1 Lesser aggressors

There are wars, such as the Falklands War of 1982, in which wrongful aggressors have quite limited aims, such as greater access to natural resources, increased political or economic influence over another state, or the conquest of territory that is of nationalist or religious significance but also sparsely inhabited and of little strategic or economic value. One might refer to such wars as instances of lesser aggression. They raise in a practical context a puzzling theoretical problem in the theory of proportionality. A brief review of the practical issue can serve as an introduction to the theoretical problem, which will be the main subject of this essay.

Imagine a case of lesser aggression in which the aggressing soldiers (“lesser aggressors”) of state A move swiftly but stealthily across the border into an oilfield in a neighboring state, B, and occupy it before soldiers from B can be mobilized in opposition. The lesser aggressors now have two functions: to extract oil and transfer it across the border into A, and to defend their occupation of the oilfield against efforts to recapture it. The immediate, unconditional threat they pose is a reduction of B’s national wealth through the theft of oil. They will neither kill nor physically harm anyone in B unless they are attacked by B’s armed forces. And they will eventually withdraw after they have taken the amount of oil they want.

The view that is shared by common sense morality, international law, and the traditional theory of the just war is that it is permissible for B to go to war against A to regain possession of its oilfields. But there is a serious question whether such a war against lesser aggression would be proportionate. The main harm that would be averted by a successful war against A’s occupying forces is a reduction in B’s national wealth. Suppose this loss would impose modest financial hardships on most citizens of B. The harm that any one citizen would suffer could not be attributed to the action of any particular lesser aggressor but would be attributable to what the aggressors together do. Each lesser aggressor, it seems, would be responsible for only a tiny fraction of the financial harm suffered by each citizen – that is, for a tiny fraction of each lesser, merely financial harm suffered by each of a great many victims.

There is a further bad effect that the action of the lesser aggressors is likely to cause unless defensive action is taken against them, which is a reduction in the deterrence of aggression, not only by A but by other states as well. Each lesser aggressor is therefore also responsible for a tiny increase in the risk that each person in potentially vulnerable states faces of being harmed by future aggression.

For discussions of the issues I address in this paper, I am greatly indebted to Derek Parfit, and also to Victor Tadros, Shelly Kagan, Frances Kamm, and Larry Temkin.

I have discussed the phenomenon of lesser aggression at length in “What Rights May Be Defended by Means of War?,” in Cécile Fabre and Seth Lazar, eds., The Morality of Defensive War (Oxford: Oxford University Press, 2014). There is some overlap between the material in sections 6.6 and 6.7 of that article and the first two sections of the present paper.
Several effects might therefore be achieved by killing any particular lesser aggressor. Killing him would eliminate his tiny contributions to the lesser harms suffered by the immediate victims of the aggression as well as his tiny contributions to the small increase in the risk to people generally of becoming a victim of aggression in the future as a result of a weakening of deterrence. Killing him might also help to convince the government of A that it is in the national interest to withdraw from the oilfield.

Suppose that the lesser aggressors of state A are in general ill-informed about the facts relevant to the evaluation of their action – for example, that most of them believe, though without adequate justification, that A has a legitimate claim to the oilfield. And suppose that they all, including those who enlisted voluntarily, act under duress to the extent that they would be punished if they were to refuse to fight. These facts, we may suppose, mitigate their culpability for participating in the unjust aggression, so that most of them are only minimally culpable.

One question posed by this case is whether these lesser aggressors who are not highly culpable can be morally liable to be killed as a means of preventing them from making their tiny contributions both to the lesser harms that would be suffered by the many immediate victims of the aggression and to the very slightly increased risk to others of becoming victims of aggression. Can a person who is only minimally culpable be morally liable to be killed as means of preventing him from making only tiny contributions to lesser harms, or very small risks, to many people?

Most people believe that the citizens of B are not morally required to capitulate to A’s aggression but are permitted to defend their territory and their oil by military means. Traditional just war theory and international law support that belief by claiming that all combatants are liable to be killed during a state of war and that, in consequence, there is no proportionality limit to the number of combatants it can be permissible to kill. But these claims are false, at least as claims about morality. Combatants who are not culpable and make no contribution to morally unjustified harms are not liable to killed. And even when combatants are individually liable to be killed, there is often a proportionality limit to how many it can be permissible to kill. In the Falklands War, for example, the stakes were perhaps sufficiently high for it to have been proportionate for the British to kill the number of Argentine combatants that they did, but they were not high enough for it to have been permissible to kill 50,000 Argentine combatants if that had been necessary to preserve British sovereignty over the islands.

Still, it seems that it would clearly be permissible for B’s soldiers to kill one lesser aggressor from A if that would somehow be sufficient to end the occupation of the oilfield. It might also, of course, be permissible for them to kill one civilian from A if that were the only way to end the occupation. But the justification for killing one of the lesser aggressors would, it seems, be different in form from that for killing a civilian. The justification for killing a civilian would have to be a lesser-evil justification. Suppose, therefore, that the justification for killing a single aggressor would be that the aggressor, unlike a civilian, would be liable to be killed. Yet if one lesser aggressor would be liable to be killed and there were no relevant difference between him and any other lesser aggressor, it seems that all must be liable to be killed.

There is, however, a simple explanation of why in this case the assumption that each individual aggressor is liable to be killed does not imply that all are. It is that because killing one aggressor is sufficient to defeat the occupation, killing more than one
would violate the necessity constraint on defensive action. As I understand the notion of liability, there is a necessity constraint that is internal to liability itself, in that a person cannot be liable to suffer a harm that is unnecessary for the achievement of some good aim. Hence, though each lesser aggressor is initially liable to be killed, his liability is conditional on no other aggressor’s having already been killed. Once one aggressor has been killed, which is sufficient for the achievement of the defensive aim, the others cease to be liable. (Alternatively, one might say that in these conditions, if there are \(x\) lesser aggressors, what each is conditionally liable to is a \(1/x\) risk of being killed. The first lesser aggressor it is possible to kill in effect loses the lottery and all the remaining ones then cease to be liable. But one might also worry about the coherence of this idea, in that it could be claimed that if what a lesser aggressor is liable to is a \(1/x\) risk of being killed, his actually being killed harms him beyond the extent of his liability and is thus disproportionate.)

According to this way of understanding the liability of lesser aggressors, it might be that each aggressor is liable to be killed, but only until enough have been killed to defeat the occupation. Then the remaining ones cease to be liable. But this simply states the implication of the necessity condition. And it presupposes two controversial claims – namely, that each lesser aggressor is conditionally liable to be killed and that there is no proportionality limit to the number it can be permissible to kill.

One reason for doubting both of these claims is that it may be difficult to identify morally significant differences between lesser aggressors and taxpaying voters in states that fight wars of unjust aggression. Because weapons have to be paid for, and soldiers paid to use them, with money collected in taxes, a civilian who pays taxes may make tiny contributions to at least some of the unjustified harms her state inflicts in fighting an unjust war. And a civilian who votes for candidates who advocate fighting a war that is in fact unjust may, like a lesser aggressor, be at least minimally culpable for supporting the war in this way. Thus, if lesser aggressors are liable to be killed, subject only to a necessity condition, and taxpaying voters are like lesser aggressors in culpably making small contributions to unjustified harms to many victims, then taxpaying voters may also be liable to be killed, perhaps without any proportionality restriction on the number it can be permissible to kill. This is a clearly unacceptable implication. Yet it may also seem unacceptable to conclude that lesser aggressors are not liable to be killed, as that would suggest the impermissibility, at least in many cases, of defensive war against lesser aggression. This is because there is unlikely to be a lesser-evil justification for killing a significant number of lesser aggressors as a means of preventing lesser harms, even to a much greater number of people. There is a lesser-evil justification for killing people who are not liable to be killed only when the killings are necessary to prevent substantially greater harms to people who are also not liable to suffer them. But in the case of lesser aggression, it is unlikely that the badness of the lesser harms that defensive war might prevent would substantially outweigh the badness of the deaths of a significant number of lesser aggressors.

One must either show that defensive war against lesser aggression can sometimes be justified even if lesser aggressors are not liable to be killed, or show that taxpaying voters are different from lesser aggressors in ways that explain why they are not liable to be killed even if lesser aggressors are. I will indicate how I think both of these claims can be defended.
First, one might argue that the amount of harm to which a person can be liable as a matter of defense is determined by the amount of harm she would otherwise cause and the degree to which she is responsible for the threat of that harm. [I will later reject this, along with the idea that the limit of liability can be determined in this way.] One could then argue that if a person will make only tiny contributions to lesser harms, and will be only minimally culpable for doing so, that person cannot be liable to the great harm of being killed, even if the number of people on whom she will inflict a tiny harm is very large. The tiny harms, it might be claimed, do not aggregate in a way that could make the killing of the threatener a proportionate means of prevention. Certainly it seems implausible, on reflection, to suppose that the reason it would be permissible to kill one lesser aggressor as a means of defeating the occupation is that he is liable to be killed. For if killing him would be sufficient to defeat the occupation, that could not be because it would be an effective form of defense against a threat he poses but must be because he would be being used as a means of influencing the action of others. And the threshold for liability to being killed in this opportunistic way is arguably higher than that for being killed defensively.

But it does not follow from the claim that lesser aggressors are not liable to be killed that it is not permissible to kill them, even if there is also no lesser-evil justification for killing them. For there might be a combined liability and lesser-evil justification for killing them. Each lesser aggressor might be liable to some degree of harm less than death and there might then be a lesser-evil justification for inflicting the remainder of the harm involved in being killed.

This explanation of the permissibility of killing lesser aggressors is compatible with the idea that there is a proportionality limit to the number of lesser aggressors it can be permissible to kill. Assuming that the aims of an instance of lesser aggression are fixed, the harm to be prevented by killing lesser aggressors remains constant no matter how many lesser aggressors there are. But as the number of lesser aggressors who have to be killed increases, the amount of harm inflicted on them that cannot be justified on grounds of liability increases correspondingly. But if the harm to lesser aggressors that has to have a lesser-evil justification increases with the number of lesser aggressors while the amount of harm to be prevented by defensive action remains constant, there must be some number of lesser aggressors that it would be disproportionate to kill as a means of preventing the harms inflicted by lesser aggression. The total harm it would be necessary to inflict on lesser aggressors beyond that to which they are liable would at that point cease to be substantially less than the total harm they would otherwise inflict.

This is true even if the amount of harm to which each lesser aggressor is liable would remain constant as their number increased. But in fact the harm to which each would be liable would decrease as their number increased if, as we are assuming, the total harm they would cause were fixed. For if the total harm that lesser aggressors would together inflict would remain constant even as the number of lesser aggressors increased, each lesser aggressor’s contribution to that harm would decrease the more of them there were. Imagine, as an analogy, a group of housepainters who must each paint some part of a house equal in size to the part painted by the others. There more painters there are, the smaller each one’s contribution will be to the painting of the house.

There are thus two reasons why the defensive harm that must be justified on grounds of lesser evil increases the more lesser aggressors there are. One is simply that
the more aggressors there are, the more harm there is that cannot be justified on grounds of liability and thus has to be weighed against the fixed harm to be prevented. The other is that the more aggressors there are, the less each contributes to the fixed harm to be prevented, so that the amount of harm to which each aggressor is liable decreases as the number of aggressors increases.

To show that there are reasons to believe that lesser aggressors may not be liable to be killed but that there may nevertheless be a combined justification for defensive war against them does not eliminate the worry about the possible liability of taxpaying voters. Because taxpaying voters in a state fighting an unjust war may, like lesser aggressors, be minimally culpable for making tiny contributions to harms suffered by many of the war’s victims, they too may be liable to certain nonlethal harms. There might then be a combined justification for killing them, just as there may be for killing lesser aggressors.

There are, however, reasons why they may not be liable even to nonlethal harm, at least on the basis of voting and paying taxes. Consider first the paying of taxes. It is true that this action by citizens in a state that is fighting an unjust war makes a material contribution to the harms caused by the war. But the payment of taxes is also a moral duty when the great majority of what is paid supports other morally necessary functions of the state, such as the provision of domestic order and security, education, health care, and so on. In every state at all times, some fraction of each taxpayer’s money is inevitably spent in support of aims that are wrong. Unless the proportion is high, this cannot nullify the citizen’s moral duty to pay. And when an act is morally required (and even when it is morally justified though not required), the one who does it cannot on that basis be morally liable to defensive harming as a means of preventing the act.\(^3\)

There are several reasons why it is extremely unlikely that a civilian citizen could be liable even to nonlethal harm in war merely for having voted in a state that is fighting unjustly. First, many such citizens, perhaps even a plurality, have voted against those who are now responsible for initiating an unjust war and thus they cannot be liable to defensive harm on that basis. Only those who have voted for those responsible might be liable to be harmed. Yet if the unjust war is now in progress, their action in voting lies in the past; hence their having voted cannot make them liable to defensive harm now.

In principle it is possible that their having voted makes them liable to be used opportunistically as a means of thwarting their state’s unjust aims. Combatants on the just side might, for example, harm or kill them as a means of coercing the enemy government to abandon its unjust war. But it seems that the threshold for liability to be used in this way is quite high – that is, a person must have been responsible to a significant degree for a significant contribution to a threat of substantial unjustified harm to be liable to be harmed in this opportunistic way. Thus, even those citizens who are culpable for voting as they did (for example, because they hoped those for whom they voted would initiate the war) are highly unlikely to have made themselves liable to be harmfully used now as a means of influencing the action of others.

Even when citizens will otherwise vote wrongly in the future to initiate or continue an unjust war, they are highly unlikely to be liable to defensive harm as a means of

\(^3\) This claim is controversial. I have argued for it in “Self-Defense Against Justified Threateners,” in Helen Frowe and Gerald Lang, eds., *How We Fight: Ethics in War* (Oxford: Oxford University Press, 2014).
preventing them from voting. This is primarily because in virtually all actual cases, the outcome of a popular vote is overdetermined, so that if any one person who voted for the winning side had not voted, the outcome would have been exactly the same. When this is true, none of the voters individually makes any causal contribution to the fighting of the unjust war, though they together do. When the outcome of a vote is overdetermined, the only way to make a difference defensively is to prevent enough of those who would vote wrongly from doing so in order to guarantee victory to those who would vote rightly.

Yet there are various reasons that together make it highly unlikely that … any are liable … preventing enough from voting could be proportionate.

First, it is seldom reliably predictable that the outcome of an election will determine whether a war will be fought or continued. But if in practice the manipulation of an election is unlikely to be an effective means of preventing the initiation or continuation of an unjust war, the low probability of effectiveness will correspondingly reduce the likelihood that manipulating an election through harming voters will be a proportionate means of preventing the initiation or continuation of an unjust war. And if, as I believe, a proportionality condition is internal to liability, this means that voters cannot be liable to harms that would be disproportionate.

[People can’t be liable to disproportionate harm. But is this true when the disproportionality is because of the numbers? Might it be true that each is individually liable but there is nonetheless a proportionality limit to the number? This is the topic of the second paper on proportionality & numbers.]

Second, the most realistic means by which one state might prevent citizens in another state from voting is to kill them. Assuming that the outcome of an election would be overdetermined, any one citizen who would vote for those who favor unjust war would be liable to be killed only on condition that enough other such voters would also be killed to ensure that the vote would go the other way. Assume that the vote would be close. Given that there is no way that the state threatened with unjust war could determine in advance how any particular citizen would vote, the killing of any particular citizen would be almost as likely to prevent a vote for an anti-war candidate as it would be to prevent a vote for a pro-war candidate. In these conditions, a disproportionately high proportion of the voters would have to be killed for the killings be effective defensively. Killing a lower proportion of voters might, of course, be effective opportunistically – for example, by operating the way terrorist violence does – but it is unlikely that voters would be liable to be killed in this way if, as many believe, the threshold for liability to opportunistic killing is higher than that for liability to defensive killing. If we assume, by contrast, that the vote would not be close, for the number who would vote for a pro-war candidate would greatly exceed the number who would vote for an anti-war candidate, the proportion of the voters that would have to be killed would be correspondingly lower, but it remains doubtful that so many voters could all be liable to be killed as a means of preventing them from voting.

That the outcome of a popular election is almost certain to be overdetermined may also affect the liability to opportunistic harming in the present of those who voted wrongly in the past. Assuming that the threshold for liability to opportunistic harming is high, it seems unlikely that a person could be liable to be harmed in that way on the basis of action that in fact had no effect at all, in that the outcome of the vote would have been the same had the person not voted. (I will, however, later suggest possible
counterexamples to this claim [the culpable attempter, the overdetermining contributing killers].

These various considerations suggest it is highly unlikely that citizens can be liable even to nonlethal harms merely on the basis of voting for a candidate or party that was or will be responsible for initiating an unjust war. But if citizens in a state that is fighting an unjust war are not liable to be harmed for voting or paying taxes, there cannot be a combined justification for killing them, for such a justification presupposes that some of the harm they would suffer in being killed can be justified on the ground that they are liable to it. It is, of course, possible that some taxpaying voters are liable to be harmed, or even perhaps killed, on other grounds, or that there is a lesser-evil justification for killing some of them. But what is important for our purposes is that the claim that there can be a combined justification for killing lesser aggressors does not entail that there can also be one for killing taxpaying voters, even though the latter, like the former, may be responsible, and culpably so, for the infliction of tiny harms on each of a large number of people.

2 The Harmless Torturers

I have suggested that even if lesser aggressors are not liable to be killed, they are each liable to some significant harm, so that killing some number of them could be justified on the basis of a combination of liability and lesser-evil justifications. One plausible explanation of why they are liable to some significant degree of harm is that the tiny contributions that each makes to the lesser harms suffered by their victims aggregate, or add up to a significant sum of harm, even though that harm is not suffered by any one person but is dispersed among a great many victims.

This is one explanation that Parfit gives of why the action of his well-known “Harmless Torturers” is seriously wrong. The Harmless Torturers are a thousand individuals who each press a button, thereby inflicting a barely perceptible pain on each of a thousand victims. Because each Harmless Torturer’s thousand victims are the same as every other Harmless Torturer’s thousand victims, each victim experiences a thousand small pains simultaneously, which together constitute agonizing suffering, which persists for some fixed period of time. Parfit suggests that one explanation of why what each Harmless Torturer does is seriously wrong is that, “since each torturer adds to the suffering of a thousand victims, each torturer imposes a great total sum of suffering.”

One might also appeal to the total amount of suffering that each Harmless Torturer causes to defend the claim that they are all liable to be killed in defense of their victims. Assume that the Harmless Torturers are culpable for their action – for example, because they want their victims to suffer torture but can achieve their aim only collaboratively. With this assumption, it is plausible to suppose that the thousand Harmless Torturers are liable to be killed, as is suggested by reflection on ordinary torturers. Suppose, as most

4 Derek Parfit, *Reasons and Persons* (Oxford: Oxford University Press, 1985 corrected reprint), pp. 79-81 [check]. In the main version of the example as Parfit presents it, the pain that each Harmless Torturer inflicts on each victim is imperceptible. Because the problem of imperceptible pains or harms would be a distraction here, I stipulate that the amount of pain that each torturer inflicts on each victim is very slight, or barely perceptible.

5 Ibid., p. 79 [check].
people believe, that it is permissible for a person to kill someone who will otherwise wrongly torture him, if the torture would have a significant duration, the torturer is culpable, and killing him is the only way of preventing the torture. It seems the justification must be that the torturer makes himself liable to be killed. It should be permissible, then, for each of a thousand potential victims of torture to kill his or her torturer. Assuming that each potential victim’s justification is a liability justification, it should also be permissible for a third party to kill all thousand potential torturers in defense of the thousand victims. But if it is permissible for the victims or a third party to kill all thousand torturers to prevent the thousand victims from suffering torture, it should also be permissible for the victims or a third party to kill all thousand Harmless Torturers to prevent their thousand victims from suffering torture, if that is the only option for preventing the torture. For in each case, each torturer, whether “harmless” or not, will otherwise inflict a “a great total sum of suffering.”

One may wonder why, if each Harmless Torturer is liable to be killed, it is not also the case that each lesser aggressor is liable to be killed, for these two types of agent are alike in inflicting tiny harms on each of a large number of people. The best answer seems to be that how much harm those who inflict many small harms are liable to as a matter of defense depends not only on how serious the harms they would inflict would be but also how serious the harms to which they would contribute would be. Even if each lesser aggressor inflicts a greater total sum of harm than each Harmless Torturer, the lesser aggressors may not be liable to as much harm as the Harmless Torturers because their victims suffer only lesser harms rather than torture.

This suggests that the full explanation of why it is permissible to kill all the Harmless Torturers, and why they are all liable to be killed (if indeed they are), cannot be just that each of them will otherwise inflict a great total sum of suffering or harm. This conclusion is reinforced by consideration of another example. Imagine another thousand people – the Inflictors of Tiny Harms or, for brevity, the Inflictors – who all do what the Harmless Torturers do – namely, press a button that causes each of a thousand victims to experience a small, barely perceptible pain. The difference between the Inflictors and the Harmless Torturers is that each Inflictor’s thousand victims are different from every other Inflictor’s victims. Whereas the Harmless Torturers together have a thousand victims, each of whom suffers agony, the Inflictors together have a million victims, each of whom experiences only a small, barely perceptible pain. It seems clear that the Inflictors are not liable to be killed and that it would be impermissible to kill any of them. Yet each of them inflicts the same total amount of harm as each Harmless Torturer.

Suppose that each of the thousand Inflictors had five thousand victims rather than just a thousand but that there would still be no overlap among their victims. In that case the thousand Inflictors would together cause each of five million people to experience a small, barely perceptible pain. But even with this substantial increase in the total sum of harm that each would cause, it still seems that none would be liable to be killed to prevent the infliction of that harm.

Again, the explanation seems to lie in what the small harms an agent causes are contributions to. While the harms inflicted by the Harmless Torturers are all contributions to torture, those caused by the Inflictors are not contributions to any other harms. Like the comparison between the Harmless Torturers and lesser aggressors, this suggests that how much harm a person who inflicts small harms on many people is liable
to suffer as a matter of defense varies with the severity of the harms to which his small harms contribute. This explanation seems consistent with common intuitions about all three cases we have considered. The Harmless Torturers, who together make the difference between their victims’ suffering no harm and their suffering torture, are liable to be killed. Lesser aggressors, who together make the difference between their victims’ suffering no harm and suffering certain lesser harms, such as a loss in wealth, are liable to some significant but nonlethal harm. Finally, the Inflictors, who make only the difference between their victims’ suffering no harm and their each suffering a small, barely perceptible pain, seem liable to only a small harm as a means of preventing their action.

It does not, however, seem necessary to the liability of any of these agents that they act in conjunction with other agents, or as part of a group. It seems sufficient for each to be liable to be killed that he inflicts a small pain in the knowledge that he will adding to other sources of pain, irrespective of their source.

Suppose that a man wants a thousand people to suffer torture. Like the Harmless Torturers, he can press a button that will cause each of the thousand to experience a small, barely perceptible pain. But there are no other such buttons and no other individuals to collaborate with him. He knows, however, that each of the thousand people will soon, as a result of natural causes, be suffering a level of pain equivalent to that which would be caused by the pressing of 999 buttons like his own. If he presses his button, each of the thousand victims will then be in as much agony as the victims of the Harmless Torturers. Parfit calls this person the “Single Torturer.”

Suppose the victims, or a third party, have one option for preventing all the pain, which is to detonate a bomb that will simultaneously kill the Single Torturer and eliminate the natural sources of pain. If it would be permissible in the case of the Harmless Torturers for the victims to kill all thousand Harmless Torturers, assuming that is the only way to prevent the torture, it should certainly be permissible for these other thousand victims to detonate the bomb, thereby killing only one person. They might, moreover, permissibly detonate the bomb with a variety of intentions, depending on the circumstances. They might intend only to eliminate of the natural sources of pain, so that the killing of the Single Torturer would be a side effect. Alternatively, they might intend both effects. Or, finally, the situation might be that killing the Single Torturer is a necessary means of eliminating the natural sources of pain. But it seems that even in the latter case the killing would be permissible.

It seems that in all of these cases the Single Torturer is liable to be killed, either as a side effect or as a means. But one cannot infer that he is liable to be killed just from the permissibility of killing him. For given that killing him is necessary to prevent a thousand people from suffering pain that would constitute torture, there could be a combined liability and lesser-evil justification for detonating the bomb even if he were liable only to some harm less than that of being killed.

One might at this point consider a variant in which the Single Torturer has only one victim. In this case, the Single Torturer wants one person to suffer torture. But all he can do is to press a button that will cause this person to suffer a small pain equivalent to $1/1000$ the pain of torture. But the victim will soon experience 999 equivalent pains

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6 Ibid., pp. 80-81.
simultaneously, though from natural causes. The Single Torturer intends to press his button, adding his small contribution to the other sources of pain. The victim, however, can detonate a bomb that will both kill the Single Torturer and eliminate the natural sources of pain.

Some people think it would be permissible to detonate the bomb. If it would be, the justification could not be a combined justification. This is because no part of the justification could be a lesser-evil justification, assuming that the death of the Single Torturer would be a worse outcome than the victim’s suffering agonizing pain for a limited period. It seems that the Single Torturer would have to be liable to be killed, either as a means or as a side effect, for it to be permissible to kill him.

My evidence for saying that some people think it would be permissible to detonate the bomb derives from discussions with others about a further variant of the Harmless Torturers. Suppose that all thousand Harmless Torturers together have only one victim—that is, they each have a button that, if pushed, will cause one person to experience a small, barely perceptible pain. But if they all push their buttons, this person will experience agonizing suffering for a fixed period of time. Several prominent moral philosophers have told me that they think it would be permissible for the potential victim to kill all thousand Harmless Torturers to prevent them from together causing great suffering to one person, provided that they all know that the small pain they would cause would be a contribution to the torture of that person. It seems that anyone who believes that it would be permissible to kill all thousand Harmless Torturers to spare one victim would accept that it would also be permissible to kill the Single Torturer to spare one victim.

The justification for killing the Single Torturer with one victim would have to be a liability justification, assuming that his death would be a worse outcome than the great suffering of the victim for a limited period. But if the Single Torturer is liable to be killed in defense of only one victim, it seems that he must also be liable to be killed in defense of a thousand, even when in both cases he is not acting as part of a group but instead adds his additional bit of pain to pains deriving from natural sources. He seems liable to be killed in defense of the thousand even though, were he liable only to some lesser harm, it would still be permissible to kill him because there would be a combined justification for doing so.

I have suggested that how much harm a person who inflicts small harms on many victims can be liable to suffer in defense of those victims depends on the severity of the harms to individual victims to which his small harms are contributions. And I have also suggested that it does not matter to the person’s liability whether the other sources of harm to the victims are human or natural. Suppose further that there is no significant difference between making a tiny contribution to a person’s becoming substantially worse off and making an already badly off person worse off by only a tiny amount. In that case, the difference between a Harmless Torturer and an individual Inflictor that explains why the former is liable to be killed while the latter is not is that each Harmless Torturer’s victims are very badly off while each Inflictor’s victims are well off—and, one

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7 [Alternatively, one might imagine that the Single Torturer inflicts his small pain on each of a thousand victims knowing that each victim will at the same time suffer 999 equivalent pains, but without knowing their source.]
might add, that the Harmless Torturer and the Inflictor both know this about their victims. If an Inflictor’s thousand victims are already suffering almost as much as the victims of the Harmless Torturers when the Inflictor causes each to experience a further tiny increment of pain, there seems to be no difference between that Inflictor and a Harmless Torturer that is relevant to each one’s liability to be killed.

Consider again the Single Torturer, who culpably causes each of a thousand victims to experience a small, barely perceptible pain, knowing that each will simultaneously suffer 999 equivalent pains from natural causes. I stipulated earlier that the victims, or a third party, had only one option for preventing any of the pain, which was to detonate a bomb that would kill both the Single Torturer and eliminate the natural sources of pain. Suppose now that they have a further option, which is to eliminate the natural sources of pain without affecting the Single Torturer at all. If they adopt this option, each victim will experience only a mild, barely perceptible pain for a certain fixed period.

It seems that, of these two options, they ought to adopt the second. If they can eliminate all the natural sources of pain, they ought not to kill the man who will otherwise cause each of them to experience a tiny pain when each will be well off. This man would no longer be a torturer. In these circumstances, he would be only a nuisance, and he would not be liable to be killed to prevent him from being a nuisance, even to a thousand people.

He would, it seems, not be liable to killed even if he were highly culpable for pushing his button – for example, if he believed that in pushing the button he would on his own be torturing a thousand people. The reason he would not be liable to be killed in these circumstances seems to be that killing him would not make a significant difference to the life of any individual person. Although killing him would prevent a great total sum of harm, the individual harms that would be prevented would be widely dispersed among many victims, each of whom would be only trivially affected.

There are parallel claims about the liability of the Harmless Torturers that also seem plausible. Earlier I considered whether the victims of the Harmless Torturers, or a third party, could permissibly kill all the Harmless Torturers as a means of preventing the torture. My implicit assumption was that the alternative to killing them all was to kill none, so that all thousand victims would suffer torture. But suppose the victims, or a third party, had only two options: killing one and killing none. Intuitively it seems that it would be impermissible to kill only one, as that would impose a great cost on someone who will otherwise cause only tiny harms, so that killing him would make no significant difference to any of the individual victims. Similarly, if the victims had only three options – killing none, killing 999, and killing all thousand – it seems that they could justifiably kill 999 but not all thousand, for to kill the last Harmless Torturer would be to kill someone to prevent him from causing a barely perceptible pain to each of a thousand well-off people, which seems clearly disproportionate. Again, it seems that for a person to be liable to defensive killing, the act that kills him must make a significant difference to the amount of harm that some individual will suffer. For it to be permissible to kill

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8 The intuitive basis of this claim seems to be much the same as that of Larry Temkin’s “Disperse Additional Burdens View” in Rethinking the Good: Moral Ideals and the Nature of Practical Reasoning (New York: Oxford University Press, 2012), chapter 3.
one of the Harmless Torturers, his killing must be an effect of an act or sequence of acts that would produce a significant reduction in the suffering of individual victims.

There is, however, a serious problem here. Suppose the potential victims of the Harmless Torturers have only three options: they can kill 500 of the Harmless Torturers, kill 499, or kill none. While it seems permissible for them to kill roughly half the Harmless Torturers, as that would reduce the suffering of each by roughly half, it also seems that they ought to kill only 499 rather than 500, for killing the one additional torturer would make no more than a trivial difference to any of the victims. But the same seems true when we compare their killing 499 and killing 498, or killing 498 and 497. It seems that it would always be better to kill one fewer. But if it would be better to kill 499 rather than 500, 498 rather than 499, … 4 rather than 5, then it seems to follow that it would be better to kill only 4 than to kill 500. But killing only 4 would make no significant difference to any victim, whereas killing 500 would reduce all thousand victims’ suffering by half. It therefore seems that killing 500 would be better than killing 4 – indeed, that killing 500 would be permissible while killing only 4 might not be.

One response to this problem is to deny that it is always better to kill one fewer. There might be a threshold below which killing fewer would be worse because killing only that few Harmless Torturers would not make a sufficiently significant difference to the victims. It might, for example, be worse to kill only 49 than to kill 50. But if the threshold lies between 49 and 50, that still allows that killing 50 would be better than killing all 1000, which seems false.

Another response is the deny the transitivity of the “better than” relation.

**Derek’s challenge in OWM 2**

The intuition I share with Larry Temkin is that we should prevent harms that make a significant difference to individual lives rather than a greater total sum of harm that makes only a trivial difference to a large number of lives. This is why one ought not to kill only one Harmless Torturer to prevent him from inflicting a barely perceptible pain on each of a thousand victims even though they are already very badly off. But this leads to Derek’s problem when iterated. In Derek’s cases, reducing the suffering of a million by a minute each does not make a significant difference to anyone, whereas reducing the suffering of one by a year does. But iterating the preference for making a significant difference means that the victims will all suffer more.

Suppose one repeatedly does what will reduce the intensity (or duration) of the suffering of many by a tiny amount rather than what will reduce the intensity (or duration) of the suffering of one by a great amount. If the sufferers are the same people and the total reduction in suffering when one reduces the suffering of the many by a tiny amount each is greater than the total reduction in suffering of the one, over enough iterations one will reduce the suffering of each by less if one always reduces the suffering of the one.

**Rationale for Larry’s response to this challenge by Derek**

When the choice of whether to concentrate or disperse the benefit of reducing suffering would not be iterated, it is best to bestow a concentrated benefit even if it is somewhat lesser because it makes a significant difference to some individual’s life. But if the choice is to be iterated *enough* so that choosing the greater but dispersed benefit
would, as a result of iteration, make a significant difference to individual’s lives, then it is better to choose to disperse the benefit.

**The limit of liability**

Some think that the amount of harm to which a threatener can be liable is determined by the magnitude of the harm he will otherwise cause and the degree to which he is responsible for the threatened harm.

This view assumes that the necessity and proportionality constraints are external to liability – that is, that a person can be liable to suffer harms that are unnecessary or disproportionate.

One reason this is bad is that it diminishes the difference between liability and desert. In my view, one of the main differences between liability and desert is that one cannot be liable to be harmed unless harm is unavoidable. Liability is instrumental. One may deserve to be harmed when no one has to be harmed but one cannot be liable to be harmed if no one has to be harmed. Liability presupposes unavoidability.

**Example: grenade or pistol**

If one’s only weapon is a grenade, the culpable killer is liable to be killed, but if the victim has a pistol as well, the culpable threatener is liable only to be shot in the leg.

**Why necessity is internal to liability**

NB: liability indicates exactly what right has been lost in the circumstances. If it is unnecessary to kill a culpable threatener, he has not lost his right not be killed and to kill him would be to wrong him – because the harm beyond that necessary for effective defense would be wholly gratuitous. (Compare “Proportionate Defense.”)

Still, it may be plausible to suppose that there is a *limit* to the harm to which a person can be liable as a matter of defense that is determined by the magnitude of the harm for which he will otherwise be responsible and the degree of his responsibility for it.

If the only way one can prevent a person from giving one a vicious pinch is to kill that person, one must accept the pinch. The harm involved in being killed is disproportionate as a means or side effect of preventing oneself from being pinched.

Yet there are various cases involving those who inflict small harms that challenge this assumption about the limit of liability. (In some cases of inflicting small harms on many victims, the small harms seem to aggregate, so that the causal condition for liability to be killed is satisfied. But this does not seem to be true in the case of the Inflictors of Small Harms.)

**(1) The Harmless Torturers with one victim**

Each of a thousand people presses a button that inflicts a small, barely perceptible pain on one person. The net result is that this one person experiences terrible agony for some fixed period of time. Suppose these Harmless Torturers are highly culpable: each would like to torture the victim but cannot. The most they can do is to collaborate in the way described to bring about the torture. But all that each one individually does is to inflict a single tiny pain on the victim.

There are distinguished moral philosophers (FK, RC) who believe that each of these thousand Harmless Torturers is liable to be killed to prevent his contribution to the torture
of the one victim. Some of these philosophers believe that it would be permissible for the victim to kill all thousand in self-defense. The justification for this would have to be a liability justification.

I find this hard to accept, even if all thousand Harmless Torturers are highly culpable. (One might imagine a version in which each believes that he alone is torturing the victim by pressing his button, when in fact he is inflicting only a tiny pain. It may seem slightly more plausible in this case to suppose that all are liable to be killed.)

[Single Harmless Torturer with one victim: pp. 9-10, earlier.)

(2) The contributing killers with one victim

Suppose that, if no one does anything to shorten his life, Victim will live for a certain fixed period of time – say, a thousand days. But there are a thousand people who, unless they are killed, will each culpably deprive Victim of 1/1000th of his remaining life. That is, each will wrongly deprive him of one day of life. These thousand Contributing Killers might act sequentially or simultaneously. If they act sequentially, the first one’s act will make it the case that Victim will die in 999 days rather than in a thousand days. If a second one then acts, Victim will die in 998 days. And so on. If 998 of them have already acted, the action of the penultimate Contributing Killer will cause Victim to die tomorrow. The final one’s act would then cause him to die now. If they all act simultaneously, he will die now.

(One question this example raises is whether each of the Contributing Killers kills Victim. Suppose they act sequentially. One might say that they cannot each kill Victim at a different time, as he can die only once. But it is possible to act now to kill someone in the future, for example, by giving someone a slow-acting poison. And it is also possible that the poison might kill the person exactly a day before she would otherwise have died from other, unavoidable causes. The poisoner’s act would thus count as killing the person. But what each Contributing Killer does is relevantly like what the poisoner does. This is not, however, a case involving overdetermination. Each Contributing Killer shortens Victim’s life by a day. There is a sense, then, in which Victim is killed a thousand times.)

This may seem a comparatively uncontentious case, as most people believe that it would be permissible to kill someone to prevent him from causing one to die a day earlier than one otherwise would. This is curious, though, because being deprived of only one day’s life is normally not a substantial harm; it is relevantly like being caused to be in a coma for a day, albeit one’s last day. (Many people seem to believe that it would be permissible to kill a person to prevent him from painlessly killing one now, even if one would otherwise live for only one more day and even if the person himself would otherwise live another 50 years. But some who believe this might also accept that it would be impermissible to kill the person to prevent him from causing one to die a day earlier 50 years from now.)

If being deprived of one day seems a sufficiently serious harm to justify killing someone to prevent him from causing it, we could imagine a variant of the case in which each Contributing Killer deprives Victim of only one hour of life. Suppose Victim would otherwise live 5 years. That is 43,800 hours. We might imagine 43,800 Contributing Killers who each cause Victim to die one hour earlier than he otherwise would.
But even if we suppose that each Contributing Killer painlessly kills Victim one day before he would otherwise have died, it is still true that each causes less harm overall than each of the Harmless Torturers causes. For the total sum of harm inflicted by each Harmless Torturer is equivalent to the harm suffered by a person who is tortured. That is normally significantly worse than being deprived of one day of life.

Yet it seems plausible, as I suggested earlier, that the fact that the harm that an individual Harmless Torturer causes is dispersed among many victims, each of whom suffers only a trivial harm, makes it impermissible to kill only one Harmless Torturer; for doing so would cause him a great harm but would have no significant effect on the life of any victim. Yet many people would think it permissible to kill only one Contributing Killer, even though he would cause a lesser total harm than a single Harmless Torturer. The fact that the Contributing Killer’s act would make a significant difference to the life of one person, Victim, whereas the Harmless Torturer’s act would not make a significant difference to any individual’s life, seems to explain the difference between our views of these cases.

(3) Contributing Killers with one more responsible than the others

Way in which liability is sensitive to circumstances: what others are doing

There are 999 Contributing Killers. One will deprive the victim of 2 days and is more culpable than the others. If killing any one of the Contributing Killers will save the victim, the most responsible one seems liable to be killed. But only small harm.

Test of the comparative dimension of liability versus weighted lottery? There can be no combined justification for killing all when there is only one victim. There might be in the version in which there are a thousand victims.

(4) Overdetermined Contributing Killers

Takes 100 drops of poison. 200 will contribute a drop. The only way to save the victim is to kill 101. Yet none on his own makes a difference (except the last one, after 100 have been killed, who makes all the difference).

(5) Culpable attempters

Basement window case: culpable attempter is liable to be killed even if he’ll otherwise cause no harm.