage.

However, this is not to say that in such cases the principle of distinction becomes less stringent. In cases where combatants and civilians may foreseeably intermix there are

⁷² See Section III Sub-section 612 (1) pg. 343 in Jann K. Kleffner, 'Protection of the Wounded, Sick, and Shipwrecked', in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* (Oxford: Oxford University Press, 2008), 325-65. She cites Article 22, para. 2, GC I; Article 35, para. 3, GCII; Article 13, para. 2 and Article 19, para 2 in API. See Roberts and Guelff (eds.), *Documents on the Laws of War*. for the articles specified. The point I wish to make here is NOT that civilians are never permitted to use lethal force during armed conflict. They are permitted to use such force in accordance with the legal norms pertaining to self-defense. Such use of lethal force may be shown to be permissible at trial. However, members of the armed forces engaged in an armed conflict are not subject to criminal prosecution for using lethal force against other combatants. They can only be prosecuted in cases where they violate IHL or LOAC. Furthermore, medical and religious personnel are allowed to use lethal force in defense of themselves or those under their care when threatened with lethal force *without the loss of their protected status*. Again, this limited permission seems to me to be a form of ‘combatants privilege’, albeit a very narrow one.

⁷³ This benefit is referred to in law as the ‘military advantage’ gained.

⁷⁴ Article 52(2) API See Roberts and Guelff (eds.), *Documents on the Laws of War*.

obligations on both sets of combatants (attackers and defenders) to minimize harm to civilians. Attacking combatants must only attack (directly) other combatants, and both sets of combatants must make a reasonable effort to clear civilians from the area where they foresee that lethal force may be brought to bear.⁷⁵ If attacking combatants kill civilians in the course of an attack such use of lethal force is permissible only if it meets the conditions laid out in Article 57 paragraph 2(a) in the First Additional Protocol to the Geneva Conventions:

“2. With respect to attacks, the following precautions shall be taken:

(a) those who plan or decide upon an attack shall:

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

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

(iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;”⁷⁶

This third condition, that prohibits attacks that can be expected to cause incidental harm to civilians excessive to the direct anticipated military advantage, forms the second constraint on the use of lethal force in IHL.

Proportionality

Broadly speaking, Proportionality demands that the relevant anticipated benefit achieved from a particular use of force is not outweighed by the relevant harm that force can be reasonably expected to cause. This principle is slightly different in law than it is in Just War Theory, but still holds this same structure. In both ethics and law proportionality takes two forms. There is proportionality as it applies to HRL, and proportionality as it applies to IHL. In Just War Theory there are also two forms of the proportionality principle: proportionality as it applies to *jus ad bellum* (JAB), and proportionality as it applies to *jus in bello* (JIB). While the general demand that benefit

⁷⁵ Article 58 AP I in Roberts and Guelff (eds.), *Documents on the Laws of War*.

⁷⁶ Roberts and Guelff (eds.), *Documents on the Laws of War*.

outweigh harm if a use of lethal force is to be permissible holds, the relevant benefits and harms vary across the four interpretations of this principle. In this section I will focus primarily on the principle as applied under IHL.

In IHL proportionality is primarily a function of customary law. It appears in treaty law only in the First Additional Protocol to the Geneva Conventions as a general prohibition on the use of lethal force in cases where such force would cause “incidental loss of civilian life” such that the loss would be “excessive in relation to the concrete and direct military advantage anticipated”⁷⁷ Article 57 paragraph 2, sub-paragraph (b) adds some specificity to this by demanding that “an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection”.⁷⁸ This additional clause specifies the precautionary measures that attacking military personnel are to take with regard to the principle of proportionality.⁷⁹

In armed conflict, when IHL/LOAC applies, the relevant harm is *only* harm done to civilians or civilian objects. The relevant benefit sought is some gain of military advantage. One must balance these two factors against one another when trying to determine whether or not a particular use of force is proportionate. There are two important things to note here. First, proportionality under IHL does not apply to the killing of combatants. If one combatant is in the middle of the desert, dropping a 2,000-pound bomb onto that combatant’s head is legally permissible provided that the principles of distinction and military necessity have been met, that the military advantage of killing that particular combatant is sufficiently high, and no one else is harmed in the process. While such a use of force might seem excessive there are a couple of reasons for thinking that such an act would be justifiable. First of all,

⁷⁷ Art. 50 (5b) prohibits “an attack which may be expected to cause incidental loss of civilian life...which would be excessive in relation to the concrete and direct military advantage anticipated” Roberts and Guelff (eds.), *Documents on the Laws of War*.

⁷⁸ See Roberts and Guelff (eds.), *Documents on the Laws of War*.

⁷⁹ Solis notes that this clause also reduces the legal culpability for military commanders who may accidentally begin to plan or execute an attack that would lead to a disproportionate amount of harm to civilians on the basis of a reasonable belief that the target they have selected is a legitimate one. Provided they cancel or suspend the attack when the true nature of the target becomes apparent, they are not legally culpable for the harms caused. Given that the sub-paragraph ends with the same general prohibition on incidental harm disproportionate to the military advantage gained, I agree with his claim in this regard. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*.

combatant's privilege permits the killing of any combatant who has not surrendered, been wounded, or otherwise rendered *hors de combat*. If we were to include harms done to combatants in our proportionality calculus this would drastically narrow, if not completely undermine, combatant's privilege. Secondly, and perhaps most obviously, killing opposing combatants generally constitutes some level of definite military advantage insofar as it weakens the opposing party's ability to fight. Even the killing of Ipsen's 'blue-collar non-combatants' causes problems for the functioning of the military as a fighting force, which carries with it military advantage.

It should also be noted that, like the principle of distinction, the principle of proportionality does not state that the killing of civilians is impermissible, rather it places limits on such killing. Some harm to civilians is permitted provided that the expected harm caused is proportionate to the anticipated military advantage gained. For example, when the U.S. discovered the whereabouts of Osama Bin Laden several alternatives were put forward. One alternative was to attack the house where he was living with laser guided bombs dropped from aircraft. Another was a drone strike on the building, resulting in less destruction and better accuracy. Finally, an option of sending in Special Forces personnel to raid the building and kill Bin Ladin was put forward. The first option was rejected as being disproportionate. The destruction caused by the bombs in a residential area was considered likely to cause a great deal of harm to those living around the building in a residential neighborhood. The second option was rejected as well, in part because of proportionality concerns. While a hellfire missile fired from a drone might be more accurate and cause less destruction, the potential harm to civilians living in the neighborhood and the building itself was considered disproportionate to the military advantage of eliminating Bin Laden. The third option was chosen, but resulted in one civilian being killed and another wounded.⁸⁰ Given the military advantage of killing the leader of Al Qaeda, this use of lethal force would likely be considered to meet the principle of proportionality despite the fact that civilians were harmed in the course of the operation.⁸¹ Under IHL, the greater the

⁸⁰ Mark Owen, *No Easy Day: The Firsthand Account of the Mission That Killed Osama Bin Laden* (New York, NY: Penguin Group, 2012).

⁸¹ Of course, this is assuming that Osama Bin Laden, and the others in the house that were killed, were combatants in an ongoing armed conflict at the time. This is a controversial assumption to make, but it is not the focus of the discussion here.

military advantage to be gained, the greater harm to civilians is permitted to obtain it, as long as such harm doesn't violate the conditions of Article 57 (2; a-c).

The IHL principle also places legal obligations on defending combatants. It prohibits the use of human shields to prevent attacks on otherwise legitimate targets. The First Additional Protocol states clearly in Article 58 that the Parties to the conflict are required to remove civilian populations including any individual civilians from the area around military objectives and to avoid placing such objectives in or near densely populated areas “to the maximum extent feasible”.⁸² By laying out as clearly as possible the obligations of the parties to the conflict relative to the protection of their own citizens IHL attempts to restrict the application of principle by assigning certain responsibilities to the parties caught up in the conflict. These responsibilities lessen to some extent the legal weight of harms caused by intermediate agency in proportionality considerations, sharing the responsibility between the user of lethal force and the agent placed in the way of it. This prevents parties from claiming they have no responsibility for harms they did not directly cause, and therefore claiming permission to leave such harms out of proportionality considerations. It also prevents parties from attempting to use the principle to defend otherwise legitimate targets by either allowing the shielding of such targets by civilians, coercing civilians into the vicinity of such targets, or by deliberately placing such targets in the midst of civilian populations when they could reasonably be placed elsewhere.

Necessity

The third and final restriction on the use of lethal force under IHL is necessity. This principle can actually be subdivided into two legal principles. Military Necessity, which permits parties to a conflict to use what lethal force is sufficient to win the armed conflict they are fighting as quickly as possible, at the lowest cost, to themselves, and Unnecessary Suffering,⁸³ which limits the means by which such lethal force is employed against combatants in the pursuit of this goal. The first sub-principle allows

⁸² Roberts and Guelff (eds.), *Documents on the Laws of War*.

⁸³ This is sometimes referred to as the principle of humanity.

parties to kill to achieve military advantage,⁸⁴ while the second regulates the permissible means by which this is to be done. Parties to an armed conflict are permitted to cause death and destruction to opposing parties in order to achieve military advantage, and ultimately military victory, but are only allowed to cause the minimum amount of harm and suffering necessary to achieve this goal.

Military Necessity permits parties involved in an armed conflict to use lethal force against one another in pursuit of military advantage, and ultimately, military victory. This legal principle differs from the principle of necessity that restricts the use of lethal force under HRL. Military Necessity allows for lethal force to be used even against non-imminent threats for as long as an armed conflict continues. This is what allows parties to an armed conflict to engage in tactics that would never be permitted outside of the paradigm of hostilities, such as ambush, sniping, or the killing of individuals who pose some form of non-imminent threat without first being required to call on them to surrender.⁸⁵ However, this permission is limited. Parties to an armed conflict are not permitted to violate the norms set out in the treaty and customary law of IHL, nor are they permitted to use any more force, or cause any more destruction, than necessary to achieve their goals. This later constraint overlaps to some extent with the proportionality principle.⁸⁶ In a recent article on the ethical principle of proportionality Thomas Hurka gives an account of what he terms “comparative proportionality” that might also be thought to be an application of the principle of Military Necessity.⁸⁷

⁸⁴ Provided it is not otherwise prohibited by international law. Military Necessity is not, of itself, sufficient to grant permission to use lethal force under international law. However, it does offer a minimal permission for combatants to target military objectives, including opposing combatants, insofar as such targeting is not otherwise forbidden by international law and is anticipated to weaken the opposing military forces’ ability to fight. See Janina Dill and Henry Shue, ‘Limiting the Killing in War: Military Necessity and the St. Petersburg Assumption’, *Ethics & International Affairs*, 26/03 (2012), 311-33.

⁸⁵ A common example of such a threat might be a combatant who is acting as a sentry. Such an individual does pose some degree of threat, but provided the opposing party remains unseen, the threat is not an imminent one. Military Necessity also permits attacks against Ipsen’s ‘blue-collar’ non-combatants in many cases, as killing these individuals is permissible under IHL, and killing them grants a military advantage to the attacking party insofar as it disrupts the defender’s ability to achieve its military goals.

⁸⁶ As does the former I suppose, insofar as the proportionality principle is one of the norms set out in the treaty and customary law of IHL.

⁸⁷ Thomas Hurka, ‘Proportionality in the Morality of War’, *Philosophy and Public Affairs*, 33/1 (2005a), 34-66.

Hurka points out that proportionality *in bello* can be simple or comparative. In a simple case a particular good ‘G’ expected from Act A is or is not proportionate to Harm ‘H’ which is caused by Act A. Provided $G > H$ then A is proportionate and, all else being equal, permissible. This is a common understanding of proportionality. The comparative case is less commonly referred to however. In a comparative case we have Good ‘G’ which can come about via either Act ‘A’ or Act ‘B’ where Harm caused by A ‘H^A’ is greater than the harm caused by B ‘H^B’, and $(G > H^A) \& (G > H^B)$. In such a case both acts are proportional and, considered separately, permissible. However, Hurka claims that because $H^B < H^A$ the JIB principle of proportionality demands that we undertake Act B rather than A, because A would be excessively harmful and therefore violate the principle of proportionality as the harm caused by Act A would be excessive. If this argument holds this means that in at least some cases the principle of necessity would be encompassed by the principle of proportionality. One might claim that we should undertake Act B rather than Act A because Act A, and the harms it would inflict, are unnecessary, and as such, disproportionate. My concern here is not to argue for or against this claim, particularly as the focus here is the legal constraints imposed by IHL rather than the ethical restraints imposed by Just War principles. However, this similarity does raise the question of how one is to separate the legal principle of proportionality from the legal principle of necessity *in bello*. This problem is complicated by the fact that despite the multiple appearances of the term “military necessity” in treaty law, military necessity is never explicitly defined. As such this principle is primarily a function of customary law.⁸⁸

To draw a clearer distinction, we can turn to the opposite side of the Necessity coin, so to speak. The legal principle of proportionality sets limits on the harm that can be inflicted on civilians exclusively. Necessity includes harms to both civilians and combatants. While military necessity permits the use of lethal force against combatants to achieve military ends, unnecessary suffering limits this permission to harm combatants in the same way that proportionality limits this permission for civilians. This sub-principle is set in treaty law in Article 35 of the First Additional Protocol to

⁸⁸ See Solis, *The Law of Armed Conflict: International Humanitarian Law in War*. (258-269)

the Geneva Conventions.⁸⁹ Unnecessary Suffering maintains that both parties in an armed conflict are only permitted to kill one another in a manner that causes no more harm, or suffering, than necessary to accomplish this end. While military necessity grants combatants permission to kill one another in cases where they are not otherwise legally prohibited, unnecessary suffering restricts the means one is permitted to use in doing so. One is permitted to inflict harm only to the extent needed to force the combatants to submit, or otherwise gain a military advantage over them, but no more.

Destruction or killing for the sake of destroying or killing is prohibited, as is any harm done in retribution for some wrong inflicted by the enemy. Thus unnecessary suffering forms the basis of the prohibition of harms such as the shooting of or torture of prisoners. This sub-principle also prohibits the use of weapons or munitions such as biological and chemical agents, “dum-dum” or soft-nosed bullets, and other forms of weaponry that would cause more physical or psychological trauma than required to achieve a military objective.⁹⁰ Necessity is primarily a function of customary law. However, this customary law principle, specifically the sub-principle of Unnecessary Suffering, forms the basis of much of the treaty law pertaining to prohibited weapons and munitions.⁹¹

Permissible use of Lethal Force Under the LEP

The use of lethal force is also permitted under the LEP. However, the principles that set restrictions on such force are more stringent than those IHL principles that restrict the use of lethal force under the HP. Here again we can set out three primary legal principles that define the permissibility of lethal force: precaution, proportionality, and

⁸⁹ Roberts and Guelff (eds.), *Documents on the Laws of War*. Art. 35, paragraph 2, API.

⁹⁰ For extended discussion of unnecessary suffering and how the principle restricts the use of weapons and munitions see Stefan Oeter, 'Methods and Means of Combat', in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* (Second Edition edn.; Oxford: Oxford University Press, 2008), 119-235.

⁹¹ Often what I have called two ‘sub-principles’ is presented as two separate principles of IHL. However, in defining exactly what constitutes “Necessity” *in bello* it seems that these two principles work in concert, each helping to define the other and both defining the boundaries of what constitutes Military Necessity. I do not appear to be alone in this opinion. Nils Melzer, for example, points to the complimentary relationship between military necessity and what he refers to as the principle of humanity. See Nils Melzer, 'Targeted Killings', in Terry D. Gill and Dieter Fleck (eds.), *The Handbook of International Law of Military Operations* (Oxford: Oxford University Press, 2011a), 277-301.

necessity.⁹² These principles restrict military use of lethal force when operating outside of the Hostilities Paradigm.

Precaution

The first principle, precaution, requires that any and all operations that are undertaken outside of the conduct of hostilities be planned and executed so as to minimize the possible use of lethal force. This principle can be distinguished from the Necessity principle in that it is applied prior to the attack rather than as a means to regulate the use of force during the attack. It requires that military forces operating under the LEP take steps to minimize the chances that lethal force will become necessary during a given operation. In short the military force tasked with enforcing authority in the area is required to do everything reasonably possible to carry out its operation without having to resort to lethal force at all. Specifically noted in international law are restrictions on the use of firearms. The Code of Conduct for Law Enforcement Officials demands that firearms not be used “except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others, and less extreme measures are not sufficient to restrain or apprehend the suspected offender.”⁹³ This condition also mandates that states that utilize military personnel in this way must provide those personnel with equipment and training that allows them alternatives to lethal force.⁹⁴

Proportionality

The second principle, proportionality, is narrower in scope than the legal principle under IHL. Under this principle, lethal force is only proportionate when it is used in self or other defense against an unjust attack which would reasonably be believed to cause very serious, if not lethal, harm. The proportionality of the act in these cases is determined by weighing the harm to be inflicted against the harm prevented. In short, unless the harm threatened is sufficiently dire to justify severe injury or death to the individual that poses the threat, one is not permitted to use lethal force to prevent such harm. The term ‘threatened’ here requires some further elaboration. This principle

⁹² Melzer, 'Law Enforcement and the Conduct of Hostilities'.

⁹³ UNGA, 'Code of Conduct for Law Enforcement Officials'. Article 3, paragraph (c). The last clause here highlights the strict necessity condition that I will come to momentarily.

⁹⁴ See General Provision 2 in UN, 'Basic Principles on the Use of Force and Firearms by Law Enforcement Officials'.

allows military use of lethal force in order to arrest or prevent the escape of persons who present a serious danger of such harm, or who are violently resisting their authority, insofar as doing so is likely to prevent some sufficiently serious harm. In cases of individual self and other defense the relevant threat to be addressed by the defender must be an imminent threat to themselves or someone else. In the case of law enforcement this imminence requirement is relaxed to some extent. If the individual reasonably poses a threat of severely harming others, or has been detained on the basis of a reasonable belief that they have done so, military personnel are permitted to use lethal force to prevent the escape or stop the individual. However, such use of lethal force is only proportionate in cases where the individual targeted is likely to commit a serious crime resulting in severe harm to others if allowed to escape.

Necessity

The third principle, necessity, is likewise narrower in scope than the principle as applied under IHL, though its content is roughly the same. Under IHL one may only use lethal force when necessary to achieve a given military objective, and only to the extent necessary to do so. However, provided that the lethal force is employed against combatants, and that the lethal force does not cause excessive suffering to those combatants, one may use lethal force as a preliminary tactic to achieve the objective. The stricter principle of necessity under the LEP demands that such lethal force can only be used as a last resort, and if used, must be used in such a way that minimizes the harm done to the threat without placing others at greater risk. This means that military personnel operating outside of the conduct of hostilities are only permitted to use lethal force in cases where the use of any other less harmful method would be ineffective or impossible to employ to eliminate the threat. Furthermore, in such cases where lethal force may be necessary, military personnel are required if at all possible, to attempt less harmful methods to alleviate the threat.⁹⁵ For example, a recent Rules of Engagement (ROE) card issued specifies that military personnel are required, if at all possible, to use “Graduated Measures of Force”. These measures of force start from shouted warnings and the visible display of one’s weapon and intent to use that weapon, and

⁹⁵ See UNGA, 'Code of Conduct for Law Enforcement Officials'. Article 3 and Commentary, and General Provision 5(a-c) UN, 'Basic Principles on the Use of Force and Firearms by Law Enforcement Officials'.

extend to firing warning shots before employing lethal force.⁹⁶ If at any point prior to the ‘kill-shot’ killing the individual ceases to be necessary to alleviate the threat then it is not permissible to utilize lethal force against the individual.⁹⁷ If this fails and the kill shot is taken, international policy requires that steps be taken to render medical aid to the individual who posed the threat “at the earliest possible moment.”⁹⁸

Rules of Engagement

The final restriction that defines the permissible use of lethal force by military personnel is the Rules of Engagement, or ROEs, under which they operate. ROEs do not constitute an independent body of law, but rather are military directives issued by the military command of the states whose personnel are involved in the conflict.⁹⁹ They are the primary means by which the use of force is directly regulated, and incorporate aspects of international and domestic law, political objectives specific to the operation, and various other legal, diplomatic and operational considerations.¹⁰⁰

ROEs clarify the obligations and restrictions that limit troops’ permissible use of lethal force in a particular military operation. Because multiple bodies of law may apply in one area of operations, it is sometimes unclear where and when lethal force might be allowed. Combat operations in an ongoing armed conflict might include primarily IHL restrictions, but some HRL restrictions might apply as well. An occupying force fighting against an insurgency, on the other hand, would be restricted by both IHL and HRL considerations, and could also be bound by the laws of the host nation pertaining to the use of lethal force in some cases. Additionally, political and operational objectives may impose constraints on the use of lethal force. In formulating ROEs

⁹⁶ See Multi-National Corps – Iraq (MNC-I) ROE card cited in Solis, *The Law of Armed Conflict: International Humanitarian Law in War*. (Pg. 516)

⁹⁷ Melzer refers to these three aspects of what he calls “strict necessity” as “qualitative, quantitative, and temporal necessity”. See Melzer, 'Targeted Killings'. 17.03 (5-7) pp. 283-284

⁹⁸ UN, 'Basic Principles on the Use of Force and Firearms by Law Enforcement Officials'.

⁹⁹ Solis, *The Law of Armed Conflict: International Humanitarian Law in War*.

¹⁰⁰ Blaise Cathcart, 'Rules of Engagement in Self-Defense Operations', in Terry D. Gill and Dieter Fleck (eds.), *The Handbook of International Law of Military Operations* (Oxford: Oxford University Press, 2011), 201-11.

military command and policy makers take all these considerations into account and incorporate them into the ROEs given to military forces on the ground.¹⁰¹

ROEs, as directives issued by the military authority under which the troops are serving, also have ‘teeth’. Violations of ROEs are punishable under military or domestic law even when no violation of international law can be demonstrated. An example of how these rules can be used to limit the use of force was given to me by Maj. Gen. Stephen Day during a conversation in 2010.¹⁰² Australian ROEs for operations in Iraq required that, when possible, an escalation of force be employed. However, this escalation did not allow for warning shots to be fired. The escalation of force started from a verbal warning, and then extended to a verbal command coupled with the presentation (i.e. pointing) of the soldiers’ weapon to the individual constituting the threat. However, if these steps did not stop the individual from posing a threat, the soldier could either choose to use non-lethal force (i.e. pushing, shoving, tackling etc.) or use lethal force (i.e. shooting the individual). In the particular case that the General was discussing, the Australian soldier did fire a warning shot into the air, which eliminated the threat but violated his ROE. This violation resulted in a military investigation of the incident that concluded that given the circumstances the soldier’s action was permissible under international law, and justified by the facts in the case. Only when this was determined by the Australian military was the soldier excused for his actions.

Military authorities are restricted in the formulation of ROEs by two factors: law, both international and domestic, and the combatant’s right to defend him or herself, and others in their unit. ROEs cannot require that combatants violate applicable

¹⁰¹ Solis distinguishes between ROEs and Rules for the Use of Force (RUFs). ROEs are based primarily in international law, and are used in cases where there is no functioning law enforcement, or civil administration in place, or that administration is hostile to the military forces. RUFs on the other hand are based on domestic or host nation law pertaining to the use of force, and are usually used in cases where the state military is partnered with the law enforcement or civil administration of the country in which it is operating. This distinction is based in the U.S. model of ROEs/RUFs, and so I am unsure if it is generalizable. If we take the general definition of ROEs as directives limiting the use of force based in a combination of legal and operational considerations, it seems that the general term ROEs is sufficient for the discussion here.

¹⁰² The conversation took place at a conference at ANU where the General was speaking on ROEs in practice. Maj. General Stephen Day, *Violence, War & Terrorism: Ethical Legal & Political Perspectives - Protecting Civilians During Violent Conflict* (The Australian National University, Canberra, 2010).

international or domestic law, regardless of the political goals that operation might seek to achieve. In cases of armed conflict combatants must still comply with the principles of distinction, proportionality and necessity. When serving in military operations other than war,¹⁰³ such as a humanitarian intervention or an occupation, ROEs must comply with the relevant HRL and possibly the domestic laws pertaining to the use of lethal force in the country where the operation is taking place. When conducting operations in their own country ROEs¹⁰⁴ must comply with domestic law.

ROEs also cannot prohibit a combatant from using lethal force to engage in self-defense, or defense of his or her unit against attack.¹⁰⁵ However this does not grant carte blanche permission. Rather permission is limited by treaty and customary IHL, and may be further limited by domestic law or policy incorporated into the ROEs. ROEs often restrict the use of lethal force in self or other defense by limiting the means or equipment soldiers are permitted to use when engaging in self-defense.¹⁰⁶ For example, a soldier may not be permitted to call in an artillery or air strike in particular areas without permission from someone further up the chain of command. Some ROEs may also state that certain calibers of ammunition, or particular weapons, may not be used in some areas. A unit driving through a heavily populated area may not be permitted to use a .50 caliber machine gun or an M40 grenade launcher as a first strike weapon to fight off an attack, for example. The ammunition fired by both of these weapons is likely to cause much collateral damage, which could undermine the political objectives of the operation, or, if the soldiers were not engaged in an ongoing armed conflict, possibly violate strict proportionality and necessity constraints under HRL. Furthermore, permission to use lethal force in self-defense does not equate to an *obligation* to use force in self-defense. Commanders on the ground are permitted to choose what level of force they use, if any, within the boundaries set by their ROEs.

¹⁰³ Popularly referred to as MOOTWA ('MOOT-wa')

¹⁰⁴ Or RUFs as the case may be.

¹⁰⁵ To do so would violate Article 51 of the UN Charter.

¹⁰⁶ Cathcart, 'Rules of Engagement in Self-Defense Operations', Blaise Cathcart, 'Enforcement of Peace Enforcement Operations', in Terry D. Gill and Dieter Fleck (eds.), *The Handbook of International Law of Military Operations* (Oxford: Oxford University Press, 2001), 115-28.

The actions of Lt. Col. Chris Hughes during combat operations¹⁰⁷ in Iraq provide a good example of this.¹⁰⁸ When faced with a large crowd of angry Iraqis Lt. Col. Hughes held his weapon, barrel down, over his head and commanded his soldiers to 'take a knee' and 'smile'. The soldiers complied, kneeling on the ground and pointing their weapons downward. This action caused the crowd to back off enough to allow the soldiers to leave the area without further incident.

The limitations imposed by ROEs are often causes of complaint from combatants who are 'on the ground' in a particular area. Combatants claim that such limitations can prevent them from defending themselves and their fellows effectively. These limitations are particularly problematic when operating in situations where IHL does not apply. In such cases combatants may be permitted to target individuals who are committing a hostile act, which is generally construed as attacking the armed forces in some way, or who are displaying hostile intent, or acting in such a way as to suggest that they pose an imminent threat, using force against combatants, or to prevent the accomplishment of the mission with which the soldiers have been tasked. Before using lethal force against such individuals, the combatants on the ground are required to positively identify the individual as the one taking hostile action or demonstrating hostile intent. They are only permitted to target those so identified, and no one else.¹⁰⁹ These terms are less applicable during armed conflict as international law only permits combatants to target other combatants at any time, and only target civilians who are engaged in hostile acts against them.¹¹⁰

Outside of armed conflict however, the vagueness of the terms set out in ROEs often makes defending oneself particularly difficult. One of the most famous cases of this is

¹⁰⁷ Combat operations conducted by U.S. troops in Iraq during Operation Iraqi Freedom began on March 19, 2003 and ended May 1, 2003. See Barbara Salazar Torreon, 'U.S. Periods of War and Dates of Recent Conflicts', (Washington DC: Congressional Research Service, 2015), 9. Pg. 8

¹⁰⁸ See Ryan Chilcote, 'Heroes of War', *CNN.com International* ([www.edition.cnn.com](http://edition.cnn.com); <http://edition.cnn.com/SPECIALS/2003/iraq/heroes/chrishughes.html>: CNN, 2005), Dan Baum, 'Battle Lessons', *The New Yorker* (www.newyorker.com; <http://www.newyorker.com/magazine/2005/01/17/battle-lessons>: The New Yorker magazine, 2005).

¹⁰⁹ Cathcart, 'Rules of Engagement in Self-Defense Operations', Solis, *The Law of Armed Conflict: International Humanitarian Law in War*.

¹¹⁰ It is only in this later case that the terms apply at all. Opposing combatants are liable to attack on the basis of their combatant status. Civilians, and other protected parties, are liable only in cases where their conduct requires use of lethal force in self-defense against imminent harm.

related to the suicide bombing of the U.S. compound in Lebanon in 1983. ROEs for those on guard at the base permitted Marines to have a loaded magazine in their rifles, but required that the rifle be set on ‘safe’ and have no round in the chamber until the Marine had positively identified a hostile target and was so forced to defend himself. A Marine Lance Corporal on duty at a guard post saw a truck circling the parking lot and then watched as it burst through the barbed wire and raced toward the barracks building. By the time he had chambered a round and switched off the rifle’s safety, the truck had passed him. The truck crashed into the lobby of the barracks where the suicide bomber inside detonated his explosives. The attack resulted in the deaths of 41 U.S. military personnel. In this case the Marine was able to positively identify an agent taking hostile action against him and his fellow service members. However, the restrictions imposed by his ROEs prevented him from defending himself, and others, from the threat. This case was used to argue for changes to be made to the ROEs, as the ROEs as they were set at the time violated the Marine’s right to self-defense, and made it impossible for him to defend his comrades.¹¹¹ In cases such as this, ROEs are occasionally ignored or disregarded in favor of protecting oneself and one’s comrades.¹¹²

Permissible Use of Lethal Force By the Police¹¹³

In policing the permissibility of the use of lethal force is determined primarily by national and state law pertaining to permissible use of lethal force. However, the permissions for police officers are broadened somewhat to allow them to use force, including lethal force, to arrest and detain individuals who are reasonably believed to pose a threat to the communities that the police are obligated to protect. In principle, the restrictions placed on police use of lethal force appear to be very similar to the restrictions placed on military personnel who are operating under the LEP. This makes sense, as both sets of restrictions are based primarily on ideas embodied in HRL, including the individual’s right to life. However, in policing it is domestic law,

¹¹¹ Solis, *The Law of Armed Conflict: International Humanitarian Law in War*. “Sidebar” Pg. 497

¹¹² Another such case of a possibly faulty ROE is noted during the U.S. operations in Fajullah Iraq. The statement referenced in Solis notes that the Rule in question was “quietly ignored”. See statement of Sgt. Maj. Brad Kasal in Solis, *The Law of Armed Conflict: International Humanitarian Law in War*. Pg. 506

¹¹³ I limit myself here to police institutions that operate under the ‘Peel Model’ of policing. In particular, police forces based on this model in the U.S., the U.K., and Australia.

departmental policy, and administrative procedure that restrict the police use of lethal force. These may reflect international human rights law, or international law more broadly, but ultimately it is the domestic law and policy of the jurisdiction in which the police operate that determine the permissible use of lethal force.¹¹⁴

Three principles govern the permissible use of lethal force by police: legality, proportionality, and necessity.¹¹⁵ First and foremost, the use of lethal force is restricted by the laws restricting the use of force in self-defense by individual citizens of a particular state. In the U.S. such law includes both state statutory law and case law pertaining to justifiable homicide.¹¹⁶ In the U.S. the Model Penal Code states that the use of lethal force is permitted when “...the actor believes that such force is necessary for the purpose of protecting himself against the use of unlawful force...” and the actor believes that such force is “necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat...”¹¹⁷ In the UK and Australia the legality of the use force in self-defense, which may or may not include the use of lethal force, is based in the idea of ‘reasonableness’ of the force used as defined by common law.¹¹⁸

¹¹⁴ International policy that reflects policies applied in U.S., U.K., and Australian policing includes the restrictions laid out in both UNGA *Code of Conduct for Law Enforcement Officials* New York and UN, 'Basic Principles on the Use of Force and Firearms by Law Enforcement Officials'. as well as (PC-PO), 'The European Code of Police Ethics'.

¹¹⁵ Commonwealth Secretariat, 'Commonwealth Manual on Human Rights Training for Police', in Commonwealth Secretariat (ed.), (London, UK: Human Rights Unit, Commonwealth Secretariat, 2006), 63-71. While the United States is not part of the Commonwealth it does take its policing model from the UK Peel Model, and the regulations restricting police use of force follow the same three principles of legality, proportionality, and necessity. See both James J. Fyfe, 'Police Use of Deadly Force: Research and Reform', *Justice Quarterly*, 5/2 (1988), 165-205. and Deborah W. Denno, 'Selected Model Penal Code Provisions', (New York, NY: Fordham University School of Law, 2009).

¹¹⁶ Fyfe, 'Police Use of Deadly Force: Research and Reform', (Pg. 169)

¹¹⁷ Section 3.04 (1) in the Model Penal Code as stated in Denno, 'Selected Model Penal Code Provisions'.

¹¹⁸ According to the Crown Prosecution Service website the case cited as the foundation for the common law permission of reasonable force in self defense is *Palmer V. R* AC 814 (1971) Australian Law sets out these regulations in state statute, for example New South Wales Consolidated Acts *Nsw Crimes Act 1900-Sec 418*
http://www.austlii.edu.au/au/legis/nsw/consol_act/ca190082/s418.html

Legality/Reasonableness

Under U.S. law the legality of the use of force is dependent on the threat posed to the victim, the proportionality of the force used to the harm threatened, and the necessity of the force used. The threat posed must be both unlawful and unavoidably imminent. If the agent being attacked incites the attack, or is being attacked as the result of an illegal act they have or are committing, they are not permitted to use lethal force to defend themselves.¹¹⁹ Furthermore, the threat being posed to the agent must put them at imminent risk of harm. If the agent has the ability to avoid the threat, they must at least attempt to do so.¹²⁰ The notable general exception to this requirement to retreat, or otherwise avoid the threat, is when the individual is attacked within his or her own residence. In such cases it is permitted for the individual to ‘stand their ground’.¹²¹ Next, the force used to prevent the threat must be proportionate to the harm threatened. This is a fairly straightforward condition. One is not permitted to use lethal force unless they reasonably believe they are protecting themselves against a threat of severe bodily harm. Proportionality here is based on evidence-relative reasonable belief. If the defending party has grounds, based on the evidence available to them at the time, to believe that using lethal force to prevent what they believe to be lethal harm is proportionate, then they are legally permitted to do so. For example, in a rubber gun case an individual’s use of lethal force would be proportionate to the extent that they had evidence necessary to justify a reasonable belief that that they were being threatened with lethal harm.¹²² Finally, the harm caused must be necessary to prevent the harm threatened. In individual cases the use of lethal force is only permitted if no other means less harmful to the attacker could be reasonably judged to be sufficient to eliminate the threat that attacker poses. This means that the defender is required to request that the attacker stop their attack if it is possible to do so without endangering

¹¹⁹ See Section 3.04 paragraph 2b (i) in Denno, ‘Selected Model Penal Code Provisions’.

¹²⁰ Fyfe, ‘Police Use of Deadly Force: Research and Reform’, (Pg. 169)

¹²¹ See Model Penal Code Section 3.04 Paragraph 2b (ii) A and Section 3.06 Paragraph 3d (i) Denno, ‘Selected Model Penal Code Provisions’. (Pg. 20 and Pg. 23) One is also permitted to stand their ground in their place of work provided that the attacker has no legal reason to be there (i.e. the attacker does not work at the defender’s place of work).

¹²² A rubber-gun case would be a case in which Defender is threatened by an individual with a replica (rubber or otherwise) of a gun. Attacker therefore poses no threat of lethal harm *in fact* even though they appear to do so to Defender or any other reasonable third party with access to the evidence available to Defender at the time of the attack.

the defender or others.¹²³ This may also require surrendering items, or complying with demands that one does not have a legal duty to disobey.¹²⁴ Again, it is important to note that the requirement here is evidence-relative rather than fact-relative.¹²⁵ If the agent has reasonable grounds to believe that the only way to prevent themselves or others from being killed or otherwise seriously harmed is to use lethal force against the attacker, then this is sufficient for them to be permitted to do so. This is the case even if it is discovered after the fact that other options, unknown or otherwise unavailable to the defender, could have been chosen that would have eliminated the threat but been less harmful to the defender.

Under UK and Australian common law legal force is synonymous with 'reasonable' force.¹²⁶ This term is somewhat vague, but is determined by examining the same three factors required by U.S. law. Again the standard of judgment is evidence-, rather than fact-relative and examination of the threat posed, the proportionality of the force used, and the necessity of the use of that level of force to prevent the threat determine the level of force considered to be reasonable. Insofar as it is judged that the force used by an individual in defending themselves was reasonable given the imminence and character of the threat, the proportionality of the harm inflicted with the harm that the individual believed himself or herself to be threatened with, and the reasonableness of the evidence-relative belief that no less harmful method of eliminating the threat existed at the time, individuals are legally permitted to use force, including lethal force, to defend themselves.

¹²³ Model Penal Code, Section 3.06 Paragraph 3a Denno, 'Selected Model Penal Code Provisions'.

¹²⁴ Model Penal Code, Section 3.04 paragraph 2b(ii) Denno, 'Selected Model Penal Code Provisions'.

¹²⁵ The importance of evidence relative judgments in the moral considerations of necessity is highlighted in Lazar, 'Necessity in Self-Defense and War', (pp. 8-10) I believe that his conclusions apply in legal considerations of necessity as well. There is some question whether one is legally required to take harms done to bystanders into necessity considerations when acting in self-defense, but it certainly seems that such considerations are important in civil law, if not in criminal law.

¹²⁶ For UK Common Law see: Crown Prosecution Service, 'Self-Defense and the Prevention of Crime', <http://www.cps.gov.uk/legal/s_to_u/self_defence/#Reasonable_Force>, accessed 02/13/2013 2013. For comment on 'reasonableness' under Australian Law see Simon Bronitt and Miriam Gani, 'Regulating Reasonable Force: Policing in the Shadows of the Law', in Simon Bronitt, M. Gani, and S. Hufnagel (eds.), *Shooting to Kill: Socio-Legal Perspectives on the Use of Lethal Force* (Hart Publishing Limited, 2012), 143-69.

Use of Lethal Force in Arrest and Detention

In addition to these restrictions, police are permitted to use lethal force in a way that private individuals are not. They are legally permitted to use force to arrest or detain individuals suspected of a crime. In short, they may use lethal force to enforce the law.¹²⁷ Such cases are often referred to as ‘Fleeing Felon’ cases. Again departmental policy and administrative procedure, rather than statutory law, play a powerful role in defining the restrictions on the use of lethal force in these cases. The U.S. Model Penal Code lays out several restrictions on the use of lethal force to effect arrest or prevent escape.¹²⁸ The UK statutory permission is so brief that it can be quoted here in its entirety.

“Where any provision of this Act

- a. confers a power on a constable; and
- b. does not provide that the power may only be exercised with the consent of some person, other than a police officer,

the officer may use reasonable force, if necessary, in the exercise of the power.”¹²⁹

In Australia there is some variation between states, but the general form followed by these state statutes is based on Division 4, Subsection 3ZC of The Crimes Act 1914 which outlines the restrictions on the use of force in making an arrest.

All three states have similar general requirements that must be met before a police officer is permitted to use lethal force in arresting or preventing the escape of a suspect. The crime the subject is suspected of having committed must be of sufficient severity. Only crimes amounting to felonies are permitted, and in many cases only violent felonies, or felonies that have caused or are likely to cause severe harm to some individual are considered sufficiently severe to permit the use of lethal force.¹³⁰ The force used to arrest the individual in question must be proportionate to the threat they pose to both the officer and the community at large, and the harm done to them must

¹²⁸ Specifically Section 3.07 Denno, 'Selected Model Penal Code Provisions'.

¹²⁹ Department of the Home Office *Police and Criminal Evidence Act (Pace) 1984* Chapter 60: 117 <http://www.legislation.gov.uk/ukpga/1984/60/contents>

¹³⁰ John Kleinig has commented the increased use of lethal force in “Fleeing Felon” cases where such force may not be justified by the felony committed on at some length. See John Kleinig, *The Ethics of Policing*, ed. Douglas Maclean (Cambridge Studies in Philosophy and Public Policy; Cambridge: Cambridge University Press, 1996) 335.

not outweigh the probable harm they would cause if they were allowed to escape.¹³¹ Finally, the use of lethal force is only permissible if it is strictly necessary. Such force must be the only way to prevent the individual's escape, and the officer is required to demand the suspect's surrender, if possible, prior to the use of lethal force. These last two requirements, that the force be proportional and necessary, require some further elaboration.¹³²

Proportionality

When using force to affect the arrest or prevent the escape of a felon, police are required to consider a slightly broader formulation of proportionality. The difference is based in a difference in the relative goods and harms that must be considered. For police the proportionality of the act is judged on the basis of the "legitimate objective to be achieved".¹³³ In some cases this objective may simply be to "protect life or prevent serious injury",¹³⁴ but in others the objective may be broader. Police may be called upon to use lethal force in order to prevent civil unrest, protect the 'queen's peace',¹³⁵ or otherwise safeguard the community they serve. In such cases these objectives must be taken into consideration as relevant 'goods' that the officers are trying to bring about. If the harm caused by the use of lethal force is likely to exceed

¹³¹ Australian law states for example that

"a constable must not, in the course of arresting a person for an offence:

(a) do anything that is likely to cause the death of, or grievous bodily harm to, the person unless the constable believes on reasonable grounds that doing that thing is necessary to protect life or to prevent serious injury to another person (including the constable); or

(b) if the person is attempting to escape arrest by fleeing—do such a thing unless:

(i) the constable believes on reasonable grounds that doing that thing is necessary to protect life or to prevent serious injury to another person (including the constable);"

Commonwealth Of Australia *Crimes Act 1914*
http://www.comlaw.gov.au/Details/C2013C00031/Html/Volume_1#_Toc346009569 3ZC(2) See also U.S. Model Penal Code Section 3.07 Paragraph 2b (i-iv) Denno, 'Selected Model Penal Code Provisions'.

¹³² In US case law the case that defined the modern limits on the use of lethal force in Fleeing Felon cases is U.S. Supreme Court *Tennessee V. Garner Et Al.* Washington DC

¹³³ This wording is taken from Article 3 Commentary (b) United Nations, 'Code of Conduct for Law Enforcement Officials'.

¹³⁴ Australia, 'Crimes Act 1914'.

¹³⁵ Anonymous, 'Police and Criminal Evidence Act (Pace) 1984'.

the good brought about by the use of that force then such a use of force is disproportionate, even if the harm done to the individual posing the threat is proportionate to the harm they are threatening to do. This principle is the foundation of the strict restrictions placed on the police use of lethal force in circumstances that are likely to cause harm to bystanders. In policing the use of lethal force is permitted only if the use of such force poses “no substantial risk of injury to innocent persons”.¹³⁶ This additional emphasis on the prevention of harm and minimization of force is also reflected in public policy and administrative procedures, or ‘soft-law’ pertaining to police use of lethal force. Bronitt and Gani note that the primary consideration in the Australian National Minimum Guidelines for Incident Management, Conflict Resolution, and Use of Force is “Safety First”. This principle states, “The safety of police, the public, and offenders or suspects is paramount”.¹³⁷

Necessity

When lethal force is used to effect arrest or prevent escape the principle of necessity is also applied slightly differently to police than to private individuals. For police the ‘last resort’ requirement is particularly stringent. As with military personnel operating under LEP, police are permitted to use lethal force only when it is strictly necessary to do so. Individuals engaged in self-defense are only permitted to use lethal force when it is the only option available, and only if the threat is temporally imminent to some degree that prevents their escape. However, they are not required to minimize the harm done to the attacker if lethal force is judged to be qualitatively and temporally necessary.

Police however are required to use the minimum amount of force necessary to achieve their objective. In order for lethal force to be permissible, the officer using the force must reasonably believe on the basis of all available evidence that no other amount of force would be effective in eliminating the threat. This requirement of strict necessity is evident in the ‘continuum of force’ models that regulate the process by which an officer

¹³⁶ Model Penal Code, Section 3.07 paragraph 2b (iii) Denno, 'Selected Model Penal Code Provisions'. This general principle also appears in policy documents pertaining to the use of deadly force or firearms such as 6122 Firearms Policy, 6122.13 Use of Deadly Force, D.E.A., 'Operations Manual', in Drug Enforcement Administration (ed.), (Washington D.C.: Drug Enforcement Administration),

. And Anonymous, 'Domestic Investigations and Operations Guide'.

¹³⁷ Bronitt and Gani, 'Regulating Reasonable Force: Policing in the Shadows of the Law'. (Pg. 155)

is allowed to employ force when dealing with suspects. There are various models of this continuum, but the idea behind them is the same. Police are required to use the absolute minimum amount of force necessary to eliminate the potential threat. The continuum usually begins with a verbal warning or command to surrender, and progresses through use of empty-handed control techniques, to non-lethal weapons, and finally lethal force. At all times the officer's goal is to 'de-escalate' the situation using the minimal amount of force needed to generate the desired effect.¹³⁸ Lethal force is only permissible under this criterion of necessity if it is the only level of force that is necessary to minimize harm and prevent others from becoming exposed to greater risk.

This necessity requirement is demonstrated in a recent incident of police use of lethal force in Arizona.¹³⁹ A police SWAT team raided the home of Jose Guerena, mistakenly believing that the house belonged to a known drug dealer. Mr. Guerena, who was in bed at the time of the raid, put his wife and young son in a closet and armed himself with a semi-automatic rifle. He then stepped into a darkened hallway holding the weapon. Police shot him, and Mr. Guerena died as a result of his wounds. This case is problematic because it does not appear that police used the minimum amount of force necessary to conduct a search of the house, and, if necessary, arrest Mr. Guerena. First it is unclear whether or not police announced themselves on entering the home, or demanded that Mr. Guerena surrender before opening fire. Secondly, it is unclear if Mr. Guerena threatened the officers with the weapon. Owning such a weapon is not illegal in Arizona, and even if it was believed that he was a dangerous criminal police would not be permitted to use lethal force against an armed individual without prior attempts at less harmful methods unless they were directly threatened. When the weapon was taken from Mr. Guerena the safety was still engaged, making it impossible for Mr. Guerena to fire on officers. It seems likely that there was opportunity to attempt less harmful methods. Finally, after shooting Mr. Guerena the police denied emergency medical personnel access to the house for an hour. If one believes the critical accounts

¹³⁸ Again this is a common principle across U.S., U.K. and Australian policing institutions, for examples see Bronitt and Gani, 'Regulating Reasonable Force: Policing in the Shadows of the Law'. And Secretariat, 'Commonwealth Manual on Human Rights Training for Police'. This is also why police continue to shout commands, somewhat ridiculously, at subjects even while escalating the force they are using to subdue the subject.

¹³⁹ Balko, 'Jose Guerena Killed: Arizona Cops Shoot Former Marine in Botched Pot Raid'.

given, this violates the police's obligation to seek to minimize the harm done once the threat has been eliminated. Mr. Guereña was not killed instantly, but bled to death before EMS was allowed into the house.¹⁴⁰

Implications of Analysis

Based on the above discussion of the legal restrictions imposed on both institutions, I believe that the claim that the norms defining the permissible use of lethal force by police are more restrictive than the norms defining the permissible use of lethal force by military personnel can be motivated by both current practice and the content of the legal restrictions pertaining to police and military personnel.

One might object to the first claim by pointing out the sheer amount of law that is used to delineate the permissible use of force by military personnel. Comparatively, the 'hard law' restricting the use of lethal force by police seems quite vague and possibly insignificant. Surely the greater amount of work done in specifying the permissible use of lethal force for military personnel would result in more restrictive permissions in practice. Both Fyfe and Bronitt et al. point to the lack of legislation limiting permissible police use of lethal force and argue for additional statutory legislation to better define the boundaries of permissible lethal force. They criticize current 'soft-law' restrictions as too vague to offer effective guidance to either the public or police officers, resulting in overly permissive use of lethal force.¹⁴¹

I would respond that this vagueness in statutory law does not mean that the restrictions placed on police are more permissive than those placed on military personnel in practice. Much of the law defining the permissible use of lethal force is customary rather than treaty law. As such it is not well defined and often as vague as the 'soft-law'

¹⁴⁰ For a similar case in the UK see the case of Jean Charles de Menezes BBC, 'Man Shot Dead by Police on Tube', http://news.bbc.co.uk/2/hi/uk_news/4706787.stm (http://news.bbc.co.uk/2/hi/uk_news/4706787.stm: BBC News, 2005). These cases might be contrasted with the case of David Martin, where armed police complied with the strict necessity condition, with much more favorable results. See Miller and Blackler, *Ethical Issues in Policing*. Pg. 77.

¹⁴¹ Bronitt and Gani, 'Regulating Reasonable Force: Policing in the Shadows of the Law', Fyfe, 'Police Use of Deadly Force: Research and Reform', (pp. 165-205), James J. Fyfe, 'Structuring Police Discretion', in John Kleinig (ed.), *Handled with Discretion* (Lanham: Rowman & Littlefield Publishers, INC., 1996), 183-205, Fyfe, 'Tennessee V. Garner: The Issue Not Addressed', (721-731)

defining the permissible use of lethal force by police. Important terms, such as armed conflict and military necessity, remain at least as vague or poorly defined as important concepts in statutory law pertaining to police such as 'reasonableness'.

Furthermore, this vagueness in 'soft-law' is counteracted in policing by a higher degree of accountability and enforcement. This higher degree of accountability is both internal and external. Internally, police are required by administrative procedures to report any use of force, particularly lethal force, to superior officers.¹⁴² Uses of lethal force are always investigated to determine whether or not the use was permissible. Additionally, most modern police departments in the U.S., U.K. and Australia have means by which the public can lodge complaints of excessive force against particular officers or their departments. Often attempts are made to cover such claims up,¹⁴³ but this does not mean that those responsible are not held accountable to some extent. Communities also have the ability to review restrictions, and, at least in the U.S., act to change them by ballot or through the courts.¹⁴⁴ When violations are found there is also greater enforcement of both soft and hard law. Administrative procedure and departmental policy breaches may be dealt with internally or the case may be referred to the courts. Offenses are investigated by Internal Affairs divisions and taken to court like any other criminal charge. While it is true that many military institutions have similar regulatory mechanisms, failure to comply with relevant restrictions is often "quietly ignored"¹⁴⁵ if not lost in the fog of war.

It also must be noted that the content of the legal permissions for police are narrower than the permissions that exist for the military, regardless of the quantity or quality of statutory law supporting them. Police are permitted to use lethal force only in defending themselves or others from a lethal threat or in affecting the arrest or preventing the escape of a suspect who is suspected of having committed a particularly

¹⁴² For example, any DEA agent who discharges their firearm, for any reason, is required to report this to their supervisor. D.E.A., 'Operations Manual'.

¹⁴³ As in both the Jean Charles de Menezes and Jose Guerena cases.

¹⁴⁴ The *Tennessee v. Garner et al.* case is a prime example of this, as is the inquiry conducted after the Menezes shooting IPCC, 'Stockwell One: Investigation into the Shooting of Jean Charles De Menezes at Stockwell Underground Station on 22 July 2005', in J.D. Cummins (ed.), (London, UK: Independent Police Complaints Commission, 2007), 1-168.

¹⁴⁵ See note 68 above.

heinous crime. Any force used in the apprehension of the suspect is subject to strict proportionality and necessity constraints. These constraints only permit the use of lethal force in cases where the individual can be reasonably believed to constitute a threat of severe harm to others if allowed to escape or avoid arrest and use of lethal force is the only way to prevent such a suspect from escaping. Even in such a case the officer is not allowed to ambush the suspect. They are required, if at all possible, to first demand the surrender of the suspect before resorting to lethal force, and then to minimize the harm such force might cause.

At this stage one might object that this sounds much like the restrictions placed on military personnel when operating outside of the conduct of hostilities. After all, military personnel operating domestically under domestic law or internationally under LEP are not permitted to use lethal force unless permitted by similarly strict proportionality and necessity principles. While this is correct, it misses an important legal permission granted to military personnel, but not to police officers. Military personnel are permitted to use lethal force as permitted by IHL principles in accordance with the legal principle of *lex specialis*, while police officers *qua* police officers are not. Should the violence escalate to the point of armed conflict, military personnel are permitted to abandon the narrower restrictions imposed by the LEP in favor of those applicable under IHL.

Police officers are granted no such permission to use lethal force in armed conflict by IHL or any international law. The Geneva Conventions and the Additional Protocols class police as civilians.¹⁴⁶ As such they are protected from direct attack, but lack combatant's privilege. They are permitted to use lethal force in defense of themselves or others and to enforce the law, for as long as they are granted jurisdiction by the

¹⁴⁶ Roberts and Guelff (eds.), *Documents on the Laws of War*. Police, even armed police, do not meet the requirements laid out in GC III Art. 4 (1) (2) (3) and (6) and therefore are classed as civilians under international law. AP I Art.43(3) requires that parties to the conflict be notified if and when other parties to the conflict incorporate paramilitary or armed law enforcement agencies into military forces, which further supports the claim that police forces *qua* police forces are granted protected status but denied combatants' privilege under international humanitarian law. This norm is also reflected in customary law and practice. See Henckaerts Jean-Marie and Doswald-Beck Louise, 'Customary International Humanitarian Law (Volume 1: Rules-Volume 2: Practice)', (2005). Vol. 1 Rule 4 "Incorporation of paramilitary or armed law enforcement agencies into armed forces" (Pp. 16-17)

power that controls their area, but that permission is still defined by the narrower restrictions defined by domestic law, public policy, and administrative procedure. One might try to get around this by pointing out that under the Geneva Conventions states are permitted to incorporate armed police forces into military or paramilitary groups for the purposes of national defense. This would allow these individuals to use lethal force in accordance with IHL/LOAC principles. However, this attempt to dodge the problem fails. Police officers, who engage in hostilities as members of a state military or paramilitary, even in national defense, are not acting as police. Instead they are acting as combatants in an armed conflict. Police *qua* police are not permitted to use lethal force outside of the domestic and international law that makes up the LEP. The content of the legal permissions pertaining to police and military personnel further motivates the claim that norms defining the permissible use of lethal force by police are more restrictive than the norms defining the permissible use of lethal force by military personnel.

Finding Firm Foundations

Introduction

In this section I will lay out three contextual asymmetries that can do some work to support the current asymmetry in legal and customary norms regulating the use of lethal force by police and military institutions and their agents. I will seek to demonstrate how these asymmetries impact the four criteria that must be met before we can claim that a particular use of lethal force can be morally justified, and thereby offer a moral foundation for our current legal and customary norms. I will then go on to delineate the limits of these asymmetries and conclude that while they form part of the moral foundation of current norms, they are too fragile to support the current asymmetry in cases where the the the contextual asymmetries do not obtain. I will conclude that if we are to provide moral justification for the normative asymmetry illustrated in the previous section, we must look beyond the moral norms of individual self-defense and appeal to political or collective ethical norms.

The first asymmetry I will examine is the Threat Asymmetry. If the threats that military institutions seek to avert are more severe in some way than those faced by police, this can give moral justification for a broader permission to use lethal force insofar as such force is more likely to be both morally proportionate and necessary to avert the threat.

The second asymmetry is an Asymmetry of Means. The Necessity criterion requires that if an agent, or group of agents, have access to non-lethal means that will effectively avert the threat without increasing the risk of unjust harm, they are required to use such non-lethal means rather than employ lethal force. If police have access to non-lethal means that military institutions do not, or if such means are more effective in averting the threats faced by police than those faced by military institutions, then this would morally justify the more stringent legal and customary restrictions placed on police use of lethal force.

The third asymmetry is an Epistemic Asymmetry. Much is made in the literature regarding the ‘fog of war’ in which combatants find themselves. In short, combatants in armed conflict are epistemically handicapped by the context in which they use lethal force. This handicap makes determining the Necessity and Proportionality of force difficult, and inhibits one’s ability to designate between liable and non-liable threats.

One might morally justify the broader permissions granted to military personnel by referring to these epistemic problems and claiming, insofar as we think military force is morally justified in at least some cases, that military personnel should be held to less stringent constraints when using lethal force under such conditions.

Obviously there is a great degree of overlap in these asymmetries; each contributing to some extent to the impact of one or more others. However, I will attempt to lay out each of these asymmetries in turn and to demonstrate how each helps to morally justify the current asymmetry in permissible use of lethal force by police and military personnel. First, however, I will briefly summarize the four criteria that must be satisfied for a particular use of lethal force to be permissible.

Morally Justifying the Use of Lethal Force

Most theorists agree that the use of lethal force can be morally justified in at least some cases. These cases can be sub-divided into cases of liability to defensive harm, and lesser-evil cases.¹⁴⁷ To say that some agent is liable to harm is simply to say that we have reason(s) to discount the object of force's rights or interests sufficiently to impose harm on them without wronging them. What reasons are sufficient to do this are a matter of some debate, most of which I will not address here. Likewise I will not discuss punitive harms, or those harms that are justified ex post by reference to desert. Liability to defensive harm is generally based on the actions taken by the object of force and the extent of harm these actions threaten to cause. To be liable, the object of force's past actions must have contributed to a wrongful threat that can be averted by harming the object of force. In most cases, the object of force must be morally responsible for those actions.¹⁴⁸ Lethal force is justified as a lesser evil when the harm done in killing the object of force is substantially less than the harm that would result if lethal force was not employed. As such we still wrong the object of force when we harm them. However, that wrongful harm is outweighed by the harm that would result from not inflicting the harm on them.

¹⁴⁷ Jeff McMahan, 'Aggression and Punishment', in Larry May (ed.), *War Essays in Political Philosophy* (New York: Cambridge University Press, 2008c), 67-84. Pp.78-84

¹⁴⁸ Use of lethal force in such cases may also be justified on grounds of desert. For discussion of the distinction between liability-based justifications and desert-based justifications for lethal force see McMahan, 'Aggression and Punishment'.

Neither military nor police are permitted to use lethal force to punish the objects of that force. As demonstrated in the previous chapter, use of lethal force is, for the military, permitted only against combatants under the Hostilities Paradigm and against those who pose a direct threat to military personnel or third-parties under the Law Enforcement Paradigm. Police are likewise permitted to use lethal force only in the defense of themselves or of third parties or to enforce the law in a very limited set of cases. For the military, on the traditional just war account, the objects of force must be liable to be targeted with lethal defensive harm, because they are a threat, and have thereby forfeited their right not to be harmed. On the recently developed reductive individualist account, moral responsibility for contributing to an unjustified threat is required for liability. Lesser-evil justifications may be applied to justify collateral damage, the unintentional but foreseeable killing of non-liable persons during armed conflict, but such permission is granted only in cases where the intended object of force is *ex ante* liable to attack for the reasons given above.¹⁴⁹ One is not permitted, under the legal and customary norms discussed in the first chapter to intentionally kill one non-threatening or otherwise morally innocent individual to save ninety-nine others.

How then do we determine when it is morally permissible to use lethal force? In cases of individual use of defensive force, the moral permissibility of lethal force is determined by looking at four criteria, Liability, Threat, Necessity, and Proportionality, which I first mentioned in the introduction above. I will briefly set out my understanding of each of the four criteria here before beginning. This is meant to be a summary of these four criteria, not an exhaustive account. The literature on each of the four is quite extensive, and I won't attempt to summarize that literature here.

¹⁴⁹ We might argue that attacks against munitions factories or other military targets occupied by non-combatants are a counter-example to this claim. The workers inside the factory are not *ex ante* liable to be killed, or, if their contribution to the armed conflict gives some reason to discount their interests *ex ante*, they are not as liable as combatants directly involved in the conflict. However, even in cases like this the target of the factory is not the workers themselves, it would be forbidden to bomb the factory barracks rather than the factory for example, but the factory itself. In such cases it is the factory that is *ex ante* liable to be destroyed, insofar as we can describe an inanimate object in this way. Killing the workers is only permissible insofar as using lethal force against the factory is necessary and proportionate.

Liability:

This criterion is the focus of a great deal of debate in the literature on permissible use of force. However, as discussed in the introduction to this paper, the core concept is this: To say that one is liable is to say that we have some morally relevant reason to discount, or otherwise disregard, harms done to this individual. Which reasons count as morally relevant here are at the core of the debate. Some theorists, such as J.J. Thompson and Suzanne Uniacke, maintain that one is liable if one threatens a non-liable party or parties with unjust harm. Thompson offers a rights-based argument,¹⁵⁰ while Uniacke grounds her argument in a general duty not to create unjust threats.¹⁵¹ Michael Otsuka in his response to Thompson requires what he calls responsible lethal agency for the harm if an agent is to be liable.¹⁵² Jeff McMahan offers a slightly broader account of responsibility not subject to one's agency that says that one is liable insofar as one is morally responsible for causing the unjust harm.¹⁵³ Helen Frowe argues for a similar view, though on her view it is that one is morally responsible, *or* could be reasonably held morally responsible, for making non-liable parties worse off.¹⁵⁴ Like McMahan the amount of harm that one is liable to is constrained by the criteria of Necessity and Proportionality. In what follows I will attempt to remain agnostic as to which of these views is the best, settling on the conceptually thin definition above.

Threat:

Threat is effectively an empirical or descriptive criterion. One can describe a threat as some object or agent that, unless averted, will cause harm to some other agent or agents. Only unjust threats, or threats of unjust harm, give grounds for defensive force. Unjust, in this case, means that the harm that will otherwise occur cannot be morally justified, or that the object of the harm is not morally liable to suffer such harm. While it is certainly the case that physical objects can threaten objects of harm, as when a boulder rolls down a hill towards a bus full of school children, many maintain that such

¹⁵⁰ Thomson, 'Self-Defense', (283-310)

¹⁵¹ Uniacke, *Permissible Killing: The Self-Defense Justification of Homicide*.

¹⁵² Michael Otsuka, 'Killing the Innocent in Self-Defense', *Philosophy & Public Affairs*, 23/1 (1994), 74-94.

¹⁵³ McMahan, *Killing in War*.

¹⁵⁴ Helen Frowe, *Defensive Killing* (Oxford UK: Oxford University Press, 2014) 219.

threats cannot be considered just or unjust in any normatively relevant way.¹⁵⁵ Furthermore, as such objects cannot be said to have any intrinsic moral value, in the same way that other agents have such value, references to ‘threats’ will therefore generally entail some agent or group of agents who will, unless averted, cause some harm to some other agent or group of agents.

Necessity:

Necessity is often thought of as a constraint on force that demands that one acting in defense of themselves or others use the least harmful means available to them to avert the threatened unjust harm. Lazar has offered a much fuller formulation of this constraint, which defines Necessity as follows:

"Necessity: Defensive harm H is necessary to avert unjustified threat T if and only if a reasonable agent with access to the evidence available to Defender would judge that there is no less harmful alternative, such that the marginal risk of morally weighted harm in H compared with that in the alternative is not justified by a countervailing marginal reduction in risked harm to the prospective victims of T."¹⁵⁶

This definition clarifies three issues that are left unexplained in other versions. First it requires one to consider how much moral weight should be attributed to both the threatened harm and the harm caused by the defensive action. In doing this it acknowledges the importance of liability. Secondly, it clarifies the epistemic standard that should be used when judging which means is the least harmful means. Finally, it takes account of the degree of risk intrinsic to uses of defensive force, or use of force more generally. These three clarifications result in a much more comprehensive, and useful, criterion than one that simply demands that one use the ‘least harmful means’ available, and so will be used as the default formulation of the Necessity constraint in what follows.

Proportionality:

Proportionality is related to, but distinct from, the Necessity constraint. A use of force is proportionate if and only if the harm caused by that force is not greater than the harm

¹⁵⁵ Michael Otsuka in particular argues that inanimate objects are not capable of causing unjust harm, insofar as they do not violate rights when they cause harm. See Otsuka, 'Killing the Innocent in Self-Defense', (Pg. 80)

¹⁵⁶ Seth Lazar, 'Necessity in Self-Defense and War', *ibid.*40 (Winter 2012), 3-44.

that would occur if the threatened harm were not averted. This distinguishes it from Necessity, which is a comparison between multiple means, and the harms likely to result from those means. Proportionality is a comparison between the harm a particular use of force would cause and the harm that would result if force were not used at all. Lazar maintains that Proportionality is a necessary, but not sufficient, condition for Necessity. Others, notably Thomas Hurka, have argued that Necessity is internal to Proportionality, but this discussion is not relevant here.

So then, if the object of force is threatening harm, and is doing so without moral justification (I.e. They have not been provoked by some action of the defender in some way, or the harm threatened in response to that provocation is disproportionate or otherwise unnecessary.) then we can say that we have reason to discount the object of force's right not to be harmed. That is, they are, to at least some extent, liable to defensive harm. The extent to which the object of force is liable to be harmed, that is, the amount of force that the defender is permitted to use to prevent the threat unjustly posed by the object of force, is determined by both the necessity of the defensive force and the degree to which the force used to prevent the unjust harm is proportionate to the unjust harm that would result should the defender do nothing. In cases where all four of these criteria are met we have a moral justification for the use of lethal force.

Whether or not these four necessary criteria are met is largely determined by examining conditional factors within the context where the use of lethal force occurs. If certain conditional factors obtain, then we are able to say that the four criteria are met and the use of lethal force is morally justifiable.¹⁵⁷ The set of these conditional factors and other related states of the world make up the context in which the use of force occurs. If the satisfaction of these four criteria is dependent on some subset of conditional factors within a given context, then one could justify the asymmetry that exists in current legal and customary norms by arguing that these norms are ultimately grounded in the four criteria of self-defense applied in sufficiently asymmetric contexts. This idea is

¹⁵⁷ i.e. If Aggressor constitutes a threat to Defender, if that threat is not the result of Defender's unjust provocation, if the means of defense chosen by Defender to prevent the threatened harm are, on an evidence-relative standard, the least harmful means likely to successfully avert the threatened harm, and the lethal harm caused by the defensive act is proportionate to the harm threatened by Aggressor, the use of force is morally justified.

reflected in the debate in Just War Theory between the traditionalists, such as Michael Walzer, who maintain that armed conflict is sufficiently contextually distinct from the context of peace to allow for more permissive moral constraints on lethal force, and reductive individualists like Jeff McMahan who, while admitting an asymmetry in context, reject the idea that the contextual asymmetry is sufficient to allow for a relaxation of the relatively stringent criteria as applied in self-defense.

How then does this help us to morally ground the legal and customary normative asymmetry between police and military use of lethal force? Regardless of the position we choose here, it is obvious that contextual asymmetry between police and military institutions might allow us to morally ground the legal and customary normative asymmetry, and so provide a moral basis for the current norms delineating the permissible use of lethal force by police and military personnel. There are three contextual asymmetries that might provide some grounds for the asymmetry in permissions. I will turn to examine the first of these now.

Threat Asymmetry

Of the three contextual asymmetries perhaps the most obvious candidate for morally grounding the asymmetry in permission is the Threat Asymmetry. If it can be demonstrated that police are under less a less severe threat than military personnel in some way, or that the nature of the threat that they aim to avert differs in a way that impacts the Necessity, Proportionality or Liability criteria, this then gives us a moral reason to hold to the current asymmetry in legal and customary norms. I will discuss two ways that we might do this here.

First, we might claim that military institutions seek to avert threats that differ in nature to those police institutions seek to avert. Seth Lazar has distinguished between two types of threat present in armed conflict: macro-threats and micro-threats.¹⁵⁸ If we can claim that only military institutions seek, *qua* institutions, to avert macro-threats, or seek to avert macro-threats of a particular nature, then this would offer moral grounds for the current asymmetry in legal and customary norms.

¹⁵⁸ Lazar, 'Necessity in Self-Defense and War', (pp. 27-28), Seth Lazar, *Sparing Civilians* (Oxford, UK: Oxford University Press, 2015) 158.

Secondly, we might claim that there is an asymmetry in the severity of the threats faced by police and military institutions, even if police do face some form of macro-threat. If the threats averted by military institutions are more severe in either scope or magnitude than those averted by policing institutions, this would provide further grounds for the current asymmetry in legal and customary norms regulating the use of lethal force by these two institutions.

Threat

For my purposes here I will use a causal definition of threat similar to the one proposed by Helen Frowe.¹⁵⁹ To be a threat means that unless prevented, one's actions, inactions, or in at least some cases, presence, in relation to a third party will cause some third party to suffer harm.¹⁶⁰ To use Frowe's terminology, this model of threat is "morally neutral". A concept is morally neutral insofar as it is purely descriptive. There is no positive or negative normative value inherent in being classified as a threat. As such, the mere fact that one is a threat is not sufficient to make one liable to necessary, proportionate harm. Others, most notably J.J. Thompson and Suzanne Uniacke have presented models of the threat criterion that are 'morally loaded': one cannot be considered a threat unless the harm one threatens is morally wrongful in some way. Regardless, this morally neutral concept of threat has normative implications. First of all, it is the threshold criterion that must be met before the other criteria of liability, necessity, and proportionality can be applied. If an agent is not going to cause me any amount of harm, directly or indirectly, then none of the other three criteria can be satisfied. One cannot be liable for harm one's actions do not or will not cause. Similarly, use of lethal force, or any force at all for that matter, cannot be reasonably thought to be a necessary or proportionate response to her actions. If a malicious fool seeks to kill me with a feather, I am not permitted to use any force against that person.

¹⁵⁹ Frowe, *Defensive Killing*.

¹⁶⁰ Helen Frowe takes her causal definition one step further to include all cases in which the agent's mere presence causing harm is sufficient to categorize the agent as a threat. While this definition allows a way to avoid some complications, particularly the problem of what to do about Innocent Threats, I worry that this model misses the distinction between Threat and Risk. For Frowe's model see Chapters 1 and 2 in Frowe, *Defensive Killing*.

The malice alone is not enough to qualify that person as a threat to me. The actions must make me worse off in some way if any of the other criteria are to be met.¹⁶¹

Secondly, the severity of the threat has a direct impact on whether or not the force used in averting a given threat can meet both the proportionality and necessity conditions.¹⁶²

Whether or not my defensive action is proportionate is wholly dependent on the amount of harm that will result if I do not act to avert the threat. Likewise, the necessity of my defensive action is determined by both the amount of harm I am threatened with, and whether or not I can avert that threat by other, less harmful, means without increasing the risk of failing to avert the threatened harm.

Macro-Threats and Micro-Threats:

Lazar points out that we can subdivide Threats, at least in cases of armed conflict, into at least two types: macro-threats and micro-threats.¹⁶³ According to Lazar “Micro-threats are threats to specific people’s lives; the macro-threat is the overarching threat posed by one belligerent to the other....”¹⁶⁴ This rough description doesn’t offer a comprehensive definition of these two subcategories but I will interpret it in the following way: First of all, micro-threats are not to collectives but to individuals. One may pose a micro-threat to a group of individuals, that is one may pose a threat to multiple individuals at one time, but one cannot, it would seem, pose a micro-threat to a group *qua* group. Macro-threats are wholly collective - they are ‘overarching’ threats to a given community or group. The threat posed by a macro-threat is posed to the group as a group, not to any particular member or set of members that make up the group. Examples Lazar gives of such threats, including “a threat to territorial integrity or political sovereignty” reflect this.

¹⁶¹ One might object at this point that the fool is liable insofar as their malicious intention makes them morally responsible for the ‘malicious’ acts they perpetrate with their feather. However, unless these acts constitute harm of some kind, what the invalid is liable for falls outside of a self-defense context. The malicious intent alone may constitute a Risk, but a Risk is distinct from a Threat and this distinction has moral implications with regard to the permissible use of defensive force.

¹⁶² As I will discuss in a moment, its scope, its magnitude, or most often, both, determine the severity of a threat.

¹⁶³ See Lazar, *Sparing Civilians*. (Pg. 11) and Lazar, 'Necessity in Self-Defense and War', (pp. 27-28)

¹⁶⁴ Lazar, *Sparing Civilians*. (Pg. 11)

The distinction between these two sub-categories of threat becomes even clearer looking at the discussion Lazar offers in another paper.¹⁶⁵ Here he describes micro-threats as ‘immediate’ and states that there is a direct causal link between the defensive action taken and the removal of the micro-threat. This immediacy, and the degree of epistemic clarity that such immediacy provides, is lacking in macro-threats.¹⁶⁶ This uncertainty is compounded by a lack of a direct causal link between the defensive act taken by the agent or group of agents and the successful, or unsuccessful, aversion of the threat. He also points out that the defensive action one is *ex ante* morally justified in taking against micro-threats is dependent on the moral justification of using defensive force to avert the macro-threat.

Macro-Threats and Policing:

In warfare between two or more polities it is the polity as a whole that is under threat, not just the individuals who face opposing forces in combat. The use of force by military agents is intended to avert threats to individual lives, but also these collective harms, such as violations of territorial integrity and political sovereignty.¹⁶⁷

We can further distinguish between whether a threat is *posed* by individuals, or posed by collectives. So for any given threat we can ask two questions – whether it impacts an individual or collective and whether an individual or a collective perpetrates that threat. Call the first axis the Victim axis, and the second the Agent axis. Micro-Threats on the Agent axis would have the greatest impact on individuals and only a contributory or indirect impact on collectives along the Victim axis, while Macro-Threats would result in both individual and collective harms on the Victim axis.

As indicated previously, two types of Threat asymmetry are relevant to our discussion here. First there could be an asymmetry in the nature of the threat faced by policing and military institutions. The nature of the threat would impact the Necessity constraint, as it would, in part, determine what means available to Defender would likely be effective

¹⁶⁵ Lazar, 'Necessity in Self-Defense and War', (pp. 27-28)

¹⁶⁶ I will offer further discussion of the epistemic problems posed by this lack of immediacy in a later section of this paper.

¹⁶⁷ It's worth noting, of course, that some think that we can understand these collective harms as harms suffered by individuals, frustrating their distinctively political interests. See, for example, Frowe *Defensive Killing*.

in averting that threat. It would also impact the Liability condition as applied to micro-threats acting as members of that particular collective. Presuming that an agent can act otherwise, active membership in a collective engaged in perpetrating some unjust harm gives moral reason to discount harms done to that agent in the course of attempting to avert the collective harm that the agent is contributing to as a member of the collective threat.¹⁶⁸ In some circumstances, such as armed conflict, this may help justify doing harm to an agent who does not pose an imminent threat.

Secondly, there could be an asymmetry in the severity of the threat faced by these two institutions. The severity of the threat would impact the Proportionality constraint. The more severe the threatened harm, the more likely it is that less morally weighted harm would result from a lethal defensive act than if Defender took no defensive action. The severity of the threat also impacts the Necessity constraint both because lethal means are less likely to result in the defensive act causing greater (morally weighted) harm than the threatened harm and because any increased prospects of success that might be granted by using lethal means would carry with them a greater reduction in risked (morally weighted) harm.

Looking at cases of armed conflict it is apparent that military institutions operate along both axes. They seek to avert both individual and collective harms to themselves and the polities they represent and to avert threats posed by both individual combatants and the collective agents for whom they fight. While it seems equally obvious that police institutions act to avert individual harm from individual threats, it is less clear that they operate at the collective end of both axes. This then leaves us with two questions regarding police institutions: Do police seek to avert collective harm? – And – Do police seek to avert collective threats? If the answer to either of these questions is ‘no’ then we have reason to say that police seek to avert threats that are different in nature than those averted by military institutions. This could give some basis to the asymmetry

¹⁶⁸ I do not say this gives us *sufficient* reason to use lethal force against members of a collective threat. My claim here is that membership gives us some reason to discount their interests relative to those who are not members of such a collective. This reason may be overridden by liability, proportionality, or necessity constraints or by other factors such as coercion or the degree to which their actions, inactions, or presence contribute to the collective harm caused by the collective of which they are a member.

in permissions granted to police and military institutions, insofar as a lethal defensive force may not be permissible in all cases of threatened harm, even when that harm is particularly severe.

Threat Asymmetry #1 – Nature of Threat

Looking at the literature on policing, we have good grounds to say that police institutions seek to avert collective harms to the polities they represent as well as individual harms.

While warfare or armed conflict is a paradigm case of collective harm, it does not seem to be the *only* case where the threat of collective harm occurs. In principle, any collective would be vulnerable to collective harm in some form. Furthermore, in the police ethics literature the purpose of policing is often to bring about some collective ‘good’, or to avert the threat to a collective posed by some individual or sub-group within that collective. Whether we take the purpose of policing to be preservation of order and liberty within society,¹⁶⁹ protection of moral rights more broadly,¹⁷⁰ or the even more ambitious goal of a peaceful community¹⁷¹ the purpose of policing is to preserve some collective good.¹⁷²

Insofar as these collective goods are sufficiently ‘overarching’, like political sovereignty or territorial integrity, we can say that threats to these goods would be macro-threats to the collective as a whole. Police attempting to ensure these goods would have to avert not only individual micro-threats to themselves or others, but also the macro-threat to these collective goods. Furthermore, as in the case of armed conflict, the macro-threat of collective harm cannot be combated directly. Rather it is averted indirectly by means of averting a number of micro-threats to the officers or

¹⁶⁹ Edwin J. Delattre, *Character and Cops* (Washington D.C.: The AEI Press, 2002) 406. Chapter 3. Delattre does acknowledge the tension between the two goods here, but regards each as a restriction or check on the other. Police, and the state more broadly, are meant to preserve the proper balance between these two goods, granting the greatest degree of both to members of the community at large.

¹⁷⁰ Miller and Blackler, *Ethical Issues in Policing*. Chapter 1

¹⁷¹ Kleinig, *The Ethics of Policing*. Chapter 3

¹⁷² Even wholly functional accounts of policing refer to the function of police in terms of achieving collective, rather than individual, outcomes. Police functions include maintaining order, preventing crime, and maintaining general welfare in the communities they police. See R.I. Mawby, 'Models of Policing', in Tim Newburn (ed.), *Handbook of Policing* (Devon, UK: Willan Publishing, 2004), 15-40.

third parties the police institution represents. Finally, the *ex ante* justification of use of force against micro-threats is dependent on the justification of averting the macro-threat. Police use of force against a micro-threat to ensure the preservation of an unjust society is unjustified just because the macro-threat to society they seek to overcome by means of averting the micro-threat is justified. German police use of force against the Jewish population of Europe or political dissidents during the Second World War would be one example of police use of force that would be morally unjustifiable along these lines. So too would police use of force to prevent the marriage of an African man to a Caucasian woman during apartheid, or police action against union members protesting unjust employment practices etc.

One might object at this point that the threats that police generally encounter are individual criminals who contribute very little to undermining such goods. However, the same can be said of the contribution made by any particular combatant engaged in armed conflict. Their contribution as an individual agent to the collective harm suffered by the victim state is miniscule at best, yet it is unreasonable to claim that they make no contribution to the macro-threat of collective harm posed by an invading army. The fact that police directly avert individual micro-threats is not sufficient reason to think that they do not also act to avert the macro-threat of collective harm as well.

However, there is some question as to whether or not the Macro-Threat of collective harm that police seek to avert is caused by a collective agent, as it is in the case of an invading army, or caused by an aggregation of micro-threats posed by individuals. To help clarify this idea a bit, consider an angry mob rioting in the street. This mob may constitute a Macro-Threat as they threaten collective harm to the community insofar as they threaten collective goods of order and liberty, respect for rights, or disrupt the peace of the community, but it seems strange to classify such a mob as a collective threat. Even if all in the mob are pursuing the same end, their lack of organization or coordinated intent in contributing to that goal makes it difficult to reasonably classify such a group as a collective.¹⁷³

¹⁷³ The literature on collective agency and collective action is too great to incorporate at any length here. The minimal requirements for an action to be a joint action are laid out in Philip Pettit, David Schweikard, 'Joint Actions and Group Agents', *Philosophy of the Social Sciences*, 36/1 (2006), 18-

Police do seek to avert collective-threats in addition to individual micro-threats. Examples of such threats include everything from independent armed-robbery ‘crews’ to street-gangs, to regional, national, and transnational organized crime groups. Members of such groups have shared ends, and strategies to achieve those ends. They fulfill their roles in the belief that others will also do so and are motivated to do their bit because of their belief that others expect it of them. However, the collective-threats that police commonly seek to avert differ in two important ways from those that military institutions commonly seek to avert. First, such threats are, traditionally, less common than threats of collective-harm caused by an aggregation of micro-threats. This makes it less likely that the use of lethal force against a particular threat will meet the Necessity criterion. This allows the Nature of the Threat to provide some moral basis for the more restrictive permissions granted to police. Secondly, and perhaps more importantly, the collective-threats faced by police are generally far less severe than the collective-threat posed by an invading army.

Threat Asymmetry #2 - Severity of Threat

The severity of a Threat is determined by the degree of morally weighted harm that will occur if the Threat is not successfully averted. Use of lethal force against severe Threats is more likely to be morally justified because the severity of the Threat makes it more likely that the defensive force used will meet both the Proportionality and Necessity criteria. Regardless of the type of threat we are referring to, we can class threats as more or less severe in terms of scope, magnitude, or a combination of the two. Scope simply refers to the number of people likely to be directly impacted by the harm threatened. Magnitude is the degree of harm that will be suffered by a particular victim if the threat is not averted. In most, if not all, cases both factors contribute to determining the severity of a given threat.

39. Pp. 23-24. Other influential accounts of joint or collective action include Seumas Miller, *Social Action: A Teleological Account* (Cambridge: Cambridge University Press, 2001) 299. Raimo Tuomela, 'We-Intentions Revisited', *Philosophical Studies*, 125/3 (2005), 327-69, Raimo Tuomela, 'Joint Intention, We-Mode and I-Mode', *Midwest Studies in Philosophy*, 30 (2006), 35-58, Michael Bratman, 'Shared Cooperative Activity', *The Philosophical Review*, 101/2 (1992), 327-41, Michael Bratman, 'Dynamics of Sociality', *Midwest Studies in Philosophy*, 30 (2006), 1-15. and Margaret Gilbert, *On Social Facts* (Princeton NJ: Princeton University Press, 1989).

Implications for Police and Military

If it can be demonstrated that police seek to avert Threats that are less severe in terms of either scope or magnitude than military institutions, this will provide us with moral grounds for the more restrictive legal and customary norms regulating the use of lethal force by police. While I think that we have some reason to accept this claim in some cases, in many cases the claim does not hold up. In cases of severe domestic Threats, such as those stemming from transnational organized crime and terrorist organizations this asymmetry breaks down both in terms of scope and magnitude. If I am correct in this assessment, this means that the Threat Asymmetry can only provide partial justification for our current norms.

An Asymmetry of Scope

This is perhaps the most obvious asymmetry between police forces and military institutions. Military institutions seek to avert Threats to the polity as a whole, while police forces, at least in the majority of cases, seek to avert Threats to smaller sub-sets of the polity. This means that the Threats that these police forces seek to avert are most likely to be less severe in terms of scope than those faced by military institutions. Such threats produce less morally weighted harm insofar as fewer less than fully liable agents will be harmed if the threats are not averted. This makes it less likely that the use of lethal force to avert such threats will satisfy the Proportionality criterion and, insofar as this is a necessary condition for Necessity, less likely to satisfy the Necessity criterion as well. This gives us moral reason to impose stricter legal and customary limitations on the use of lethal force by police, and so provides some moral justification for the current asymmetry in norms.

However, the justification provided by this asymmetry is extremely limited when we look more closely. First of all, there are policing agencies whose jurisdiction extends to the entire polity. Any justification that this asymmetry might provide would not apply to the Federal Bureau of Investigation or Drug Enforcement Administration in the U.S., the Royal Canadian Mounted Police, or our own Australian Federal Police. Insofar as the asymmetry in legal and customary norms holds for these organizations, the more stringent standards couldn't be morally justified by reference to the severity of the Threat faced in terms of scope alone. While most cases of invasion pose a severe threat both in terms of scope and magnitude of harm, a so-called 'bloodless' invasion, where

the aggressor uses force only when the invasion is resisted, would cause a minimal amount of harm to a broad scope of people. Such harm, even with such a wide scope, could be substantially less severe than the harm posed by a large transnational organized crime network, such as the drug cartels that once operated in Columbia or those currently operating in multiple states in Mexico. These groups produce harms of a great magnitude in terms of both individual and collective harm, but are more limited in scope than a military invasion or foreign occupation.¹⁷⁴ However, the latter threat is more likely to fall into the purview of policing agencies, while under current international legal and customary norms, police would not be permitted to oppose the former.

Secondly, most of the threats that individual departments seek to avert threaten harm to individuals both inside and outside of their area of operation. The macro and micro-threats posed by drug trafficking, organized crime, and even street gangs often extend beyond municipal and state boundaries. Some groups, such as the major motorcycle gangs active in Australia, or street gangs and narcotics syndicates in United States and Mexico pose threats of international scope.¹⁷⁵ Regardless of whether or not we allow that such groups pose macro as well as micro-threats, these threats do not stop at the 'county-line', even though county or local police institutions are tasked with averting

¹⁷⁴ Harms would include both collective harms in the form of political corruption, and loss of collective security stemming from corruption of state institutions, as well as individual harms inflicted by both the cartel maintaining control of those within its territory and the inevitable armed conflict between cartels vying with each other to expand.

¹⁷⁵ For the rise of 'hybrid' transnational organized crime groups see Douglas Farah, 'Transnational Organized Crime, Terrorism, and Criminalized States in Latin America: An Emerging Tier-One National Security Priority', in Strategic Studies Institute (ed.), (Carlisle Barracks, PA: Strategic Studies Institute, US Army War College, 2012). For further descriptive accounts of the threats posed by transnational crime see Robert J. Bunker, 'Strategic Threat: Narcos and Narcotics Overview', *Small Wars & Insurgencies*, 21/1 (2010), 8-29, Charles O. Blaha and Tom Malinowski, 'De-Militarizing Civilian Security in Mexico and the Northern Triangle. ', *PRISM: A Journal of The Center for Complex Operations*, 5/4 (2016), 27-33, Leana D. Bresnahan, 'A Critical Juncture for Security and Human Rights', *ibid.* (35-46, Evan R. Ellis, 'The Evolving Transnational Crime-Terrorism Nexus in Peru and Its Strategic Relevance for the U.S. And the Region', *ibid.* (189-205, Vanda Felbab-Brown, 'The Rise of Militias in Mexico: Citizen's Security or Further Conflict Escalation', *ibid.* (173-86, Matthew Levitt, 'Iranian and Hezbollah Operations in South America: Then and Now', *ibid.* (119-33, Renee Novakoff, 'Transnational Organized Crime: An Insidious Threat to U.S. National Security Interests', *ibid.* (135-47, Lisa J. Campbell, 'Los Zetas: Operational Assessment', *Small Wars & Insurgencies*, 21/1 (2010), 55-80, Robert J. Bunker, 'The Mexican Cartel Debate: As Viewed through Five Divergent Fields of Security Studies', *Small Wars Journal*, 11/February 2011 (2011), 1-10, John P. Sullivan and Robert J. Bunker, 'Drug Cartels, Street Gangs, and Warlords', *Small Wars & Insurgencies*, 13/2 (2002/08/01 2002), 40-53.

them. The scope of the Threat that police seek to avert is not necessarily confined to those within their jurisdiction. There may be some cases in which we can rest current norms on the asymmetry of scope of Threat faced by police and military institutions, but this particular justification does not provide much support for current norms given current empirical research into the Threats police seek to avert.

Asymmetry of Magnitude, plus or minus scope

Grounding our asymmetry in severity of threat in the magnitude of the threat, or some hybrid of magnitude and scope offers a more promising moral foundation for current norms. The threats that arise from armed conflict are particularly severe precisely because the magnitude of the threatened harm is so great. Even if the macro-threat indirectly impacts the same number of people, more people are likely to be directly impacted by micro-threats faced by military institutions. Furthermore, those directly impacted in such cases are more likely to suffer a greater degree of harm either because the force used to cause the harm is greater, or because other means of mitigating the harm once caused will be unavailable to them.¹⁷⁶ Finally, high magnitude threats can be more severe than broad scope threats assuming that the number of those affected is fixed. If a threat of sufficient magnitude exists, it can be classed to be as severe, if not more so, than a threat that is broader in scope. Because the micro-harms military forces seek to avert are greater in magnitude than those police avert, the force used to avert such harms is more likely to meet the Necessity and Proportionality conditions because the morally weighted harm caused by such threats will be more severe: making it more likely that the use of lethal force to avert such threats will be morally justified. This same claim has been traditionally applied to collective-threats as well. Even when the collective-threat impacts the entire polity, the magnitude of harm threatened by the threats police seek to avert is generally far less than that posed by a political invasion.

Asymmetry of Means

The second asymmetry that may offer some moral foundation for the current asymmetry of legal and customary norms is an asymmetry of means. Such an asymmetry would impact the institution's ability to meet the Necessity constraint.

¹⁷⁶ Even in cases where one is under a micro-threat of lethal harm similar to that of being in a war zone, one may have better access to medical care or other forms of assistance that help to mitigate the harm caused when the harm occurs outside of the context of armed conflict.

Meeting this constraint is dependent on three primary factors: 1) the degree of morally weighted harm¹⁷⁷ caused by both the threat and the Defensive act against that threat 2) the means *available* to the agent attempting to avert the threat, and 3) the likelihood that use of a particular means will avert the threat. Some discussion of the effect of an asymmetry in morally weighted harm threatened has already been discussed in the previous section, and so I will not address this first factor directly here.¹⁷⁸ Instead I will focus my discussion on the second and third factors and how they might offer a moral foundation for the legal and customary permissions granted to police and military personnel.

Police and Military Means

If an asymmetry of means, and its impact on the Necessity condition, is to provide a moral basis for our current norms, then it must be demonstrated that police have, or ought to have, greater access to more non-lethal means than military personnel or that non-lethal means are more likely to be effective in averting the Threats faced by police than those faced by military personnel. To say that one has access to some particular means is to say that one has the means at one's disposal and that one has the minimal capability necessary to employ that means effectively to avert a given threat.

Access

Police have greater access to non-lethal means to avert the Threats they encounter. More importantly, they have more general moral permissions to use such means. While the suggestion has been made that military forces, particularly those operating under the Law Enforcement Paradigm, be provided with non-lethal weapons some military ethicists have expressed misgivings about granting military personnel access to such weapons. Stephen Coleman has raised several reasons why we ought not give military forces access to non-lethal weapons.¹⁷⁹ He points out that military use of some non-lethal agents commonly used by police, such as tear-gas and dazzling lasers, would

¹⁷⁷ Both caused by the defensive act and caused by the Threat that harm seeks to avert.

¹⁷⁸ Though something may be said about the degree of morally weighted harm a particular means will cause while discussing the second factor.

¹⁷⁹ Stephen Coleman, 'Discrimination and Non-Lethal Weapons: Issues for the Future Military', in David W. Lovell, Igor Primoratz (ed.), *Protecting Civilians During Violent Conflict* (Surrey, UK: Ashgate Publishing, 2012a), 215-29.

violate current international humanitarian law prohibiting unnecessary harm. Insofar as we have a moral obligation to obey minimally just laws, this constitutes a moral reason not to make such weapons available. Furthermore, in many cases non-lethal weapons do not yet exist that are ‘fit for purpose’ in military operations. Use of such weapons would likely result in disproportionate or unnecessary harm. For example, a non-lethal weapon that would stop a car attempting to blast through or blow up a military checkpoint has not yet been developed, and those non-lethal weapons that currently exist would likely cause disproportionate harm to bystanders and other non-combatants relative to the benefit provided friendly forces.¹⁸⁰

Coleman’s core argument against granting the military access to non-lethal weapons is that military use of such weapons would violate the *jus in bello* Principle of Discrimination. This principle prohibits combatants from intentionally causing direct harm to non-combatants. Coleman points out that while non-lethal weapons do not kill when used properly, they do inflict harm on those they are used against. Furthermore, non-lethal weapons would be most likely to be used against targets whose status as combatants or non-combatants was uncertain or ill defined, increasing the likelihood that non-combatants would be the intended targets of such harm in practice. Therefore military use of non-lethal weapons would likely result in direct, intentional, harm being done to non-combatants, and as such, result in violations of the Principle of Discrimination.¹⁸¹ Non-combatant immunity prohibits combatants from deliberately harming non-combatants, even temporarily. This prohibition would include the less-than-lethal harms done by non-lethal weapons.¹⁸²

¹⁸⁰ Utilization of gas or dazzling lasers on the driver might cause the car to crash prior to the checkpoint, as would tools commonly used by police such as spiked chains or ‘stop-sticks’ designed to destroy a vehicle’s tires, but this would likely give rise to collateral damage to the bystanders or the passengers in the car even if the vehicle did not detonate.

¹⁸¹ Just War does allow for harm to be done to non-combatants, but only provided that the non-combatants were not the targets of the force used.

¹⁸² This norm of non-combatant immunity has been weakened by a number of theorists recently. They posit that non-combatants on the unjust side of a conflict may be liable to some degree of necessary and proportionate harm, which could allow for the necessary harm caused by non-lethal weapons. Coleman does not share this view. Nor do I. For a persuasive attempt to reinforce non-combatant immunity even for ‘unjust’ non-combatants see Lazar, Seth, *Sparing Civilians* (Oxford, UK: Oxford University Press, 2015).

Michael Gross has pointed out that such apparent violations of non-combatant immunity can be justified by a 'lesser-evil' argument, pointing out that the harm suffered by non-combatants directly targeted by non-lethal weapons is much less than the harm suffered by non-combatants inadvertently harmed by 'high-explosives'.¹⁸³ However, Coleman responds that this incorrectly applies the Principle of Discrimination *ex post*. He argues that the Principle of Discrimination applies prior to the use of force, and cannot be met by reference to things that occur after the fact. Therefore, this still constitutes a moral reason to avoid providing military forces means to directly harm non-combatants, even if only temporarily. Finally, Coleman worries that during armed conflict non-lethal weapons would be used as 'force-multipliers' increasing the lethality of military personnel and resulting in unnecessary harm. There is some evidence for this in modern armed conflict. 'Flash-bang' grenades, designed to emit bright light and loud noise to disorient rather than kill, are commonly used in urban combat to disorient opposing combatants to make them easier to kill. A better documented case of non-lethal weapons being utilized to cause unnecessary harm is the military response to a terrorist attack on a theatre in Moscow in 2002.¹⁸⁴ Setting aside the harm done to the hostages/non-combatants as a result of the gas, it is worth noting that none of the separatists, including those incapacitated by the gas, were taken alive.¹⁸⁵ Those knocked unconscious by the gas were found to have been shot in the head.

Many of these objections do not apply to police institutions or the context in which they operate. IHL does not impact the permissions granted to police during armed conflict. While such weapons may result in unnecessary or disproportionate harm due to improper use, they are more likely to be 'fit to purpose' when used by police to detain or arrest armed suspects. Police are also not subject to the Principle of Discrimination, and so the core of Coleman's argument against non-lethal weapons

¹⁸³ Michael L. Gross, 'The Second Lebanon War: The Question of Proportionality and the Prospect of Non-Lethal Warfare', *Journal of Military Ethics*, 7/1 (2008), 1-22. (Pp. 15-16).

¹⁸⁴ See Coleman, 'Discrimination and Non-Lethal Weapons: Issues for the Future Military'. (Pp. 220-222) for a detailed account of the case.

¹⁸⁵ Coleman acknowledges that this operation's classification as a military or law-enforcement operation is unclear. However, considering this a law-enforcement operation carried out by military personnel makes the act of killing the unconscious separatists more egregiously wrong as capturing them alive would have been an equally effective means of averting the threat they posed. This will be addressed to some extent in the next section.

does not apply. Police are permitted to use force, and inflict harm, to enforce the law and detain subjects in order to avert micro and macro-threats to the communities they serve. Finally, the existence of societal controls such as courts of law, review boards, and other similar accountability mechanisms make it less likely that the use of such weapons will result in unnecessary harm. This makes access to such non-lethal means not only permissible but morally obligatory, insofar as such means allow for the aversion of a given Threat with the minimal amount of morally weighted harm. Without access to such tools police officers would be required to place themselves at greater risk of harm. While it is permissible for individuals to take on a greater risk of harm to themselves to avoid harm to others, in many cases an officer taking on greater risk would also expose third parties to additional risk. Should the officer become injured or incapacitated other officers could be required to come to their aid exposing themselves to a greater risk of harm. Alternatively, an officer becoming incapacitated could increase the risk of harm to others the officer was trying to protect. Insofar as the object of force is more liable to be harmed than the officer, failure to use such tools risks violating the Necessity criterion, as harms done to the officer, or any third parties, will outweigh the harms done to the object of force. Failing to allow officers access to such tools would be morally unjustified, assuming the tools would be used only against sufficiently liable subjects.¹⁸⁶

One might object at this point that police should be held to a similar moral standard as military personnel *in bello* and say that police should not be permitted to target non-liable parties with any force. For example, a crowd at a violent protest is likely to be made up of individuals who have varying degrees of liability for the threat that they pose. Some, such as children attending with their parents, may be completely non-liable. These individuals, one might argue, are immune from direct harm in the same way as non-combatants during armed conflict. Therefore, use of tear gas, water cannon, or other non-lethal means would be as impermissible for police as it would be for military personnel, and so should not be made available to police. While the claim that

¹⁸⁶ Coleman raises valid concerns about the misuse of such tools by police that are borne out by research into police practice. However, this does not give us a principled reason to think that such tools, if provided, will necessarily result in greater morally weighted harm. It does give us excellent reason to re-evaluate how officers are trained in the ethical use of such tools, but that is not our concern here.

one should not harm non-liable parties is strong, this particular objection is problematic. Insofar as the crowd as a whole poses some form of unjust Threat either to the officers themselves, innocent third-parties, or the community as a whole, then police action to avert the Threat seems required to prevent morally weighted harm.

The questions to be asked are ‘Is force required?’ and ‘If so, how much?’ Insofar as non-lethal means such as tear-gas is the least harmful means available to effectively avert the Threat posed by the crowd without increasing the risk of additional morally weighted harm, then the use of non-lethal but harmful means may be permissible, provided the harm posed by the crowd is sufficiently large to make the harm caused by the defensive act proportionate. While harms done to non-liable parties will carry more moral weight in calculating both the proportionality and the necessity of the act, the mere fact that non-liable parties will suffer harm is not sufficient to make the act impermissible. This is especially true in cases where the harm likely to be suffered can be judged, on an evidence-relative standard, to be non-lethal. While this objection fails to give sufficient reason to prohibit access to such means to police it does give good reason to require that police use discretion in utilizing the means they have access to. As we shall see in the next section, in some cases such means cannot be used without violating the Necessity criterion. The effectiveness of non-lethal means must also be taken into consideration. Gassing a peaceful protest, or using a high degree of force to detain one or two members of a protest, is unlikely to avert any macro-threat of public disorder posed by such a crowd. Rather such action will likely make the threat more severe.

There is a stronger objection to the claim that military institutions should not be given access to non-lethal weapons however. Military institutions are often called upon to use force in circumstances that fall outside of the scope of armed conflict. In such cases many of the reasons Coleman provides against granting military access to non-lethal means lose their force, while the positive reasons to equip state agents with such weapons apply to the military forces conducting law enforcement operations. While the Principle of Discrimination holds *in bello* it does not necessarily hold ‘*in vim*’. In such cases the strong prohibition imposed by non-combatant immunity fades to something resembling the moral constraints placed on police operating in similar circumstances. The majority of Coleman’s objections assume that the military would be employing non-lethal weaponry in the course of an armed conflict, not in the course of a law-

enforcement operation or some set of circumstances other than war. In such cases giving military institutions access to non-lethal means to avert threats would increase, rather than decrease, the likelihood that the use of force would meet the Necessity constraint.

While IHL forbids the direct targeting of civilians under the Hostilities Paradigm, the Principle of Precaution demands that military forces acting under the LEP give themselves means to avoid recourse to lethal force as much as possible. Denying access to non-lethal weapons for military personnel operating under the LEP would violate this principle, and so could constitute a breach of international law. ROEs issued to military personnel on the ground could be used to limit the chances of improper or inappropriate use of such weapons, resulting in unnecessary or disproportionate harm. For example, the ROEs issued to U.S. forces operating in Iraq circa 2005 allowed for the use of non-lethal weapons, but only after such use had been authorized by higher-level commanders.¹⁸⁷ While it may be the case that we have moral reasons for prohibiting military access to non-lethal weapons in the cases Coleman highlights, we have little, if any, moral reason to prohibit such access in cases where the military is not engaged in an armed conflict. In cases where operations carried out by military institutions overlap with those traditionally performed by police, we have little, if any, moral reason to prohibit the use of non-lethal weapons by the military. An asymmetry in access to non-lethal means cannot do much work then in providing a moral basis for our current norms.

Effectiveness

While Coleman's arguments give us some moral reason to restrict, if not prohibit, access to non-lethal means by military institutions *in bello*, much of the moral basis provided by this asymmetry is provided by the likelihood that a given means will be effective in averting the threat without increasing the risk of morally weighted harm. In short, non-lethal means are more effective in averting the Threats faced by police than

¹⁸⁷ These weapons were divided into Riot Control Means (RCM) which included rubber bullets, tazers, batons, flash-bangs, etc. and Riot Control Agents (RCA) which included gas and other chemical means that could conflict with international prohibitions on chemical weapons. See U.S. Department Of Defense 'Annex E (Consolidated Roe) to 3-187 Frago 02, Opord 02-005' http://wikileaks.org/wiki/US_Rules_of_Engagement_for_Iraq

those faced by military personnel. Arresting and detaining opposing combatants is unlikely to avert the macro-threat posed by the invading army. Furthermore, those posing micro-threats to military personnel are seeking to kill them and will go on killing if they succeed. The opposing combatants are not trying to escape capture or to kill a particular individual, as is often the case in policing situations. In armed conflict the means by which one achieves one's cause, just or otherwise, is by killing opposing combatants until one side gives up. Non-lethal means, at least those non-lethal means that are currently available would probably be ineffective in averting such threats. Police, on the other hand, traditionally face a very different kind of threat. Lethal threats faced by police rarely target police themselves, but instead result from an individual attempting to avoid capture, or from an individual attempting to harm a third-party that the officer or officers seek to defend.¹⁸⁸ Furthermore, use of lethal force against particular micro-threats can actually result in failure to avert the harm caused by the macro-threat police are attempting to mitigate.

The recent case of the killing of Michael Brown in Ferguson Missouri serves as a good example of this.¹⁸⁹

Michael Brown was shot and killed by Darren Wilson, a police officer. Officer Wilson directed Brown and a friend of Brown's to the sidewalk where Brown was recognized as a suspect in a minor theft. What happened next is unclear, but the situation escalated. The officer claims that Brown leaned into his car, struck him, and attempted to take his weapon. Others have claimed that Brown said something to the officer but did not enter the vehicle. Officer Wilson fired two shots within the car and Brown ran some distance. Officer Wilson chased him on foot. Brown stopped and turned to face Wilson who also stopped. Brown was shot some distance from the officer and died from his wounds.

¹⁸⁸ Common cases are like those raised in Chapter 3 of Miller and Blackler, *Ethical Issues in Policing*, pp 67-80 Even with so-called 'spree-killings', where the killer continues to kill until he or she is stopped, it is rare that the killer is targeting police officers specifically, though they may target officers who try to interfere.

¹⁸⁹ Larry Buchanan et al., 'What Happened in Ferguson', *The New York Times* (http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html?_r=0: New York Times, 2015)., BBC, 'Ferguson Protests: What We Know About Michael Brown's Last Minutes', *BBC US & Canada* (<http://www.bbc.com/news/world-us-canada-28841715>: BBC.com, 2014).

It is unclear whether or not Brown was in fact a micro-threat to Wilson and so it is unclear whether or not the use of lethal force was justified. However, the use of lethal force against Brown resulted in a large amount of civic unrest in the community and a loss of security, and in some cases, liberty, for residents that would not have otherwise occurred. Even if Brown posed some unjust threat to the officer, and to the greater community, the use of non-lethal means to avert that particular threat would have been much less likely to result in the degree of harm indirectly caused by use of lethal means. This case, and others like it, indicates that in many cases the use of lethal force by police against micro-threats is a less effective means to avert macro-threats than non-lethal alternatives.

The societal controls that exist in the context in which police operate also make non-lethal means more likely to meet the efficacy requirement of the Necessity criterion.¹⁹⁰ These controls make non-lethal means more effective in averting a particular threat. State agents operating in areas where functional controls exist can utilize options other than the use of lethal force to achieve their ends, without substantial increase in risk of harm to themselves or others. Where other institutions, such as law enforcement, courts of law, etc. are available, state agents have the option to surround and contain the problem, and seek alternate resolutions that do not require the use of lethal force.

Even in cases where lethal force is used against a micro-threat, functioning societal constraints that hold the user of force accountable for his or her use of lethal force can help ensure that the successful mitigation of the micro-threat effectively contributes to averting the macro-threat to the community. Detaining and trying a suspect in open court, or investigating uses of lethal force publicly, holds the users of force accountable and may demonstrate that the object of force was in fact liable to be harmed. This allows for the preservation of order even in cases where lethal force is used, avoiding the harms caused by public disorder.¹⁹¹ Furthermore, officers operating in a non-

¹⁹⁰ See Jennifer C. Daskal, 'The Geography of the Battlefield: A Framework for Detention and Targeting Outside the "Hot" Conflict Zone', *University of Pennsylvania Law Review*, 161/5 (June 1 2013), 1165-234. for more on the effect of societal controls on the permissibility of lethal force.

¹⁹¹ This is of course assuming that such constraints are functioning properly. One of the motivating factors behind the protests that erupted in Ferguson was that such constraints were not perceived as functioning properly. It was generally thought that any investigation would result in the officer being exonerated regardless of the facts.

conflict zone take on no greater risk in containing threats, or attempting to avert such threats non-lethally.

Imagine a case in which officers corner an armed robber inside of an otherwise empty building. They can use a sniper on a nearby roof to shoot and kill the robber through a window, or they can surround the building and negotiate the robber's surrender. Because it is unlikely that third parties will intervene on the surrounded party's behalf, negotiation or other non-lethal means can be attempted at little to no risk of additional morally weighted harm. Should the robber escape, the state agents may call upon other state agencies for aid. These other agencies can then track, pursue, and detain the escapee.¹⁹² This is not the case during armed conflict, where other combatants in the area may aid a surrounded group of combatants. Containing one micro-threat does not avert that threat as another threat may appear and compound the threat originally faced.

In short, the existing societal controls narrow the set of cases in which lethal force can reasonably be deemed necessary by making non-lethal means more effective in averting the given threat. The presence of these additional equally effective options give us further moral grounds for the more stringent standard applied to state agents who operate in such conditions. If non-lethal means are as likely to avert a given threat without an increased risk of morally weighted harm one is morally obligated to use such means rather than lethal means. When such controls are present the necessity condition is not met by the use of lethal force, even for those who may be directly involved in the conflict, as other societal controls that are in place allow state agents options other than the use of lethal force without increasing the risk of harm to the agents, or the risk that the agents will fail to achieve the ends they are seeking to achieve. This asymmetry of means gives some moral justification to the current legal and customary constraints placed on police use of lethal force.

¹⁹² There is some discussion in the literature on police ethics about the harms caused by 'hot-pursuit'. Some go so far as to class it something akin to lethal force, given the risk of harm posed by such pursuits. For an influential voice on this discussion see Kleinig, *The Ethics of Policing*. Pp.117-122

Epistemic Asymmetry

The third and final contextual asymmetry that may provide some moral foundation for current norms is an asymmetry in knowledge or certainty about the context in which lethal force is used by police and military institutions. Much is made of the ‘fog of war’ in both literary and descriptive accounts of armed conflict. A combatant’s world is one of uncertainty: uncertain of what to do, of when an attack will come, if they will survive it, why, and most of all, uncertainty about why he or she is there in the conflict in the first place. Such uncertainty is not as evident in accounts of policing. The line between ‘good-guys’ and ‘bad-guys’ is much clearer. Obviously such literary pretense is not borne out in reality, but the presumption persists. Because police, ideally, only use force against those who are *prima facie* liable to such harm and because they do so, traditionally, within a context that includes social conditions that limit the risk of morally weighted harm to at least some degree, it is assumed that the degree of epistemic certainty that police have with regard to the status of the object of force as a Threat or Bystander, the Liability of that Threat to harm and therefore the moral weight of the harm threatened by both the Threat and the defensive-act, and efficacy of the force used in averting both the micro-threat they engage directly and the macro-threat that they seek to avert by means of mitigating the micro-threat is greater than the certainty available to military personnel.

This epistemic asymmetry can offer some moral justification for current legal and customary norms, even in cases where some uncertainty exists for both police and military personnel.¹⁹³ Assuming that the asymmetry holds, that soldiers or other military personnel are less certain with regard to the amount of moral weight they ought to apply to the harms they threaten and are threatened with, and the efficacy of the defensive harm that they cause in averting the threats they face, than police officers, this gives us a reason to grant military personnel more leeway in their use of lethal force against *prima facie* lethal, unjust, threats. Insofar as we accept the idea that the use of lethal force by military actors is permissible in at least some cases, the

¹⁹³ While there are many cases where one can avoid violating another’s rights by not killing, there are many cases when not inflicting harm, even lethal harm, risks producing more severe rights violations. In such cases whether or not Defender has sufficient epistemic resources to determine what action to take would impact what claims we make with regard to how Defender ought to respond to a given threat.

stringency of the four criteria that determine the moral permissibility of such force must be relaxed to reflect this uncertainty. Seth Lazar has argued that we cannot preserve intuitively plausible judgments about the permissible use of force in war and outside of it without endorsing a more permissive Necessity criterion for the use of force in war than for the use of force in individual cases outside of war.¹⁹⁴

While this epistemic asymmetry offers some moral justification for current legal and customary norms, it cannot offer a robust moral foundation for the asymmetry between these two sets of norms. I will seek to support this claim in the following discussion I maintain that the evidence-relative epistemic standard Lazar applies to Necessity allows the criterion to flex in accordance with the evidence available without substantially changing the moral content of the criterion. If I am correct, then the epistemic asymmetry can provide some moral foundation for the asymmetry in permissions granted to both police and military personnel regardless of whether or not an armed conflict exists.

Uncertainty about Uncertainty

Lazar argues that due to the 'fog of war' combatants who kill during the course of the conflict exist in an epistemic state of profound uncertainty. This issue of uncertainty has been highlighted as an objection to McMahan's rejection of the Moral Equality of Combatants norm encapsulated in the *in bello* principle of Discrimination before. However, McMahan and other reductive individualists maintain that this uncertainty doesn't undermine their position that self-defense norms should govern permissible conduct in war, it merely makes such norms harder to apply. In order to meet the individual Necessity constraint a combatant needs to weigh the morally weighted risk of harm averted against the morally weighted risk of harm caused by their defensive act, and then compare this result with the other means available to him. If the soldier found that they were fighting unjustly, then he would almost certainly fail to meet the Necessity condition because 1) The act of killing would morally wrong his opponent by unjustly violating the opponent's undiminished rights, and so increase the moral weight of that harm and 2) Any act committed by the soldier to advance their cause, including

¹⁹⁴ His arguments apply specifically to Necessity, which will be the focus of much of this section. However, we could perhaps extend this claim to apply it to the other four criteria as well.

the killing of opposing combatants, would be acting to advance an unjust cause which would decrease the weight of harms done to himself or those who acted with him in posing an unjust threat.

Lazar argues that this uncertainty makes it extraordinarily difficult for a combatant in an armed conflict to do the necessary 'weighing-up' of the harms caused by his actions against the harms they are intended to avert. When a combatant must choose between two different means of averting a given threat, the degree to which we discount the object of force's interests depends on the existence of a threat, the just or unjust nature of the threat, and the object of force's liability for that threat.¹⁹⁵ In short, we must determine how to weigh the harms each defensive act will cause relative to those it will prevent. Lazar contrasts the evidence commonly available to combatants engaged in an armed conflict with the evidence commonly available to defenders in self-defense scenarios to demonstrate that combatants fighting in armed conflict have less access to relevant evidence necessary to determine whether or not lethal force is the least harmful means to avert the threat posed by opposing combatants. This problem is further compounded by the fact that "combatants do not respond to immediate threats, but macro-threats posed by adversary states, as well as micro-threats to their fellow citizen's lives."¹⁹⁶ Finally, Lazar points out that even when combatants have access to some information, the information they do have about these threats is not firsthand information and is "generally either unreliable or ambiguous".¹⁹⁷

A reductive individualist might address this problem by offering a complex method of determining liability, and take up Frowe's model of threat, arguing that any causal contribution to an unjust cause for which one is morally responsible places the indirect threat's interests below those of a just combatant, and rely on the proportionality condition to constrain permissible use of lethal force by just combatants. However, Lazar raises two further uncertainties that place further pressure on the idea that individual Necessity can be applied in cases of armed conflict. First, he points out in

¹⁹⁵Lazar does not state exactly what 'liability' consists in on this account, but instead presents a functional definition: "There must be some grounds to prefer the defender's interests to those of his target". Lazar, 'Necessity in Self-Defense and War', (Pg. 22)

¹⁹⁶ Lazar, 'Necessity in Self-Defense and War', (Pg. 27)

¹⁹⁷ Lazar, 'Necessity in Self-Defense and War', (Pg. 27)

armed conflict it is virtually a certainty that some non-labile parties will be harmed when combatants act in defense of themselves and their colleagues. Because we cannot discount the interests of non-labile parties, harm done to them is as great as the harm done to a justified defender. The inability to distinguish between liable and non-labile objects of lethal force is particularly problematic in light of the uncertainty a combatant has about the justice of his cause. If one happens to be fighting for an unjust cause, the harms done to innocents in the service of that cause are "multiplied" beyond those done to a justified defender. Secondly, and perhaps more damning for the reductive individualist account, individual Necessity requires that the defensive act have some reasonable chance of effectively averting the threat posed to the Defender. Lazar argues that because combatants are engaged in averting a macro-threat, and all micro-threats they seek to avert are merely a means to this end, there is no certainty, even for a just combatant, that the harms they are inflicting meet the individual Necessity constraint. Combatants cannot be sure that harms done in averting micro-threats will be effective in averting the macro-threat, or if the macro-threat is averted, that the harms they caused had any role in bringing about this effect.

As Lazar sees it, this uncertainty leaves one with three options: One can adhere to the reductive individualist view, which would make killing in war impermissible in too many cases in war, including when one is fighting for a Just Cause. One could relax the stringency of the Necessity condition in cases of self-defense, which would allow for a single Necessity principle but result in an overly permissive set of norms for self-defense. Finally, one might relax the stringency of the Necessity constraint for those participating in an armed conflict. Lazar finds this option to be the "most plausible"¹⁹⁸ but maintains that doing so alters the 'moral content of the principles governing killing in war' from those governing self-defense, so proves reductive individualism false.¹⁹⁹ Regardless of where we stand with regard to the debate between reductive individualism and collectivist accounts of the morality of armed conflict, the question for our purposes here is this: When police officers use lethal force are they doing so in epistemic conditions more similar to combatants engaged in armed conflict, or to individuals engaged in self or other defense? If, in general, police operate under similar

¹⁹⁸ Lazar, 'Necessity in Self-Defense and War', (Pg. 29)

¹⁹⁹ Lazar, 'Necessity in Self-Defense and War', (Pg. 29)

epistemic conditions to private individuals engaged in self-defense this epistemic asymmetry between police and military personnel can provide grounds for the asymmetric legal and customary norms restricting the use of lethal force.

Lazar's account demands that we calculate Necessity on the basis of three key factors: the risk of harm inflicted by the defensive act (morally weighted), the risk of harm averted by the act (morally weighted), the available alternative means of averting the harm threatened, evaluated in each case on an evidence relative standard. This last factor offers some room to alter the stringency of the Necessity constraint on a case-by-case basis. Provided a reasonable person, looking at the evidence available to Defender at the time of the threat, can claim the defensive act did not cause superfluous harm, Defender meets the Necessity condition. As Lazar correctly points out, in self-defense scenarios this evidence is first hand, and those taking defensive action respond to immediate threats to either themselves or those nearby. There is also a direct causal link between the defensive action and the removal of the threat. A combatant on the other hand acts on information given to him by third-parties, and such information is often unclear or otherwise unreliable. Lazar claims that combatants often do not act against immediate threats but 'macro-threats' posed by the enemy as well as 'micro-threats' to themselves and their fellow citizens. Because these macro-threats are not immediate it is often unclear whether or not they are unjustified, or even if they exist at all. Justifications of micro-threats faced by combatants are dependent on the moral status of the macro-threat, so the justice of the threats combatants do have immediate epistemic access to will be ambiguous at best. Finally, it is unclear whether or not those targeted by combatants are sufficiently liable to have their interests discounted. One cannot determine with any reliability the contribution made by a particular combatant to the given conflict or their moral responsibility for that contribution. Without some knowledge of these two factors, one cannot distinguish between liable combatants whose interests can be discounted and non-liable combatants whose interests cannot be.

Macro v. Micro-Threats #2

I now want to come back to the issue of macro-threats. Lazar argues that combatants engaged in armed conflict are not just fighting against the threat posed by some individual or some set of individuals, but a macro-threat imposed by the actions of the polity against which he is fighting. This empirical claim has three implications in defining the grounds the self-defense Necessity constraint can provide for the morally

permissible use of force by the military. First, combatants lack the immediate epistemic access to macro-threats unlike defenders acting within the context of self or other defense. This lack of immediate access raises uncertainty around the moral status of the macro-threat and whether the threat exists at all. Secondly, the moral weight we assign to micro-threats is dependent on the moral status of the macro-threat. If the macro-threat a combatant is fighting to avert is morally just or nonexistent, then this adds moral weight to the harms he imposes on those he fights against, and discounts the moral weight on harms done to him. Finally, even in cases where we have sufficient evidence to claim that the macro-threat exists, and is unjustified, the indirect causal relation between micro-threats and macro-threats raises uncertainty about averting the given threat, both because we lack sufficient evidence to claim that the defensive harms Defender causes have a reasonable chance of averting the macro-threat, and because we are uncertain if the harms caused in defense against micro-threats will have any effect on the outcome of the conflict at all. Even if we can apply individual Necessity to defensive acts against individual micro-threats that occur in armed conflict, these uncertainties seem to prevent us from grounding any plausible Necessity constraint for armed conflict in individual Necessity.

Again, I think that while there is some shift in stringency, it does not necessarily alter the content of the constraint. We are still obligated to evaluate necessity claims on the basis of the set of evidence available to the agent engaging in the harmful act. Our lack of immediate access to the given macro-threat does reduce the evidence available to us when compared to cases where we have such access, such as self-defense. However, this reduction in evidence doesn't mean that we lack *any evidence* on which to evaluate the defensive act. The explicit requirement that Defender take into account all reasonably available evidence imposed by the evidence-relative epistemic standpoint allows for greater stringency when one has 'better' evidence, and less when one has more ambiguous evidence.

'Better' in this case might be construed either in terms of less ambiguous, or more reliable evidence, but it may also be thought of as more directly accessible evidence. Unlike the belief-relative standard, the evidence-relative standard requires that one incorporate *all* available evidence, not just what one might reasonably believe given a particular set of circumstances. At this point, one might raise Lazar's point that much of the evidence about the existence and moral status of macro-threats comes from third

parties. The state, one's senior commanders, the media, etc. all provide much of the information combatants have about the existence and moral status of macro-threats. Such evidence is vulnerable to the claim that it is likely to be ambiguous or unreliable, and so only exacerbates the problem of uncertainty regarding macro-threats.

However, the requirement that all available evidence be taken into account mutes this objection. Our judgments from an evidence relative standpoint result from each piece of evidence being considered *in toto* with other pieces in the set accessible by the actor engaging in defensive harm. This means that first-party evidence may override third-party evidence in cases where such second hand information is judged, on the basis of other evidence available to the actor, to be ambiguous or unreliable.

This evidence-relative standpoint also places greater moral obligations on those who have access to 'better' evidence than others with less, or worse, evidence that may be acting in tandem with them. Those with access to better evidence have a moral obligation to minimize the moral risk faced by those with less, or worse quality, evidence. The moral risk of impermissibly using lethal force is so severe that the harms produced by imposing such a moral risk on less informed actors who use lethal force in the pursuit of some goal are virtually on a par with the imposition of risks of physical harm.²⁰⁰ Those with 'better' evidence are required to alert others to such evidence and make decisions on that basis to minimize the moral risks faced by others.

Those who gain access to evidence that undermines or contradicts more ambiguous, indirect, or less reliable sources similarly have an obligation to both alert those tasked with committing the harmful act that (a) the Defender's evidence is 'less-good' than other evidence and needs to be amended and (b) make available the 'better' evidence to be considered as part of the full set available to those on the ground. Consider the following case:

²⁰⁰ See the developing literature on 'moral injury' and the psychological and physical harms caused by such injuries. For example: Nancy Sherman, *Afterwar: Healing the Moral Wounds of Our Soldiers* (Oxford, UK: Oxford University Press, 2015) 234.

Marine Advance on Baghdad:²⁰¹

A Marine company commander was leading his company toward Baghdad during the 2003 invasion of Iraq. He was required to reach a particular point to rendezvous with other units, and was on a strict timeline. In order to reach the rendezvous, he had to go through a town. He received information that the northern sector of the town had been occupied by Republican Guard and other Iraqi army forces, and that these forces were waiting to ambush his company as they passed through. The commander was ordered to call in artillery on the portion of the northern sector of town that he would need to pass through to clear out any enemy lying in wait. However, the commander had other, unclear, indicators that there were no enemy present in that area. He also was relatively certain that the section of town he had been ordered to shell was still populated. Despite pressure from both his command and his own staff to shell the town rather than risk delay and harm to his men, he halted the company and sent forward a reconnaissance team. He then held the artillery barrage in check until he heard from his team. They found that the enemy was no longer in the town. The commander moved his company through without resistance of any sort and made up time elsewhere to make the necessary rendezvous.

This case demonstrates how this interplay in the face of uncertainty might operate. The commander made his decision to risk failure in averting both micro and macro threats because he lacked sufficient first party evidence that the harm caused by the artillery barrage was permitted by the Necessity condition. This was despite the fact that he had third-party information that indicated such force was Necessary. One might argue that he was required to take on this additional risk by two circumstantial factors. First he could not be certain that he was engaged in a 'just' conflict, or to bring this in line with the macro/micro threat distinction, he was not certain that the macro-threat he was seeking to avert was unjustified. Secondly, he had evidence that using the artillery barrage would likely cause harm to individuals who were not liable to a greater or lesser extent. Harm done to these individuals would be, at best, on a par with harm done to his own personnel assuming that the macro-threat that they were seeking to avert was unjust and, at worst, be well beyond any harm done to his own personnel if they were seeking to avert a justified threat. Combining these two factors gave the commander reason, from an evidence relative standpoint, to use the least harmful

²⁰¹ This is a brief version of Case 6.2 in Coleman, *Military Ethics: An Introduction with Case Studies*. (Pp. 122-123). Coleman states that his case is based on a case written by Captain Bob Schoultz, U.S. Navy (Retired).

means available to avert the threat to his company and the overall mission despite the fact that the less harmful means risked failing to avert the harm threatened by the enemy. 'Defender' in this case did not deem the third-party evidence to be sufficiently unambiguous or reliable on the basis of the other evidence available to him to meet the Necessity condition. He decided to take on risk to himself and his men in order to acquire first person evidence prior to acting. Once he had ascertained that the use of artillery would likely cause a substantial risk of greater morally weighted harm than advancing through the town without 'softening-up' the area with artillery, he disregarded the third-party evidence.²⁰²

Our evaluation of the Necessity of any act of defensive force is based on evidence available to the user of that force. In self-defense, this user is Defender, but in armed conflict one must first determine which act of harm one wishes to evaluate and then determine who is responsible for that harm and to what extent. One might argue that this is confusing, as many individual agents and sets of individuals are employing force against other individuals and sets of individuals constantly. However, by focusing on particular acts of harm against specific macro or micro-threats, rather than the agent committing the harm, we can apply the self-defense criterion of Necessity to armed conflict. What we end up with is a layered approach, beginning with individual threats, and building into more and more 'macro' threats posed both by larger and larger groups of individuals doing and receiving harm and those responsible for these groups. In order to determine if a particular act meets the Necessity condition we must determine what set of evidence those responding to the threat had access to prior to attempting to avert the threat in question.

Just War Theory has attempted to accommodate this division of moral labor among combatants, who are involved in the armed conflict, and those morally responsible for getting combatants into such messes in the first place. The *Jus ad Bellum* principles that reflect the necessity constraint are Last Resort and Reasonable Chance of Success.

²⁰² Of course one might argue that because he was not part of the reconnaissance himself, such information was still 'third-party'. This is, strictly speaking, correct. However, this marks the limits of the Self-Defense constraint to justify the permissions granted to collective groups engaged in armed conflict, and can be partially answered by my response to the 'collectivity' objection that follows.

Both of these principles hinge on the existence of a Just Cause for fighting, and the 'justice' of that cause. If there is a less harmful method of achieving the Just Cause, without a sufficiently increased risk of harm, then armed conflict does not correspond with the Last Resort principle. If armed conflict does not have some reasonable chance of averting the given macro-threat posed by the opponent, then use of such force fails to meet the Reasonable Chance of Success constraint. If either or both of these constraints are not satisfied then an armed conflict is not permissible under Just War principles, making military use of lethal force such an armed conflict impermissible as well.

This division of moral labor also allows the incorporation of the evidence-relative standpoint of Necessity to address a portion of the worry raised in regard to macro and micro-threats. As Lazar points out, it is unlikely that an individual combatant can have any certainty about important factors relating to either the overall justice of the threat they are posing by fighting or the chances of the harm they inflict averting the macro-threat they fight against. Individual combatants simply do not have enough evidence to make these judgments, and should know this; given the evidence they do have access to. However, it does not seem to be implausible to say that others at higher levels of command do, or perhaps should, have such access prior to causing harm to all concerned by sending combatants into armed conflict. I do not mean to say that those in charge *will* make the right decisions on the basis of the evidence accessible, but rather, that they should have access to sufficient evidence that the Necessity constraint can be met before committing others to the great moral and physical risk entailed in entering an armed conflict.²⁰³ If they lack access to such evidence then they fail the Necessity constraint with regard to both 'individual' Necessity and associated JAB principles, and wrong those they call to fight by placing them at both the moral risk of being unable to comply with the Necessity constraint and the physical risk of being harmed in the process.

²⁰³ This view of the obligations entailed by Necessity also offers some justification for another military norm closely related to permissions regarding the use of lethal force: the obligation to obey orders from superiors. This obligation seems to be founded in the idea, at least in practice, that those 'higher-up' know something those 'lower-down' don't.

Assuming those 'at the top' do have such access to sufficient evidence, then it is they, and not the individual combatants, who should be determining the Necessity of lethal force as a means to avert a given 'macro-threat'. The fact that individual combatants cannot do this is not necessarily an argument for adopting a concept of 'collective' Necessity wholly distinct from 'individual' Necessity.²⁰⁴ Rather it is an argument for holding command morally responsible for the harms caused by failing to meet the Necessity constraint and causing others to do so. Again we can layer this response from a Commander-in-Chief, who should have access to the most evidence and most direct access to the existence and nature of the 'macro-threat', to campaign commanders, to regional command, to sub-regional command, to platoon command, to squad leaders. Each of these groups has access to different sets of evidence, and to apply the Necessity constraint we must simply look at the use of lethal force each is responsible for, or perhaps the extent to which they are responsible for a given act of harm or threat of harm. Then we need to determine the evidence available to them to see whether or not the Necessity condition has been met. Incorporated into each set of evidence is some 'third-party' evidence from at least one of the layers above, but the worry that such information is ambiguous or unreliable can be covered by the limited flexibility allowed by the evidence-relative aspect of Necessity.

The previous discussion has given some reason to believe that the uncertainty faced by combatants engaged in an armed conflict does not prevent the Necessity constraint from doing some work in offering moral justification for the broad permissions granted to military personnel. Assuming the Necessity constraint can flex due to the evidence-relative standard, then the more restrictive legal and customary norms regulating police use of lethal force can only be justified if it can be demonstrated that police operate in an environment that is epistemically richer than that in which military institutions operate.

The question for our purposes then is this: When police officers use lethal force are they doing so in epistemic conditions more similar to combatants engaged in armed

²⁰⁴ This is not to say that we have *no* reason for a concept of collective Necessity. Other features of widespread collective violence, such as armed conflict, may give us good reason to reject the more stringent standard of Necessity applied in cases of self-defense. Here I merely argue that epistemic uncertainty is not one of them.

conflict, allowing the application of the broader ‘collective Necessity’ criterion, or to individuals engaged in self or other defense? If, in general, police operate under similar epistemic conditions to private individuals engaged in self-defense this epistemic asymmetry between police and military personnel can provide grounds for the asymmetric legal and customary norms restricting the use of lethal force.

While I don’t think that police operate under the same epistemic standards as individuals acting in self-defense, it is certainly the case that they do not operate under the same epistemic standards as those generally faced by members of military institutions. Like military personnel, police seek to avert both macro and micro threats and so are subject to some uncertainty both with regard to the effect of the harm that they cause in their efforts to avert the macro-threats they face for the reasons discussed above. They also operate on third-party information, received from dispatchers, command, witnesses or other third parties. This differentiates the epistemic environment in which police operate from the epistemic conditions faced by an individual considering the permissibility of lethal force in self or other defense.

As discussed in the first section of this chapter, we have reason to think that police attempt to avert macro-threats as well as micro-threats. Many of the harms that police institutions guard against are harms to the community *qua* community rather than harms to particular individuals within those communities. The goods policing institutions seek to promote are much like those of political sovereignty or territorial integrity defended by military institutions. Police officers, like military personnel, would not necessarily have direct epistemic access to the nature of these macro-threats and so would be vulnerable to the same uncertainties faced by military personnel with regard to the Necessity criterion. What evidence officers would have would be, at least in part, provided by third-parties and so be more or less reliable or ambiguous.

However, police, due in part to the environment in which they operate, ought to have access to more evidence on which to base their decision to use lethal force than military personnel. Presuming a minimally just society, the uncertainty faced by police is mitigated by at least two factors. First Societal Controls reduce the uncertainty and ambiguity of third-party information. They do so indirectly by enhancing the efficacy of non-lethal means of averting imminent micro-threats, making lethal force less likely to be necessary to avoid an increased risk of unjust harm. This allows officers to gather

more evidence before using more harmful means to avert the threat. Societal controls also directly minimize uncertainty by minimizing the ambiguity or otherwise increasing the reliability of third party information. Information may be filtered through multiple levels of communication prior to it being received by the officer. A call from a witness to police dispatch will likely result in various checks being run to confirm and fill gaps in the information received. An officer responding to a call can access databases and communicate with other officers familiar with the area to gain additional evidence regarding the severity and nature of the threat he or she is likely to face. Such databases and local knowledge are available to military personnel as well, but these resources are likely to be more reliable and less ambiguous in cases of policing, in part due to the direct access police have to information about the communities they police.

Secondly, in addition to third party sources, officers also have direct access to more evidence than military personnel involved in armed conflict or even those involved in peacekeeping or law enforcement operations in a foreign country. Members of policing institutions are generally drawn from the population that they police, and often reside in it. This gives them direct access to information about local norms that can provide evidence about whether or not a particular agent, or group of agents, constitutes a threat, or the degree to which they are liable for any threat they do pose. To use an example taken from current events: An officer not familiar with the legal and customary norms regarding owning and carrying weapons in the southwestern United States would likely class a person openly carrying a semi-automatic firearm into a restaurant as a threat. However, officers drawn from that region would understand that such behavior is not only legal but relatively common in the area. Police drawn from, or otherwise familiar with, the population that they police would also have direct access to evidence regarding the likelihood that the use of lethal force against micro-threats would fail to avert a particular macro-threat. In cases where police were operating in an unfamiliar area, existent societal controls, including local police, would allow them to directly access reliable third party evidence relevant to determining whether or not lethal force was a necessary response to a given micro-threat and whether such a response would result in additional risk of unjust harm by aggravating local macro-threats.

So the epistemic asymmetry can help explain why police are held to a more stringent standard. Police, due in part to the environment in which they operate, have access to

more evidence on which to base their decision to use lethal force. This evidence allows them to make more informed judgments regarding the moral weight of harm caused by the available means vs. the moral weight of harm that would be averted if the given means averted the threat. Judging whether or not the Necessity constraint has been met on an evidence relative standard requires that this evidence be taken into account before lethal force is used. The evidence relative standard allows for the stringency of the constraint to shift in accordance with the evidence available to the Defender using lethal force against a given threat. This flexibility is limited however. The evidence relative standard demands that Defender, on the basis of accessible evidence, acknowledge their uncertainty about the moral status of the threat they pose and the existence of the macro-threat that they are attempting to fight, and consider this in concert with other evidence available to them when performing Necessity calculations. This allows us to ground current legal and customary norms restricting the use of lethal force in armed conflict to at least SOME extent in what Lazar calls individual Necessity.

Each of these asymmetries provides some moral basis for the current norms delineating the permissible use of lethal force by police and military personnel. While both police and military institutions seek to avert collective harm, military institutions generally do so by means of averting both individual micro-threats and the collective-threats of which those micro-threats are a part. While police also seek to avert collective-threats in some cases, they do so less often, and when they do these threats are generally less severe in terms of scope and magnitude than those faced by military institutions. The more restrictive legal and customary permissions granted police are also justified by the additional non-lethal means available to police officers, and the additional effectiveness of those means in successfully averting a given threat. Both of these factors make it more likely that such means will satisfy the Necessity constraint, effectively averting the given threat without increasing the risk of additional morally weighted harm.

Finally, the epistemic asymmetry between individuals and police allows us to apply the broader 'collective Necessity' criterion to police use of lethal force, but only just. Police also lack direct evidence of the effect their defensive actions have on the macro-threats they face, and so are less epistemically certain that a particular use of force will be effective in averting the macro-threat they act against. However, this uncertainty is mitigated by the existence of functional Societal Controls that reduce the ambiguity and

increase the reliability of third party information. Police also have more direct access to evidence pertaining to *prima facie* threats in the polity they are policing. Living and working for long periods within a particular polity should provide police with more first person/direct evidence pertaining to what does and does not constitute an unjust threat, and whether or not use of lethal force against some micro-threat would be likely to be effective in averting the increased risk of morally weighted harm.

What happens however when these asymmetries begin to break down? David Kilcullen and others reference above have indicated that the overlap between police and military operations will increase in future armed conflict.²⁰⁵ Incidents such as the attacks in Pakistan, Belgium, Paris, Mumbai, and the Moscow Theatre siege are becoming the norm and advances in technology are making communication and targeting capabilities available to collective-threats that were previously only available to state military institutions and police. In closing this section of the paper I want to make a couple of general points that relate to the previous analysis before moving on to the implications of this analysis and the conclusion of the paper as a whole.

First, I should point out that just as all four criteria must be met for a use of lethal force to be morally justified, it is the combination of these three asymmetries that allows us to provide a strong moral foundation for the asymmetry in current legal and customary norms regarding the permissible use of lethal force by police and military institutions. In cases where police face threats as severe as those faced by military institutions, such as transnational organized crime groups, or terrorist organizations, the asymmetry in means and epistemic asymmetry fill the gap. Insofar as these two asymmetries hold, the more restrictive legal and ethical norms placed on police use of lethal force can still be morally justified, because it is unlikely that the Necessity constraint could be met, despite the severity of the threat approaching the severity of threats generally faced by military institutions in bello.

This interdependence can be a double edged sword however. The degradation of one asymmetry is likely to lead to degradation of the others. For example, as the severity of

²⁰⁵ See in particular Kilcullen, *Out of the Mountains*. and Kilcullen, *Blood Year: Islamic State and the Failures of the War on Terror*.

the threat faced by police increases, the efficacy of non-lethal means of averting the harm without increasing the risk of additional harm decreases, and the epistemic uncertainty that using less than lethal means will be effective in averting the macro-threat of collective harm without risking greater unjust harm fades. Mapping the interplay between these contextual asymmetries, and the impact this interplay has on the moral permissions granted to police and military personnel, is tangential to the core question of this thesis, and so I will not go any deeper into the issue here. However, the general point is important. Our ability to morally ground the current asymmetry in legal and customary norms in the norms of self-defense is dependent on the existence of these contextual asymmetries. If the threat, means, and epistemic status faced by police and military institutions are sufficiently equivalent then the restrictions imposed by the four criteria of self-defense would be the same, and, in the absence of other relevant moral reasons, the more restrictive legal and customary permissions granted to police would be without moral foundation.

Implications and Conclusions

Implications

The discussion above yields two possible conclusions. We might claim that the asymmetry in legal and customary norms is without moral foundation in cases where the three contextual asymmetries noted previously do not obtain. Alternatively, we might conclude that we ought to incorporate other norms to ‘shore-up’ the moral foundations supplied by threat, liability, necessity and proportionality in cases where the contextual asymmetries have evaporated. Both of these conclusions have advantages and disadvantages that I will briefly discuss here before concluding.

The first is the more conceptually straightforward.²⁰⁶ Lethal force is justified in cases where all four of the necessary criteria that morally justify the permissible use of lethal force in self-defense are met. In cases where the context is asymmetric, the asymmetry in legal and customary norms is morally justified. In cases where it is not, then these legal and customary norms are not. What’s more, it is not immediately evident that we are forced to abandon or alter our current legal and customary norms in such cases. We could argue that the application of such legal and customary norms, even in cases where the asymmetries discussed previously do not obtain, is the lesser-evil.²⁰⁷ Application of these norms in cases where the contextual asymmetries no longer exists may result in some unjust harm, but, we might argue, that degree of unjust harm is less than the amount of unjust harm that would occur if we abandoned current norms.²⁰⁸

However, adopting this reductive view throws up obstacles when we attempt to utilize these norms to guide action. As I briefly highlighted in the previous section on the Epistemic Asymmetry, it is extraordinarily difficult to determine the moral weights we ought to assign to both the harm threatened and the defensive harm in cases such as

²⁰⁶ I thank Chad Lee-Stronach for highlighting this point in discussion.

²⁰⁷ A lesser-evil permission, in *very* broad strokes, would be one where a wrongful act would be permitted insofar as that act would prevent substantially greater harms that would otherwise occur if some other action, including no action, were taken. Note this does not necessarily make such action morally justified, it merely offers a robust excuse for an otherwise wrongful act.

²⁰⁸ See for example: Jeff McMahan, 'The Morality of War and the Law of War', in David Rodin and Henry Shue (eds.), *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (Oxford: Oxford University Press, 2008b).

those faced by police and military personnel. It is also difficult to determine how likely it is that using lethal force to successfully avert a micro-threat will also be successful in averting the related macro-threat, or, indeed, have any positive effect at all. For a lesser-evil argument to apply, the wrong prevented by the wrongful act must be substantially greater than the wrong caused by the act itself.²⁰⁹ But if we cannot determine the moral weight of the harms involved, or determine whether or not the increased efficacy of a particular means is justified by a reduction in the risk of additional unjust harm, it is as difficult for us to say we are permitted to utilize lethal force on lesser-evil grounds as it is to say that such use of lethal force is morally justified by the norms of individual self-defense.

Those in favor of this reductivist conclusion could still argue that this action-guiding problem can be overcome. It would require substantial analysis and a complex, detailed, account, but there is nothing to prevent one from developing such an account that covers the majority of cases and leaves those on the periphery to lesser-evil permissions or other robust excuses. However, such claims strike me as deeply unsatisfactory for several reasons. The first is largely a pragmatic concern. In almost all real-world cases where lethal force can be considered a *prima facie* justified means of averting a threat, the Defender has little time in which to act. Application of complex, detailed, accounts in such cases is extraordinarily difficult, particularly given the psychological pressure that results from the foreseeable costs of a 'wrong' decision. Secondly, even in cases where one has time to perform such complex calculus, such pressure lowers the chances that it will be performed correctly, particularly by those who are not specialists in the ethics of lethal force and self-defense. Finally, the reductivist view leaves open the possibility that Commander Adama and others have warned against.²¹⁰ Specifically, the reductivist view removes a moral obstacle to the

²⁰⁹ For example: it may be wrong for me to taser an innocent aggressor, such as a person threatening lethal harm during a psychotic episode, because the object of force lacks moral responsibility for the threat they pose to others due to their mental illness and so does not meet the liability criteria. However, insofar as my wronging the innocent aggressor is Necessary to prevent greater unjust harm from occurring to the innocent aggressor, innocent third-parties, and myself, I may be permitted to do so. The wrong done by my tasering the aggressor is substantially less than the wrong that would occur if I did not zap the innocent aggressor, or utilized some more permanently harmful means.

²¹⁰ See Fn. 1 and Balko, 'Overkill: The Rise of Paramilitary Police Raids in America', Balko, *Rise of the Warrior Cop: The Militarization of America's Police Forces*.

militarization of the police in response to escalated threat to the community. As I will discuss in a moment, this gives us reason to attempt to seek alternative conclusions that can provide moral justification for the current asymmetry in norms, and so avoid the equivocation, in practice if not in name, of these two security institutions.

We might respond these concerns by arguing that surely a sufficiently detailed account would yield some rules-of-thumb that would apply in the majority of cases. This is a plausible claim. In fact, it is supported to some extent by the previous section. One implication of the discussion is that insofar as one or more of the three contextual asymmetries obtain, we ought to hold to the legal and customary asymmetry in norms between police and military personnel. That's a pretty clear rule-of-thumb that even a non-specialist can morally justify and follow. However, such a conclusion ought to give us pause. First of all, the rule-of-thumb does not cover cases where these three asymmetries do not obtain, and so is useless as an action-guiding tool in such circumstances. If we accept that current security threats are degrading these asymmetries then this is a problem for the reductivist account, assuming that norms should be *both* conceptually robust and action-guiding.

Should we accept this empirical claim? Demonstrating this conclusively would require another thesis in itself, but some recent work in security studies and international relations gives some indication that we should. To quote David Kilcullen in his discussion of what he calls "ISIS Internationale": "...a fully disaggregated terrorist movement, with an ideology insidiously attractive to alienated and damaged people likely to act on it, combined with omnipresent social media and communications tools that hadn't even existed on 9/11, could enable a spread of terrorist violence constrained by time, space, money or organized infrastructure."²¹¹ Such a macro-threat could certainly be considered on a par with those faced by military institutions in terms of scope and potentially in magnitude. Furthermore, it is not evident that non-lethal means would be effective in averting the macro-threat posed by such a movement. Capturing the leader of the group would not necessarily avert the macro-threat posed by independent cells acting towards the same goal. Finally, the "disaggregation" strategy

²¹¹ Kilcullen, *Blood Year: Islamic State and the Failures of the War on Terror*. (Pg. 111)

used by the U.S. and its allies in combating Al Qaeda and other similar organizations has elevated the epistemic uncertainty regarding effectiveness of lethal means as well. While such means may be a more effective way to eliminate the threat posed by a particular individual, it is not clear that the increased efficacy is justified by a reduction in risk of unjust harm. ISIS is only one example of this. Similar claims could be made about transnational criminal organizations operating in Central and South America as well.²¹² In such cases, accepting the reductive claim would place legal and customary norms regulating the permissible use of lethal force in tension, if not direct opposition, with moral norms regulating the use of lethal force; undermining the value of such legal and customary norms as tools for action-guidance. At best this would lead to a degree of confusion for practitioners on the ground, and the policy makers that call them out in our defense. At worst this tension could lead to wide-spread rights violations to both those unjustly harmed by the lethal force wrongfully employed and to those who are placed at moral and physical risk in attempting to avert threats to the communities they serve.

In addition to producing tension between these two sets of norms, accepting the reductivist view mutes objections to the increased militarization of police forces and police operations in the U.S., the U.K. and Australia.²¹³ Presuming that police seek to avert a severe threat that is unlikely to be averted by non-lethal means, or where the use of such means risks an increase in unjust harm, giving police permission to utilize military weapons and techniques is perfectly justified on a reductivist account. When coupled with the epistemic uncertainty caused by the tension between legal and moral norms mentioned above, this increased militarization of police operations further increases the likelihood of unjust harm. Such harm may not just result from the use of lethal force in such operations in terms of individual harms done to innocent objects of force²¹⁴ or ‘collateral damage’ done when employing force,²¹⁵ but would also result in

²¹² See Kilcullen, *Out of the Mountains*, Kilcullen, *Blood Year: Islamic State and the Failures of the War on Terror*. (pp. 111-125)

²¹³ Balko, *Rise of the Warrior Cop: The Militarization of America's Police Forces*. Militarization of police might also apply to the increased use of military personnel in domestic law-enforcement operations. See Michael Head, *Calling out the Troops: The Australian Military and Civil Unrest* (Sydney, Australia The Federation Press, 2009) 245.

²¹⁴ BBC, 'Man Shot Dead by Police on Tube', IPCC, 'Stockwell One: Investigation into the Shooting of Jean Charles De Menezes at Stockwell Underground Station on 22 July 2005', Balko, 'Jose

collective harm to the society at large caused by wide-spread infringement, if not violation, of liberties the state, through police institutions, is obligated to preserve.²¹⁶

This leads us to examine the second conclusion. We might seek to incorporate norms other than those that apply to individual self-defense, at least in cases where threat, necessity, liability and proportionality cannot provide a moral foundation for the legal and customary asymmetry in permission. This conclusion would help with the action guiding complaint because it could provide us with a moral foundation for the asymmetry even in cases where narrowing contextual asymmetries weaken the justification provided by individual self-defense norms. This would minimize, if not eliminate, the tension between moral and current legal and customary norms in such cases. Furthermore, even if we are tempted by the reductivist position and to accept that the self-defense justification is 'good enough' to cover most cases, something about the claim should stick in one's craw. Ideally we want legal and customary norms that institutionalize moral norms. While it is certainly the case that we do not live in an ideal world, and therefore do the best we can, 'the best we can' implies that our legal and customary norms ought to track our moral norms to the greatest extent possible.²¹⁷ This second conclusion offers us the possibility of providing moral grounds for the legal and customary asymmetry in a broader range of cases, and so ought to be preferred on these grounds, even if it requires a similarly conceptually complex account.

We might object to this second conclusion in a couple of ways however. First, we might worry that the account we would need to produce under this second conclusion would be as complex and difficult to follow as the first. If correct this would negate any

Guerena Killed: Arizona Cops Shoot Former Marine in Botched Pot Raid'. Coleman, *Military Ethics: An Introduction with Case Studies*. Case Study 3.5 'Esequiel Hernandez Shooting' (pp. 53-54)

²¹⁵ Tina Chen, 'Baby in Coma after Police 'Grenade' Dropped in Crib During Drug Raid', *ABC News* (<http://abcnews.go.com/blogs/headlines/2014/05/baby-in-coma-after-police-grenade-dropped-in-crib-during-drug-raid/>; ABC News, 2014).

²¹⁶ For my own views on one aspect of this problem see Adam C. Gastineau, 'Policing Cyberthreats: Regulating Exceptional Police Actions', in Nicholas G. Evans et al. (eds.), *Cybersecurity: Mapping the Ethical Terrain* (National Security College Occasional Papers, 4; Australian National University: National Security College, 2014), 21-27.

²¹⁷ See Henry Shue, 'Do We Need a Morality of War', in David Rodin and Henry Shue (eds.), *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (Oxford: Oxford University, 2008).

advantage the second conclusion has over the first in terms of action-guidance. In short, there would be little advantage to endorsing the second conclusion over the first. While I concur that such a hybrid account would likely be at least as complex as one which simply grounded legal and customary norms in the four criteria of defensive force, it does not follow from this that this would make such an account more difficult to follow. First, as mentioned previously, such an account would extend the moral foundation for our current legal and customary norms beyond those provided by the norms of self-defense and so reduce the number of cases in which moral permissions are in tension with legal and customary permissions. This would eliminate at least some of the confusion that results from the first conclusions above. Secondly, such an account would allow for a greater degree of epistemic certainty in some other respects. Insofar as one knows what one's duties are, and to whom such duties are owed, one can factor such duties into calculations balancing the moral weight of threatened harm with the harm caused by the defensive act. In cases where one has little information about the liability of the threat, or whether the more effective, more lethal, means is justified by a decrease in the risk of unjust harm, these duties would help tip the balance enough to improve action-guidance.²¹⁸ To be successful the additional norms would need to supplement, rather than supersede, the moral norms pertaining to the use of lethal force in self-defense, and this brings us to the second objection that one might raise to going beyond the norms of individual self-defense to morally ground the asymmetry in legal and customary permissions.

In some cases, the tension between morally justified use of lethal force and legal and customarily permitted use of lethal force tells us something important about the moral value of legal and customary norms. In fact, this is one of the main strengths of the reductivist view: it protects against *ad hoc* justifications and thereby allows room for critique and rejection of current legal and customary permissions that are not supported to at least some degree by the moral norms restricting the use of lethal force in self-defense. Insofar as legal and customary norms have their foundations in moral norms, rather than the other way around, this is a major advantage of the view. However, endorsing the second conclusion is not equivalent to saying that the norms of self-

²¹⁸ This is a bit vague, but I will attempt to clarify the claim a bit further in a moment.

defense have *nothing* to say in justifying the asymmetric permissions granted to police and military. Such a claim would contradict the majority of the analysis offered in the previous section. However, I have argued that there are cases in which the four criteria restricting the permissible use of lethal force in self-defense can no longer wholly support this asymmetry, and think that in such cases of equivalence, we ought to turn to other moral norms to avoid problems that may result in widespread rights violations to those involved in the circumstances in question.

The challenge then for those tempted by this second conclusion is to avoid ‘ad-hoc-ery’: we need to be able to explain what it is about the use of lethal force by police and military personnel that differentiates it from the use of lethal force by individuals engaged in self-defense, and offer a principled account of which norms ought to be considered as plausible support for the asymmetry. Building a sufficiently detailed answer to these two questions would require more space than available here. Instead I will offer a sketch of what such an account might look like before concluding.

First I will suggest a feature common to both police and military institutional use of lethal force when the contextual asymmetries discussed in the previous sections do not obtain: the collective nature of the violence that occurs in cases of contextual equivalence. This collectivity allows us to differentiate the use of lethal force by police and military personnel from the use of lethal force in cases of individual self-defense, at least descriptively. This descriptive difference may give us moral reason to incorporate norms other than those applicable to cases of individual self-defense.²¹⁹ I will then suggest two concepts, special duties and collective ends, could be incorporated to provide moral foundation for the asymmetry in legal and customary permissions, even

²¹⁹ Similar points about the collective nature of violence, in particular, armed conflict, giving moral reason for applying broader, if not wholly different, norms to collective violence have been made by several authors including Yitzhak Benbaji, ‘A Defence of the Traditional War Convention’, *Ethics*, 118/3 (2008), 464-95, Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, Rodin, *War and Self-Defense*. For a succinct account of how collectivity may impact the moral norms of self-defense when applied to armed conflict see Lazar, ‘Necessity in Self-Defense and War’, (Pp. 29-38)

in cases where the foundation provided by the four criteria of individual self-defense are weak.²²⁰

Cases of contextual equivalence, where the contextual asymmetries discussed do not obtain, would almost certainly involve conflict between two or more collectives. Collective-threats, because of their members' joint, coordinated, effort towards a single goal, are likely to pose more severe macro-threats than individual threats in terms of both magnitude and scope. Such threats also make it less likely that non-lethal means would be effective in averting the macro-threat they pose, even if such means successfully avert the individual micro-threats posed by their members in some cases. Finally, collective-threats result in a greater degree of epistemic uncertainty than individual-threats. Defender lacks direct access to the macro-threat they are seeking to avert. Therefore, it is unclear how one ought to weigh the harms done to individual members of the collective-threat relative to their liability. It is also unclear what effect that their elimination as micro-threats will have in averting the macro-threat posed by the collective to which they belong. On the other side of the conflict, police and military institutions are paradigmatic examples of collectives. They are organizations whose members engage in joint action to realize a particular end.²²¹

These ends may help to ground the asymmetry in legal and customary norms in cases of contextual equivalence. In his teleological account of social action, Seumas Miller develops the idea of 'collective ends' which he defines roughly as "an individual end that more than one agent has, and which is such that, if it is realized, it is realized by

²²⁰ Again, I cannot offer an exhaustive account here, nor address the objections that such an account might face, but I can offer a framework on which to construct such an account.

²²¹ The minimal requirements for an action to be a joint action are laid out clearly in Pettit, 'Joint Actions and Group Agents', (Pp. 23-24) They list five necessary and jointly sufficient conditions for joint action:

1. The actors each intend that they 'enact the performance' of a particular joint act
2. Each intend to do their bit in the performance
3. Each believe that others intend to do their bit
4. Each intends to do their bit on the basis of 3
5. The actors believe clauses 1-4 hold.

On joint action and institutions such as police and military institutions see Seumas Miller, *The Moral Foundations of Social Institutions* (New York: Cambridge University Press, 2010) 371.

all, or most, of the actions of the agents involved” in a particular joint action.²²² If it can be demonstrated that police and military institutions seek to achieve different collective ends or outcomes, and that their use of lethal force is instrumental to those ends, then the ‘collective ends’ of the institution in question will have an impact on the permissibility of using lethal force as a means of achieving those ends. One might object here that this is a pragmatic restriction placed on the use of lethal force, rather than a moral one. However, this is not necessarily the case with regard to the two institutions in question. I have argued that police and military institutions seek to avert macro-threats to the societies or communities they represent. In doing so, they seek to preserve collective goods such as protecting or preserving the sovereignty of the state or the moral rights of the community. Insofar as preserving or protecting collective goods is morally desirable, the efficacy of lethal force as a means to do so would impact the moral permissibility of such use, and so could offer some additional moral grounds for the legal and customary asymmetry in cases of contextual equivalence.

Special duties specific to police and military personnel might also provide some moral grounds for the asymmetry in legal and customary norms. If we can demonstrate that (a) police and military personnel have special duties to bring about a particular morally desirable state of affairs, and (b) that these duties differ in some respect, then these duties may provide moral reasons to limit the permissible use of lethal force by one group but not the other.²²³ Phillip Pettit and Robert Goodin offer a particularly convincing account of special duties grounded in the obligation to fulfill general duties that moral agents owe one another.²²⁴ On this account one has a special duty to fulfill some general duty if one can be shown to have a greater responsibility to fulfill that general duty relative to others. One is responsible to the extent that one has the

²²² Miller, *Social Action: A Teleological Account*. Pg. 57. For the complete account of Miller’s Collective End Theory see Pp. 56-71 Miller takes collective ends to be distinct from shared intentions among agents engaging in joint action. This is a controversial view in the literature, and would need to be defended in a full account, but will not be discussed further here.

²²³ By a ‘desirable state of affairs’ I merely mean that the state of affairs is morally ‘good’ and being ‘good’, is desirable. For example, in determining the special duties of physicians, the ‘good’ could be the caring for and/or curing of a patient, but any ‘good’, in that one aspect of something being a ‘good’ is its desirability, would suffice.

²²⁴ Philip Pettit and Robert E. Goodin, 'The Possibility of Special Duties', *Canadian Journal of Philosophy*, 16/4 (1986), 651-76.

capability to fulfill the general duty in question.²²⁵ It seems quite plausible to say that both police and military institutions, and, by extension, individual members of those institutions, are more capable of fulfilling some general duties than non-members, and so have special duties to do so on Pettit and Goodin's account that private individuals do not. Members of both institutions are selected on the basis of their capabilities to bring about a particular state of affairs.²²⁶ They also receive extensive training to increase and enhance such capabilities.

The challenge then is in defining and differentiating between the special duties of police and the special duties of military institutions. Differing collective ends may have a role to play here as such ends would likely determine the focus of the institution in practice and so increase or decrease an institution's capability to fulfill some specific set of general duties. Alternatively, we may simply argue that police and military institutions are assigned responsibility for fulfilling different general duties in order to better guarantee success.²²⁷ There is also a question of who is owed the special duty and to what degree that duty is owed. Special duties may not apply to all moral agents, or apply to a greater degree to some agents than others. Police may have stronger special duties to all those within the jurisdiction in which they operate than people in

²²⁵ Pettit and Goodin, 'The Possibility of Special Duties', (Pg.666)

"An agent A (be A an individual or a group) is responsible for a state of affairs p if and only if:

1a. p is (virtually) uniquely susceptible to A's influence, whether that influence amounts to partial or total control;

OR

1b. p is susceptible to the influence of A and a number of other agents; and it is not possible for those agents to exercise influence simultaneously without compromising the desired outcome p or some other desired result; and A is the salient one to assume control;

OR

1c. p is susceptible to the influence of A and a number of other agents but it is possible for these agents to exercise simultaneous control without compromising p or any other desideratum;

AND

2. A is in a position to know of the truth of whichever of those three conditions obtains."

²²⁶ We may choose to be cynical about this and claim that both institutions merely seek 'warm bodies' for recruitment. However, I think this claim can be discounted, if not wholly refuted, on empirical grounds. It is certainly the case that one must demonstrate specific capabilities before one is permitted to take on specialized roles within these institutions, including roles that increase the likelihood that one will be called on to use lethal force.

²²⁷ Goodin develops a model of assigned responsibility for special duties in Robert E. Goodin, 'What Is So Special About Our Fellow Countrymen?', *Ethics*, 98/4 (1988), 663-86.

other jurisdictions for example. Military institutions may have stronger special duties to protect members of the polity they represent than other individuals who do not belong to that polity even in cases where both groups are intermingled. If it can be shown that police have greater special duties not to cause unjust harm to those they target with lethal force than military personnel, this gives us additional moral reason to restrict the use of lethal force by police, and so can provide further foundation for the asymmetry in legal and customary norms even in cases where the three contextual asymmetries do not obtain.

Conclusion

In this paper I have sought to demonstrate that the legal and customary norms defining the permissible use of lethal force by police are more restrictive than those defining the permissible use of lethal force by military personnel. I have argued that in many cases this asymmetry can rest on a foundation provided by the moral norms of individual self-defense, but that the strength of this foundation is contingent on the context in which lethal force is used. Provided that three contextual asymmetries between police and military operations hold, we can morally justify the asymmetric legal and customary permissions granted to these two institutions on the basis of threat, liability, necessity, and proportionality. However, there are limits to the moral grounds these moral norms can provide. In cases where the three contextual asymmetries begin to break down, the moral foundation offered by the moral norms of individual self-defense weakens. In cases of contextual equivalence, we are forced to adopt one of two conclusions. Either we accept that our legal and customary norms are without moral foundation in such cases, or we must find alternative moral reasons to morally justify the asymmetry. In the final section I have sought to briefly draw out the strengths and weaknesses of both positions and offered some discussion of what other moral reasons we might use to shore-up the moral foundation for the asymmetry in the legal and customary norms regulating the permissible use by military and police institutions.

Arguing these last points in full would require several additional chapters, but would be necessary to provide a full defense for the second conclusion. My intention here has been merely to demonstrate that the second conclusion is both plausible and possibly preferable to the first conclusion in terms of action-guidance if not conceptual simplicity, and offer some ideas as to how we might develop such a defense. It may be the case that we are ultimately forced to accept the tension between moral and legal

justifications for the use of lethal force, but we should avoid such tension if possible for at least two reasons. First, this tension creates confusion as to which set of norms we ought to follow in cases of uncertainty. Such confusion is likely to lead to misuse of lethal force and so result in an increase in unjust harm. Given that these norms are intended to minimize such harm, we ought to endorse an account that results in the least possible confusion and therefore the least unjust harm. Secondly, given the moral and physical risks faced by those who use lethal force on our behalf, we have a strong obligation to provide state agents with the clearest, most comprehensive, rules for action-guidance. The expanding literature on moral injury has added a new dimension to the harms done by the unjust use of lethal force.²²⁸ While it is certainly the case that we have an obligation to limit the costs imposed on the victims of lethal force, we also have an obligation to limit the cost of such force on the agents who utilize it on our behalf.

²²⁸ Sherman, *Afterwar: Healing the Moral Wounds of Our Soldiers*. and Brett T. Litz et al., 'Moral Injury and Moral Repair in War Veterans: A Preliminary Model and Intervention Strategy', *Clinical Psychology Review*, 29/8 (12// 2009), 695-706.

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